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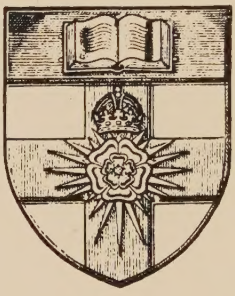

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THE
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DUFF DEVELOPMENT CO., LTD. *v.* KELANTAN GOVERNMENT AND ANOTHER

[House of Lords (Viscount Cave, Viscount Finlay, Lord Dunedin, Lord Sumner and Lord Carson), February 12, 14, 15, 18, April 10, 1924]

[Reported [1924] A.C. 797; 93 L.J.Ch. 343; 131 L.T. 676; 40 T.L.R. 566; 68 Sol. Jo. 559]

Constitutional Law—Foreign sovereign State—Immunity from legal process—Proof of sovereignty—Statement by Secretary of State—Independence of foreign State—Submission to jurisdiction of English courts—Application to enforce award against State—State party to submission to arbitration—Motion by State to set aside award.

It is the practice of our courts, when a question is raised relating to the right of a foreign government to immunity from legal process in this country, to take judicial notice of the sovereignty of a State. In all matters of which the court takes judicial cognisance the court may have recourse to any proper source of information, and on a question of sovereignty it is the practice to seek information from a Secretary of State. Such information, when received, is not in the nature of evidence. It is a statement by the Sovereign of this country, through one of his Ministers, on a matter which is peculiarly within his cognisance. Therefore, it is the duty of the court to accept the statement of the Secretary of State as conclusive and not permit it to be questioned by the parties. If the Secretary of State appends to his statement copies of documents referred to therein he does not refer to the courts to decide the question of sovereignty on those documents.

A foreign State entered into an agreement with a trading company by which the company was granted rights of mining, cutting timber, and road making in the State. A clause in the agreement provided that any disputes arising under the agreement should be referred to arbitration, and that that clause should be deemed to be a submission within the Arbitration Acts. Disputes having arisen, resort was had to arbitration, and an award was made. A motion by the foreign State to set aside the award on the ground of mistake of law was dismissed, but when the company applied, under s. 12 of the Arbitration Act, 1889, for leave to enforce the award "in the same manner as a judgment or order to the same effect," the foreign State resisted the application on the ground of its immunity, as a sovereign State, from legal process.

Held (LORD CARSON dissenting): there was nothing in an agreement by a foreign State for the settlement of disputes by arbitration to import a waiver by that State of its right as a sovereign Power to refuse to submit to the jurisdiction of the English courts on an application for leave to enforce the award by the other party to the agreement; the motion by the foreign State to set aside the award was a proceeding independent of the application by the company for leave to enforce it, and did not constitute a submission to the jurisdiction of the court when dealing with that application; and, therefore, the company was not entitled to leave to enforce the award.

Per VISCOUNT FINLAY: It is obvious that for sovereignty there must be a certain amount of independence, but it is not in the least necessary that for sovereignty there should be complete independence. It is quite consistent with sovereignty that the Sovereign may in certain respects be dependent on another Power. The control, for instance, of foreign affairs may be completely in the hands of a protecting Power, and there may be agreements or treaties which limit the powers of the Sovereign even in internal affairs without entailing a loss of the position of a sovereign Power.

Per LORD SUMNER: It is the prerogative of the Crown to recognise or to withhold recognition from States or chiefs of State, and to determine from time to time the status with which foreign Powers are to be deemed to be invested. This being so, a foreign ruler whom the Crown recognises as a Sovereign is such a Sovereign for the purposes of an English court of law, and the best evidence of such recognition is the statement duly made with regard to it in His Majesty's name. Accordingly, where such a statement is forthcoming, no other evidence is admissible or needed. . . . I conceive that, if the Crown made no answer to an inquiry for such a statement, the court might be entitled to accept secondary evidence in default of the best.

Notes. The Arbitration Act, 1889, was repealed by the Arbitration Act, 1950 (29 HALSBURY'S STATUTES (2nd Edn.) 89), of which see s. 23 (setting aside award) and s. 26 (enforcement of award).

Applied: *Engelke* v. *Musmann*, [1928] All E.R.Rep. 18. Considered: *The Arantzozu Mendi*, [1939] 1 All E.R. 719; *R.* v. *Botrill, Ex parte Kuechenmeister*, [1946] 2 All E.R. 434. Applied: *Sayce* v. *Bahawalpur State (Ameer)*, [1952] 2 All E.R. 64. Considered: *Luigi Monta of Genoa* v. *Cechofracht Co.*, [1956] 2 All E.R. 769. Referred to: *Dickinson* v. *Del Solar*, [1929] All E.R.Rep. 139; *Compania Naviera Vasconqada* v. *Steamship Cristina*, [1938] 1 All E.R. 719; *Re Dulles Settlement Trusts, Dulles* v. *Vidler*, [1950] 2 All E.R. 1013; *Kahan* v. *Federation of Pakistan*, [1951] 2 T.L.R. 697.

As to the immunity of foreign Sovereigns and governments from being sued in our courts, see 7 HALSBURY'S LAWS (3rd Edn.) 265; and for cases see 11 DIGEST (Repl.) 611 et seq. and 22 DIGEST (Repl.) 142 et seq., 311 et seq.

Cases referred to:

(1) *The Parlement Belge* (1880), 5 P.D. 197; 42 L.T. 273; 28 W.R. 642; 4 Asp.M.L.C. 234, C.A.; 11 Digest (Repl.) 628, *516.*

(2) *Taylor* v. *Barclay* (1828), 2 Sim. 213; 2 State Tr.N.S.App. 1000; 7 L.J.O.S.Ch. 65; 57 E.R. 769; 22 Digest (Repl.) 142, *1291.*

(3) *Mighell* v. *Sultan of Johore*, [1894] 1 Q.B. 149; 63 L.J.Q.B. 593; 70 L.T. 64; 58 J.P. 244; 10 T.L.R. 115; 9 R. 447, C.A.; 22 Digest (Repl.) 311, *3231.*

(4) *Foster* v. *Globe Venture Syndicate, Ltd.*, [1900] 1 Ch. 811; 69 L.J.Ch. 375; 82 L.T. 253; 44 Sol. Jo. 314; 22 Digest (Repl.) 143, *1298.*

(5) *The Gagara*, [1919] P. 95; 88 L.J.P. 101; 122 L.T. 498; 63 Sol. Jo. 301; 14 Asp.M.L.C. 547; sub nom. *West Russian Steamship Co., Ltd.* v. *The Gagara*, 35 T.L.R. 259, C.A.; 22 Digest (Repl.) 143, *1299.*

(6) *Montgomery, Jones & Co.* v. *Liebenthal & Co.*, [1898] 1 Q.B. 487; 67 L.J.Q.B. 313; 78 L.T. 211; 14 T.L.R. 201; 46 W.R. 292, C.A.

A (7) *South African Republic* v. *Compagnie Franco-Belge du Chemin de Fer du Nord*, [1898] 1 Ch. 190; 77 L.T. 555; 46 W.R. 151; 14 T.L.R. 65; 42 Sol. Jo. 66; Digest Supp.

(8) *Thompson* v. *Whitehead* (1862), 24 Dunl. (Ct. of Sess.) 381.

(9) *The Charkieh* (1873), L.R. 4 A. & E. 59; 42 L.J.Adm. 17; 28 L.T. 513; 1 Asp.M.L.C. 581; 16 Digest 103, *35.*

B (10) *The Annette*, [1919] P. 105; 88 L.J.P. 107; 22 Digest (Repl.) 144, *1302.*

(11) *Yrisarri* v. *Clement* (1825), 2 C. & P. 223; 2 State Tr.N.S.App. 986, N.P.; subsequent proceedings (1826), 3 Bing. 432; 2 C. & P. 223; 2 State Tr.N.S.App. 986; 11 Moore, C.P. 308; 4 L.J.O.S.C.P. 128; 130 E.R. 579; 22 Digest (Repl.) 142, *1292.*

(12) *Aksionairnoye Obschestvo A. M. Luther* v. *James Sagor & Co.*, [1921] 1 C K.B. 456; 96 L.J.K.B. 1202; 125 L.T. 705; 37 T.L.R. 282; reversed, [1921] 3 K.B. 532; 90 L.J.K.B. 1202; 125 L.T. 705; 37 T.L.R. 777; 65 Sol. Jo. 604, C.A.; 11 Digest (Repl.) 325, *19.*

(13) *Nobel's Explosives Co.* v. *Jenkins & Co.*, [1896] 2 Q.B. 326; 65 L.J.Q.B. 638; 75 L.T. 163; 12 T.L.R. 522; 8 Asp.M.L.C. 181; 1 Com. Cas. 436; 41 Digest 521, *3501.*

D (14) *British Wagon Co., Ltd.* v. *Gray*, [1896] 1 Q.B. 35; 65 L.J.Q.B. 75; 73 L.T. 498; 44 W.R. 113; 12 T.L.R. 64; 40 Sol. Jo. 83, C.A.; 16 Digest 119, *172.*

(15) *King of Spain* v. *Hullett* (1833), 7 Bli.N.S. 359; 1 Cl. & Fin. 333; 5 E.R. 808; 1 Digest 47, *372.*

(16) *Strousberg* v. *Costa Rica Republic* (1880), 44 L.T. 199; 29 W.R. 125, C.A.; 1 Digest 48, *389.*

E (17) *The Newbattle* (1885), 10 P.D. 33; 54 L.J.P. 16; 52 L.T. 15; 33 W.R. 318; 5 Asp.M.L.C.N.S. 356, C.A.; 1 Digest 47, *375.*

Also referred to in argument:

Emperor of Austria v. *Day and Kossuth* (1861), 3 De G.F. & J. 217; 30 L.J.Ch. 690; 4 L.T. 494; 7 Jur.N.S. 639; 9 W.R. 712; 45 E.R. 861, C.A.; 1 Digest F 46, *362.*

Re Bankruptcy Notice, Re a Judgement Debtor, [1907] 1 K.B. 478; 76 L.J.K.B. 171; 96 L.T. 131; 23 T.L.R. 214; 51 Sol. Jo. 132; 14 Mans. 1, C.A.; 2 Digest (Repl.) 700, *2129.*

Re Boks & Co. and Peters, Rushton & Co., [1919] 1 K.B. 491; 88 L.J.K.B. 351; 120 L.T. 516, C.A.; 2 Digest (Repl.) 701, *2133.*

G *Carr* v. *Fracis Times & Co.*, [1902] A.C. 176; 71 L.J.K.B. 361; 85 L.T. 144; 50 W.R. 257; 17 T.L.R. 657, H.L.; 11 Digest (Repl.) 623, *495.*

Costa Rica Republic v. *Erlanger* (1876), 3 Ch.D. 62, 69; 45 L.J.Ch. 743; 35 L.T. 19; 24 W.R. 955, C.A.; Digest Practice 912, *4542.*

Jones v. *Garcia Del Rio* (1823), T. & R. 297.

Re Suarez, Suarez v. *Suarez*, [1918] 1 Ch. 176; 87 L.J.Ch. 173; 118 L.T. 279; H 34 T.L.R. 127; 62 Sol. Jo. 158, C.A.; 22 Digest (Repl.) 311, *3237.*

Tharsis Sulphur and Copper Co., Ltd. v. *Société des Métaux* (1889), 58 L.J.Q.B. 435; 60 L.T. 924; 38 W.R. 78; 5 T.L.R. 618, D.C.; 13 Digest (Repl.) 354, *1612.*

Tompson v. *Barclay* (1828), Coop. Pr. Cas. 501; 47 E.R. 619; sub nom. *Thompson* v. *Powles*, 2 Sim. 194; sub nom. *Thompson* v. *Barclay*, 6 L.J.O.S.Ch. 93; I affirmed (1831), 9 L.J.O.S.Ch. 215, L.C.; 20 Digest 250, *151.*

Vavasseur v. *Krupp* (1878), 9 Ch.D. 351; 39 L.T. 437, C.A.; 1 Digest 49, *392.*

Walker v. *Baird*, [1892] A.C. 491; 61 L.J.P.C. 92; 67 L.T. 513, P.C.; 11 Digest (Repl.) 618, *452.*

Walker v. *Witter* (1778), 1 Doug.K.B. 1; 99 E.R. 1; 11 Digest (Repl.) 527, *1399.*

Rothschild v. *Queen of Portugal* (1839), 3 Y. & C.Ex. 594; 160 E.R. 838; 1 Digest 46, *368.*

Appeal from an order of the Court of Appeal (Lord Sterndale, M.R., and Warrington and Younger, L.JJ.) reversing an order of Roche, J.

The following statement of facts is taken from the judgment of VISCOUNT CAVE: "On July 15, 1912, the respondents, the government of Kelantan, acting by the Crown Agents for the Colonies, entered into an agreement under seal with the appellants, the Duff Development Co., Ltd., whereby the government of Kelantan granted to the company certain rights of mining, timber cutting and road making, and other rights to be exercised in that State. The deed contained an arbitration clause which incorporated the Arbitration Act, 1889. Disputes having arisen as to the meaning and effect of the deed, the disputes were referred, in accordance with the provisions of the arbitration clause, to an arbitrator, who, on Nov. 12, 1921, made an award whereby he made certain declarations in favour of the company, directed an inquiry as to damages, and directed the government of Kelantan to pay the costs of the arbitration and award. On Dec. 22, 1921, the government moved the Chancery Division of the High Court of Justice in England, under s. 11 of the Arbitration Act, 1889, to set aside the award on the ground of error in law appearing on the face of it; but this application was, on Mar. 22, 1922, dismissed with costs—a decision which was afterwards affirmed by the Court of Appeal and by this House. On June 12, 1922, the company applied to the King's Bench Division of the High Court, by originating summons under s. 12 of the Arbitration Act, 1889, for leave to enforce the award, and an order to that effect was made by MASTER BONNER. On July 7, 1922, MASTER BALL, on the application of the company, made a garnishee order whereby certain moneys, said to be owing to the government of Kelantan from the Crown Agents for the Colonies, were attached for payment of the taxed costs of the arbitration. On Dec. 12, 1922, MASTER JELF made an order whereby he set aside the order made by MASTER BONNER, and all proceedings under it, including the garnishee order made by MASTER BALL, and stayed all further proceedings in the matter, on the ground that the Sultan of Kelantan was an independent sovereign ruler and the State of Kelantan was an independent sovereign State, and that the court had no jurisdiction over the Sultan or the government of Kelantan. An appeal against the order of MASTER JELF was allowed by ROCHE, J.; but, on an appeal to the Court of Appeal, that court reversed the decision of ROCHE, J., and restored the order of MASTER JELF. The company appealed to the House of Lords on the grounds that the State of Kelantan was not de facto or de jure an independent sovereign State; the opinion of the Colonial Office as to the inferences of law to be drawn from the facts as to the relationship between the State of Kelantan and Great Britain was not binding on the courts of this country; the government of Kelantan had voluntarily submitted to the jurisdiction of the courts of this country for the purpose of the present proceedings, and, therefore, the courts had power to make any such order against the government of Kelantan as to payment of costs or otherwise in the proceedings as to the courts should seem fit; the government of Kelantan was in no better position than an ordinary litigant for the purpose of these proceedings; and the courts of this country had power, where there has been a voluntary submission to their jurisdiction, to give leave to enforce an award against an independent Sovereign in the same manner as a judgment or order to the same effect.

Maugham, K.C., and *R. Stafford Cripps* for the appellant company.
Upjohn, K.C., and *W. E. Vernon* for the government of Kelantan.
Sir Thomas Inskip, K.C., and *H. M. Giveen* for the Attorney-General.

The cases mentioned above were referred to in argument.

Their Lordships took time for consideration.

April 10. The following opinions were read.

VISCOUNT CAVE [after stating the facts].—On the hearing of the appeal before your Lordships two points were argued on behalf of the appellant company.

First, it was argued that the government of Kelantan was not an independent Sovereign State so as to be entitled by international law to the immunity against legal process which was defined in *The Parlement Belge* (1). It has for some time

A been the practice of our courts, when such a question is raised, to take judicial notice of the sovereignty of a State, and for that purpose, in any case of uncertainty, to seek information from a Secretary of State; and when information is so obtained, the court does not permit it to be questioned by the parties. Information of this character was obtained from a Secretary of State, and accepted without question in *Taylor* v. *Barclay* (2) and *Mighell* v. *Sultan of Johore* (3); and those cases were B followed in *Foster* v. *Globe Venture Syndicate* (4) and in *The Gagara* (5). In the present case the requisite inquiry was addressed by MASTER JELF—while the summons to enforce the award was pending before him—to the Secretary of State for the Colonies, and in answer to this inquiry the Under-Secretary replied as follows:

C "With reference to your letter of the 31st July, I am directed by Mr. Secretary Churchill to inform you, in reply to your letter of the 18th July, that Kelantan is an independent State in the Malay Peninsula and that His Highness the Sultan Ismail bin Almerhum Sultan Mohammed IV is the present Sovereign Ruler thereof. 2. Prior to the year 1909 the relations between Siam and Kelantan were regulated by an agreement signed in 1902, a copy of the English text of which is enclosed. Such rights as the King of Siam possessed over D Kelantan were transferred to His Majesty the King by a treaty signed at Bangkok on the 10th of March, 1909. A copy of this treaty is enclosed. 3. Not all the rights possessed by the King of Siam were ever exercised by His Britannic Majesty, and the present relations between His Majesty the King and the Sultan of Kelantan, which are those of friendship and protection, are regulated by an agreement signed on the 22nd of October, 1910. A copy E of this agreement is enclosed. His Majesty the King does not exercise or claim any rights of sovereignty or jurisdiction over Kelantan. 4. I am to explain that in 1910 the Rajah of Kelantan with His Majesty's approval assumed the title of Sultan and is now Sultan and Sovereign of the State of Kelantan. 5. The Sultan in Council makes laws for the government of the State, and His Highness dispenses justice through regularly instituted courts F of justice, confers titles of honour, and generally speaking exercises without question the usual attributes of sovereignty."

The documents enclosed in this reply show that Kelantan had formerly been recognised as a dependency of Siam; that the Siamese government had, by the Treaty of Bangkok, transferred to the British government all its rights over Kelantan; G and that by the agreement, dated Oct. 22, 1910, referred to in the letter from the Secretary of State, the Rajah—afterwards styled the Sultan—of Kelantan had engaged to have no political relations with any foreign Power except through His Majesty the King, and in all matters of administration—save those touching the Mohammedan religion and Malay custom—to follow the advice of an adviser appointed by His Majesty.

H Upon these documents it was argued on behalf of the appellants that, although the Secretary of State had stated in the letter of Oct. 9, 1922, that Kelantan was an independent State and its Sultan a sovereign ruler, this statement must be held to be qualified by the terms of the documents enclosed with the letter; that, taking the information as a whole, the true result was that Kelantan was not an independent, but a dependent State; and, accordingly, that the Sultan was not immune I from process in the English courts. In my opinion, this argument cannot prevail. VATTEL (DROIT DES GENS, Ed. Pradier-Fodéré, 1863, vol. 1, chap. 1) defines a sovereign State as a nation which governs itself by its own authority and laws, without dependence on any foreign Power (s. 4); but he also lays it down (s. 5) that a State may, without ceasing to be a sovereign State, be bound to another more powerful State by an unequal alliance; and he adds:

"Les conditions de ces alliances inégales peuvent varier à l'infini. Mais quelles qu'elles soient, pourvu que l'allié inférieur se réserve la souveraineté ou le droit de se gouverner par lui-même, il doit être regardé comme un Etat

indépendant, qui commence avec les autres sous l'autorité du droit des gens. Par conséquent un Etat faible, qui, pour sa sureté, se met sous la protection d'un plus puissant, et s'engage, en reconnaissance, à plusieurs devoirs équivalents à cette protection, sans toutefois se dépouiller de son gouvernement et de sa souveraineté, cet Etat, dis-je, ne cesse point pour cela de figurer parmi les souverains qui ne reconnaissent d'autre loi que le droit des gens."

No doubt the engagements entered into by a State may be of such a character as to limit and qualify, or even to destroy, the attributes of sovereignty and independence: WHEATON'S INTERNATIONAL LAW (5th Edn.), p. 50; HALLECK'S INTERNATIONAL LAW (4th Edn.), p. 73; and the precise point at which sovereignty disappears and dependence begins may sometimes be difficult to determine. But where such a question arises, it is desirable that it should be determined, not by the courts, which must decide on legal principles only, but by the government of the country, which is entitled to have regard to all the circumstances of the case. Indeed, the recognition or non-recognition by the British government of a State as a sovereign State has itself a close bearing on the question whether it is to be regarded as sovereign in our courts. In the present case, the reply of the Secretary of State shows clearly that, notwithstanding the engagements entered into by the Sultan of Kelantan with the British government, that government continues to recognise the Sultan as a sovereign and independent ruler, and that His Majesty does not exercise or claim any rights or sovereignty or jurisdiction over that country. If, after this definite statement, a different view were taken by a British court, an undesirable conflict might arise; and, in my opinion, it is the duty of the court to accept the statement of the Secretary of State thus clearly and positively made as conclusive upon the point.

But secondly, it is argued on behalf of the appellant company that, assuming the Sultan of Kelantan to be a sovereign ruler, he has waived his sovereignty and submitted to the jurisdiction of the High Court—and that in two ways, namely, first, by assenting to the arbitration clause in the deed of 1912, and, secondly, by applying to the court to set aside the award of the arbitrator. Has the respondent, by agreeing to the arbitration clause in the deed of 1912, submitted to the jurisdiction, so far as regards an application to the court to enforce the award? The arbitration clause provides that

"this shall be deemed a submission to arbitration within the Arbitration Act, 1889, or any statutory modification or re-enactment thereof for the time being in force, the provisions whereof shall apply so far as applicable."

I think the effect of this provision is to incorporate in the deed the relevant provisions of the Arbitration Act, 1889, including the power given by the Act to either party, on having an award made in his favour to make an application to the court under s. 12 of the Act for leave to enforce the award; and the words "so far as applicable" do not appear to me to qualify that right. If so, then the Sultan has, in effect, agreed to submit to the jurisdiction so far as to entitle the appellants to apply to the court for leave to enforce an award against him, and, on leave being given, to enforce it by the usual modes of execution; but the question remains whether this agreement to submit is equivalent to an actual submission. On full consideration, I am not satisfied that it is. I do not forget the cases in which it has been held that a person, not otherwise liable to the jurisdiction of a court, may make it a term of a contract that questions arising under it shall be decided by that court, or those cases—such as *Montgomery, Jones & Co.* v. *Liebenthal & Co.* (6)—in which it has been held that a person outside the jurisdiction may agree that service of process upon a person within the jurisdiction shall be good service upon himself. But in the case of a foreign Sovereign, something more than this is required. It was held in *Mighell* v. *Sultan of Johore* (3) that a submission by such a Sovereign, to be effective, must take place when the jurisdiction is invoked, and not earlier, and that when a question of jurisdiction is raised by him, there can be no inquiry by the court into his conduct or actions prior to that date, and I see no

reason for doubting the correctness of that decision. If, therefore, a Sovereign, having agreed to submit to jurisdiction, refuses to do so when the question arises, he may indeed be guilty of a breach of his agreement, but he does not thereby give actual jurisdiction to the court.

There remains the question whether the Sultan, by applying under s. 11 of the Act, to set aside the award impliedly submitted to an application under s. 12 of the Act to enforce it. In my opinion, he did not. By his application under s. 11 he endeavoured to get rid of the award, and left it to the court to decide his rights in this respect; but the application for leave to enforce the award is a new proceeding, and, although connected with the earlier application, is distinct from it. In my opinion, therefore, this argument also fails. Upon the above view of the case a question which was debated during the argument, namely, whether a foreign Sovereign who submits to judgment thereby submits to execution under the judgment upon his property in this country, does not arise for decision; and, accordingly, I express no opinion upon that question. For these reasons, I am of opinion that this appeal fails and should, as against the respondent government, be dismissed with costs, such costs be set off against any sum which may be owing by the respondent government to the appellants.

VISCOUNT FINLAY.—The appellants are a company formed for the purpose of working concessions in Kelantan. The respondents are described as "The government of Kelantan." The appellants held certain rights and privileges in the State of Kelantan under an agreement made with them by the Rajah of that State in 1905. This agreement was cancelled by an indenture made on July 15, 1912, between the Crown agents for the Colonies, acting for and on behalf of the government of Kelantan, and the appellant company, and by the same indenture grants were made of certain lands and rights in Kelantan to the company. By cl. 21 of the indenture all disputes relating to it were to be referred to a sole arbitrator, and this clause was to be deemed a submission to arbitration under the Arbitration Act, 1889, the provisions of which were to apply as far as applicable. In 1919 such disputes arose, and they were referred to SIR EDWIN SPEED, who made his award on Nov. 17, 1921.

The government of Kelantan moved before RUSSELL, J., in the Chancery Division, to set aside the award on the ground of mistake of law. This motion was dismissed with costs on Mar. 27, 1922, and RUSSELL, J.'s decision was affirmed in the Court of Appeal on May 26, 1922, and in the House of Lords on Mar. 22, 1923. In these proceedings the Kelantan government raised no objection on the ground of privilege as a sovereign State, but rested their case on such grounds as are open to any party to an arbitration. They had disputed this liability before the arbitrator, and they challenged the award itself when made as invalid upon legal grounds. Before the appeal to the House of Lords just referred to, the appellant company applied to MASTER BONNER for an order under s. 12 of the Arbitration Act, 1889, for leave to enforce the award in the same manner as a judgment or order. On this summons two questions arose: (i) whether the Kelantan government is a sovereign State, and (ii) whether, if the first question were answered in the affirmative, execution could be issued against it in the courts of this country. The government of Kelantan did not appear on the summons before MASTER BONNER, and on June 21, 1922, he made an order that the appellants be at liberty to enforce the award in the same manner as a judgment or order to the same effect. The government of Kelantan then applied on a summons before MASTER JELF for an order that the summons before MASTER BONNER, the alleged service of it on the government, and the order made thereon on June 21, should be set aside on the ground that the government of Kelantan is that of a sovereign ruler. The hearing was adjourned in order that MASTER JELF might communicate with the Colonial Office. The Colonial Office sent to MASTER JELF a letter dated Oct. 9, 1922, informing him that Kelantan is an independent State in the Malay Peninsula and that the Sultan is the sovereign ruler thereof. The letter also enclosed (i) the English text of an

agreement in 1902 conferring upon Siam certain rights over Kelantan; (ii) a treaty between Great Britain and Siam dated Mar. 10, 1909, transferring these rights to His Majesty's government; and (iii) an agreement between Great Britain and Kelantan dated Oct. 22, 1910. This last agreement provided, by art. 1, that Kelantan should have no relations with any foreign Power except through the King of Great Britain; by art. 2, that His Majesty might appoint officers to advise the Rajah of Kelantan, and that the Rajah should follow their advice in all matters of administration other than those touching the Mohammedan religion and Malay custom; and by art. 3, that the Rajah of Kelantan should not enter into agreements concerning land, or grant or allow the transfer of any concession, in favour of any person other than a native of Kelantan, or appoint officials other than natives, without the consent of His Majesty's government. There were also clauses providing for the raising of troops in Kelantan in certain events (art. 4); stipulations that internal administration should not be interfered with except in certain contingencies (art. 5); and provisions with reference to posts, telegraphs and railways (arts. 6 and 7). Article 8 provided that nothing in the agreement should affect the administrative authority then held by the Rajah of Kelantan, and that, except as provided in the agreement, the relations between the Rajah and His Majesty's government should be the same as those which had existed between the Rajah and the Siamese government. With the consent of His Majesty, the Rajah of Kelantan, after the date of the last-mentioned agreement, assumed the title of Sultan of Kelantan, and is now so designated. MASTER JELF held that Kelantan is a sovereign State, and by his order dated Dec. 12, 1922, set aside the order made by MASTER BONNER. ROCHE, J., on appeal, reversed the order of MASTER JELF. He was, however, himself reversed by the Court of Appeal, on Dec. 18, 1922, so that the order of MASTER JELF stands good subject to the present appeal. It is from this decision of Dec. 18 that the present appeal is brought to this House.

The first question to be determined is as to the status of Kelantan. Is the Sultan a sovereign prince? It is settled law that it is for the court to take judicial cognisance of the status of any foreign government. If there can be any doubt on the matter the practice is for the court to receive information from the appropriate Department of His Majesty's government, and the information so received is conclusive. The judgment of FARWELL, J., in *Foster* v. *Globe Venture Syndicate, Ltd.* (4) seems to me to be a perfectly accurate statement of the law and practice on this point. There are a great many matters of which the court is bound to take judicial cognisance, and among them are all questions as to the status and boundaries of foreign Powers. In all matters of which the court takes judicial cognisance the court may have recourse to any proper source of information. It has long been settled that, on any question of the status of any foreign Power, the proper course is that the court should apply to His Majesty's government, and that, in any such matter, it is bound to act on the information given to them through the proper Department. Such information is not in the nature of evidence; it is a statement by the Sovereign of this country, through one of his Ministers, upon a matter which is peculiarly within his cognisance. The letter of the Colonial Office is not an expression of the opinion of the official who wrote it. The first sentence is:

> "I am directed by Mr. Secretary Churchill to inform you in reply to your letter of July 18 that Kelantan is an independent State in the Malay Peninsula and that His Highness Ismail . . . is the present sovereign ruler thereof."

This is an official answer by the Secretary of State on behalf of the government. The question put was as to the status of the ruler of Kelantan. It is obvious that for sovereignty there must be a certain amount of independence, but it is not in the least necessary that for sovereignty there should be complete independence. It is quite consistent with sovereignty that the Sovereign may in certain respects be dependent upon another Power; the control, for instance, of foreign affairs may be completely in the hands of a protecting Power, and there may be agreements or

A treaties which limit the powers of the Sovereign even in internal affairs without entailing a loss of the position of a sovereign Power. In the present case it is obvious that the Sultan of Kelantan is to a great extent in the hands of His Majesty's government. We were asked to say that it is for the court and for this House, in its judicial capacity, to decide whether these restrictions were such that the Sultan had ceased to be a Sovereign. We have no power to enter into any B such inquiry. The reply of the Colonial Office to MASTER JELF on Oct. 9, 1922, states that Kelantan is an independent State in the Malay Peninsula, and that the Sultan is the sovereign ruler, that His Majesty's government does not exercise or claim any rights of sovereignty or jurisdiction over Kelantan, and that the Sultan makes laws, dispenses justice through courts, and, generally speaking, exercises without question the usual attributes of sovereignty.

C In the face of this statement it is hopeless to contend that the Colonial Office, by appending to its letter the agreements with Siam and with Great Britain, referred it to the courts to decide upon these documents whether the Sultan was a Sovereign or not. Such an interpretation is contrary to the plain terms of the letter. Of course, the Colonial Office might have given a bald answer that the Sultan is a Sovereign, but it has been the practice, when there are agreements or D treaties dealing with the powers of the alleged Sovereign, to append to the reply on the questions of sovereignty copies of any documents. There are very good reasons for this practice. The Department might lay itself open to serious misunderstanding if it took any other course. It might be said that there was a want of candour in merely stating the conclusion that the Power is a sovereign Power, without disclosing any such limitations on the sovereignty as exist here. The E contention that, by appending these documents, the Colonial Office remits the question to the court to form its own opinions upon it is based on a misconception. When the letter and the documents are read together it is clear that the Secretary of State says explicitly that the Sultan is a sovereign ruler, and the documents are appended by way of making it clear that their effect has been considered, and that the Colonial Office has given all due weight to them in arriving at the con- F clusion that the Sultan is a sovereign prince. There is no ground for saying that, because the question involves considerations of law, these must be determined by the courts. The answer of the King, through the appropriate Department, settles the matter, whether it depends on fact or on law. It is true that, by the agreement of Oct. 22, 1910, the Sultan is bound not to have relations with any foreign Power except through His Majesty the King, and to follow the advice given him by the G advisers appointed by His Majesty "in all matters of administration, other than those touching the Mohammedan religion and Malay custom." But it would be idle to contend that sovereignty is destroyed by the fact that a protecting Power has charge of foreign relations, and, as regards the internal affairs, the exception from the obligation to be guided by the advisers appointed by His Majesty is a very large one, as it comprises all matters touching the religion and the customary H law of the country. The restrictions on the grant of concessions and the employment of officials in art. 3 and the provisions as to posts, telegraphs and railways in arts. 6 and 7 are quite consistent with the sovereignty of the Sultan, and so are the restrictions on the grant of concessions for the construction of railways within the State (art. 7). Article 5 is as follows:

I "His Majesty's government undertake not to interfere with the internal administration of the State of Kelantan otherwise than as provided for in this agreement, so long as nothing is done in that State contrary to the treaty rights and obligations that His Majesty's government have with foreign governments, and so long as peace and order are maintained in the State of Kelantan, and it is governed for the benefit of its inhabitants with moderation, justice and humanity."

And art. 8 provides that "nothing in this agreement shall affect the administrative authority now held by the Rajah of Kelantan," and that, except as provided in

the agreement, the relations between the Rajah and His Majesty's government shall be the same as those which previously existed between him and the Siamese government. While there are extensive limitations upon its independence, the enclosed documents do not negative the view that there is quite enough independence left to support the claim to sovereignty. But, as I have said, the question is not for us at all; it has been determined for us by His Majesty's government, which in such matters is the appropriate authority by whose opinion the courts of His Majesty are bound to abide.

The second question in the case is whether the government of Kelantan had made such a submission to the jurisdiction of the courts here that execution can be issued upon the award against any property in this country of the Kelantan government. It was contended by the appellant company that there was such a submission in art. 21 of the indenture of July 15, 1912, which contains the contract between the appellant company and the Kelantan government. This article begins by providing for the reference of any disputes under the contract to a sole arbitrator, and then proceeds:

> "And this shall be deemed a submission to arbitration within the Arbitration Act, 1889, or any statutory modification or re-enactment thereof for the time being in force and the provisions thereof shall apply as far as applicable."

One of the provisions of this Act is s. 12:

> "An award on a submission may, by leave of the court or a judge, be enforced in the same manner as a judgment or order to the same effect."

We are asked by the appellant company to say that this clause is a submission to the jurisdiction of the court to order execution to issue upon the award against the property of the government of Kelantan.

To appreciate this question it is necessary to refer to the history of our law with regard to the enforcement of awards. Apart from statute, the award of an arbitrator on a reference by agreement could be enforced only by action. When this was the state of the law, it could not have been contended that a reference by agreement to arbitration with a foreign government, even if made in England, would involve any obligation on the part of the foreign government to submit to the jurisdiction of the English courts in an action to enforce the award. When such an action was brought, it would be at the option of the foreign government to appear or not, as it pleased. There would certainly be no obligation upon it to accept the jurisdiction, and to submit to judgment and execution against any property belonging to it in England. There is nothing in an agreement for settlement by arbitration to import a waiver of the right of a sovereign Power to refuse the jurisdiction of the English courts in an action upon the award. As time went on more summary remedies were given in addition to the remedy by action. In 1698 it was provided that the parties might agree that the submission should be made a rule of court, and that the court might make it a rule of court accordingly, and that any party disobeying the award should be liable to all penalties for contemning a rule of court (9 Will. 3, c. 15, s. 1). This proceeding, it will be observed, required the consent of the parties. The Common Law Procedure Act, 1954, s. 17, went a step further and provided that any agreement in writing for a reference might be made a rule of court, unless the agreement provided to the contrary. It seems clear that this provision could not be put in force against a foreign government without its consent. The Judgments Act, 1838, s. 18, provides that all rules of court for the payment of money should have the effect of judgments. This enactment still remains in force, but the sections of the Act of William III and of the Common Law Procedure Act, 1854, above referred to, were repealed by the Arbitration Act, 1889, which, by s. 12, provides, as already stated, that an award on submission may, by leave of the court or a judge, be enforced in the same manner as a judgment or order to the same effect.

In considering the effect of this s. 12 of the Arbitration Act, 1889, it is material to observe that, in the case of all the previous enactments for the same purpose,

A the party against whom the rule was applied for would have the opportunity of opposing it, and it is clear that no such rule would have been made as against a sovereign State unless it had entered into an agreement submitting to the jurisdiction. The procedure by rule was merely an alternative procedure for the procedure by action, and the foreign State would have the same right of asserting its immunity as if the old remedy by action on the agreement had been resorted to. B Section 12 of the Arbitration Act involved merely a change of procedure. The award may under it, by leave of the court, be enforced as if it were a judgment. Application must be made to the court for leave, and it appears to me that, on such an application, if the other party to the award is a sovereign State, that party might assert its immunity from process, and that the court would be bound to refuse leave unless the objection had been waived. Article 21 in the indenture of C July 15, 1912, on which the appellants rely as incorporating s. 12 of the Arbitration Act, cannot have the effect suggested. Section 12 can be made operative only by leave of the court. I fail to see how art. 21 can possibly be read as an agreement by the government of Kelantan to consent to an order for such leave being made. The leave of the court being necessary before the award can be enforced as if it were a judgment, if a sovereign State claimed its immunity this would be a good D reason for refusing the leave. The assertion that the agreement for the application of the provisions of the Arbitration Act involves a waiver of the right to object to execution on the ground of sovereignty involves reading s. 12 of the statute of 1889 as if it conferred a right to have execution on the award. The only right conferred is a right to apply for leave to issue execution on the award, and this leave will be granted only in suitable cases. It is not a suitable case, if a foreign government E is concerned, unless there has been a clear waiver by that government of its sovereign rights for this purpose. To the arbitration the government of Kelantan had no objection; they attended the proceedings throughout. It was only when it was proposed to take a step which involved the right to execution against the government, that there was any occasion to raise the objection of sovereignty. The present case differs fundamentally from the case of an action in which a foreign F government has appeared, and has had judgment given against it. It is not necessary to decide that case for the purpose of the present appeal; here the only consent was to arbitrate.

The application to set aside the award was based entirely on the allegation that the arbitrator had gone wrong on a point of law, and that this appeared on the face of the award. The award, in that case, might be set aside. I cannot see how we G can construe such an application as involving an admission, that if it failed, the government property might be taken in execution. The Kelantan government had opposed the claim made in the arbitration throughout. Their motion was made to get rid of the award as vitiated by a wrong view of the law. The government were quite entitled to get rid of an award the making of which they had opposed, and the motion to set it aside was solely on the ground that the award was H inherently bad. On this part of the case a very great many authorities were cited. I do not consider it necessary to refer to them. The question is a very short one: Have the Kelantan government waived objection to execution upon their property in this country? It is beyond question that Kelantan as a sovereign State is entitled to immunity from execution against the property of the Sultan, unless there has been a waiver. I concur with the judgment delivered by LORD STERN- I DALE, M.R., in this case, and think that he took the proper course in deciding the substantial question which had been litigated, and in refusing to amend the application in the nebulous fashion suggested. I am of opinion that this appeal should be dismissed with costs, but I think that the appellants should be allowed a set-off in respect of any costs due to them in respect of the other proceedings relating to the award which have not been paid.

LORD DUNEDIN.—I concur. On the first point I have little to add to what has been said by VISCOUNT CAVE. It seems to me that once one traces the doctrine

for the freedom of a foreign Sovereign from interference by the courts of other nations to comity, one necessarily concedes that the home Sovereign has in him the only power and right of recognition. If our Sovereign recognises, and expresses the recognition through the mouth of his Minister, that another person is a Sovereign, how could it be right for the courts of our own Sovereign to proceed upon an examination of that person's supposed attributes, to examine his claim and, refusing that claim, to deny to him the comity which their own Sovereign had conceded? A B

The second point is whether the Sultan has in this case waived the jurisdiction. It is true that the learned judges of the Court of Appeal based their judgment on the judgment which they had pronounced the day before in the garnishee action, and in that action they had held that the Sultan's property could not be taken in execution for costs awarded against him in the action, when he had waived the jurisdiction by appearing as a plaintiff to seek to have the award set aside. I wish most emphatically to state that I could not be held to approve of that part of the judgment in the garnishee case, or the headnote in *South African Republic* v. *Compagnie Franco-Belge du Chemin de Fer du Nord* (7), which I consider wrong and misleading. But the question as to the power of execution for costs so awarded is not raised by the present action, and it is, therefore, probably better that no considered opinion should be given on that subject. The only question, to my mind, is whether the Sultan waived the jurisdiction by entering into the agreement to refer, or by appearing in the reference. The present action does not embrace the Chancery costs. It seeks to enforce the award as a judgment. The Sultan does not, in this action, waive the privilege of sovereignty. He can, therefore, only be subjected to the jurisdiction if either he has done so by appearing as plaintiff in the Chancery suit, or by his subscription of the contract. Now, so far as the suit is concerned, I do not think this proceeding is a proceeding which could have founded a cross-action or counter-action to the suit. The same argument as prevailed in the *South African Republic Case* (7) prevails here. Then, as regards arbitration. An arbitrator is not a court, and, therefore, by appearing before the arbitrator, he did not submit himself to the jurisdiction. It may be interesting to note that, under the Roman law, appearance before an arbitor did not give rise to reconvention: see a very learned judgment of Lord President Inglis in *Thompson* v. *Whitehead* (8) (24 Dunl. (Ct. of Sess.) at p. 343). True, it is, that the Sultan contracted to allow the jurisdiction to be exercised against him, but he did so out of court, and now he has changed his mind. He has broken his contract, but the court has no jurisdiction to enforce any performance of it. It seems to me to say that by agreeing to submit he did submit is to argue in a circle. I, therefore, agree that the present action fails, and that the appeal should be dismissed. C D E F G

LORD SUMNER.—I should not trouble your Lordships at any length with my reasons for thinking that this appeal fails, if it were not for the novelty of this important subject in your Lordships' House. The principle is well settled that a foreign Sovereign is not liable to be impleaded in the municipal courts of this country, but is subject to their jurisdiction only when he submits to it, whether by invoking it as a plaintiff, or by appearing as a defendant without objection. For present purposes it is not necessary to examine the particular theory of law on which this principle is rested. The practice is also well settled that the court may, and generally should, make its own inquiry of the competent Secretary of State in order to ascertain, in case of need, whether a particular State is a sovereign State, or a particular person is the head, hereditary or elected, of such a State. H I

Your Lordships were frankly told at the Bar that this case is virtually an appeal against *Mighell* v. *Sultan of Johore* (3), in which that practice was approved. The questions there put to the Colonial Office by direction of the court were not simply answered Aye or No. but were answered affirmatively with the addition of details explaining the Treaty relations of Johore with Her Majesty Queen Victoria. In

The Charkieh (9) a similar question was put to the Foreign Office with regard to the Khediviate of Egypt, and was answered in the negative in the terms "the Khedive has not been and is not now recognised as reigning Sovereign of the State of Egypt." In *The Annette* (10) the reply was that His Majesty was provisionally co-operating with the new government in opposition to the Soviet government, but had not yet formally recognised it as the government of a sovereign independent State. In *The Gagara* (5) the statement by the Foreign Office was that Esthonia was recognised as a sovereign State, but provisionally. Thus in one case a clear answer was given that there had been no recognition; in another, that the State was sovereign and was so recognised, but with further information as to the Crown's treaty relations with it; in the third, that common action had taken place but without recognition of sovereignty; in the fourth, that there was only provisional recognition, but still, the State had been recognised as sovereign. Two are cases of States of some antiquity; two are cases of governments of recent and troublous origin. The same procedure was, however, followed in them all.

Certain expressions used by BRETT, M.R., and KAY, L.J., in giving judgment in the *Sultan of Johore's Case* (3) appear to suggest that the reason why the answer of the Colonial Office ought to be accepted without further discussion is, that, in effect, it is something which the Crown deigns to declare to its courts of law, and, therefore, it cannot be criticised or supplemented, since that would be disrespectful to the Crown itself. That this view of the meaning of the Court of Appeal has had its effect is shown by the language used by FARWELL, J., in *Foster* v. *Globe Venture Syndicate, Ltd.* (4). The appellants, however, desire to go a little behind the form observed. They not unreasonably say: "An official of the Colonial Office advises the Sultan to go to arbitration, and the same official of the Colonial Office, or some other, advises him to dispute the award, and then the Colonial Office, in the name of the Crown, says that the Sultan is a Sovereign and so is bound to nothing, not even to pay for what the Colonial Office has advised him to do. What, then, is the statement that the Sultan is a Sovereign? Is it the voice of the Sovereign of this country, or is it in reality nothing but the contention of someone in the Colonial Office?" Without contesting in the least either the inconvenience or the impropriety of any conflict between the High Court and the Secretary of State upon the grave question of the sovereignty of the Sultan of Kelantan, I venture to think that the mere obligation of deference to any statement made in His Majesty's name hardly constitutes the whole legal basis for the rule laid down in the *Johore Case* (3). The status of foreign communities and the identity of the high personages who are the chiefs of foreign States, are matters of which the courts of this country take judicial notice. Instead of requiring proof to be furnished on these subjects by the litigants, they act on their own knowledge, or, if necessary, obtain the requisite information for themselves. I take it that, in so doing, the courts are bound, as they would be on any other issue of fact raised before them, to act on the best evidence, and, if the question is whether some new State or some State whose sovereignty is not notorious, is a sovereign State or not, the best evidence is a statement which the Crown condescends to permit the appropriate Secretary of State to give on its behalf. It is the prerogative of the Crown to recognise or to withhold recognition from States or chiefs of State, and to determine from time to time the status with which foreign Powers are to be deemed to be invested. This being so, a foreign ruler whom the Crown recognises as a Sovereign is such a Sovereign for the purposes of an English court of law, and the best evidence of such recognition is the statement duly made with regard to it in His Majesty's name. Accordingly, where such a statement is forthcoming, no other evidence is admissible or needed. I think that this is the real judicial explanation why it was held that the Sultan of Johore was a foreign Sovereign. In considering the answer given by the Secretary of State, it was not the business of the court to inquire whether the Colonial Office rightly concluded that the Sultan was entitled to be recognised as a Sovereign by international law. All it

had to do was to examine the communication in order to see whether the meaning of it really was that the Sultan had been and was recognised as a Sovereign. A

There may be occasions when, for reasons of State, full unconditional or permanent recognition has not been accorded by the Crown, and the answer to the question put has to be temporary, if not temporising, or even where some vaguer expression has to be used: *The Annette* (10). In such cases not only has the court to collect the true meaning of the communication for itself, but also to consider whether the statements as to sovereignty made in the communication, and the expression "sovereign" or "independent sovereign" used in the legal rule, mean the same thing. BEST, C.J., says in *Yrisarri* v. *Clement* (11) (2 C. & P. at p. 225) that recognition is conclusive, but if there is no recognition yet given the independence becomes matter of proof. I conceive that, if the Crown made no answer to the inquiry, as in changing and difficult times policy might require it to do, the court might be entitled to accept secondary evidence in default of the best, subject, of course, to the presumption that, in the case of a new organisation, which has de facto broken away from an old State still existing, and still recognised by His Majesty, the dominion of the old State remains unimpaired until His Majesty is pleased to recognise the change. In *The Charkieh* (9) the Foreign Office returned a definite and unambiguous answer that the Crown had never recognised the Khedive Ismail, or his predecessors, as sovereign, but only as provincial authorities, albeit hereditary ones, who derived their authority and status from the Sultan of Turkey. This was conclusive, and hence it is that BRETT, M.R., indicated his opinion that the further inquiries made by SIR R. PHILLIMORE were unnecessary. In the present case there is a precise and sufficient statement as to the status of the Sultan of Kelantan, as recognised by His Majesty, with nothing ambiguous about it. B C D E

The questions, what are the boundaries of a foreign State, and also what communities or tribes are under its authority, apart from any recognition of their sovereignty or refusal to recognise it, are questions which seem to me to stand on a different footing. I express no concluded opinion, but, for the purpose of making clearer the reasons above given by considering the converse case, I venture to suggest my present view. In this connection two cases may be usefully compared, *Foster* v. *Globe Venture Syndicate, Ltd.* (4) and *Luther* v. *James Sagor & Co.* (12). In the former, FARWELL, J., treated the question whether the Suss district was within the territories of Morocco as equivalent in character to the question whether the Suss tribes had or had not been recognised as independent. He appears to have thought that one matter for judicial notice was the geographical extent of the jurisdiction of the Suss tribes, if they were recognised as independent. I confess, although with the diffidence that I always feel in criticising so great a judge, that the two questions seem to me to be quite different. To ask if the Crown has recognised a State as a sovereign State is one thing; to ask exactly what the boundaries of that State are at any time, and whether certain persons live within or without them, is quite another. The reason acted on by FARWELL, J., was the expression quoted from *Taylor* v. *Barclay* (2) (2 Sim. at p. 221): "The courts of the King should act in unison with the government of the King." This seems to be rather a maxim of policy than a rule of law. If, as FARWELL, J., supposed, cases had occurred in which the Crown had applied for redress of wrongs, suffered locally by British subjects, either to the Sultan of Morocco or to the head of the independent Suss tribes, such an act would have been, in the former case, a recognition of the Sultan as Sovereign of the district in question, and, in the latter, a recognition of the Suss tribes both as a sovereign State and as exercising that sovereignty in that district. No doubt the statement of the Foreign Office that this was so would be conclusive. Either it would state the recognition of the Suss tribes or it would state the recognition of the extent of the Sultan's local sovereignty, much as if application had been made by the Sultan for an exequatur for a British consul to be stationed in the district. Probably FARWELL, J., meant no more than this. The frontiers of foreign countries are matters of geography, F G H I

not always involved with matters of State. Certainly it is not always safe for courts to form their own impression on such subjects. Hong Kong, for example, has been spoken of judicially as if it were a Chinese port: *Nobel's Explosives Co.* v. *Jenkins & Co.* (13). It does not, however, follow that on mere questions of this kind resort ought to be had to the Foreign Office, or that its answer, if given, must necessarily be taken to be correct in fact. I do not think that it has yet been held, or ought to be held, that the Crown must be deemed to know all the geographical boundaries of all foreign States at all times, and this so that its statement on the subject would be conclusive. Contiguous States have often disputed their common boundary, and no other State has had occasion to know where it runs any better than they have done themselves. This was so in the last century with regard to the northern boundary of the State of Maine and Canada, and of the common frontier in the Oregon territory. More recently there have been cases of this kind between the various republics of South America. How can a judge of the High Court take judicial notice of untraced lines, and how can His Majesty's government tell him with authority exactly where they are? I doubt very much if the boundaries of the dominions of the Emir of Riad in Central Arabia were exactly known to any European government ten years ago, or if those of the Borku and Wadai tribes in the Southern Libyan Desert are definitely known to-day. I think such boundaries, where no acts of the Crown with regard to them have been involved, must depend on evidence given in the ordinary way.

Again, it is not indispensable that the information should have been solicited from the competent government department by the court itself. In *Luther* v. *James Sagor & Co.* (12) the evidence put in by the parties included several letters from the Foreign Office relating to the recognition, if it amounted to recognition, which His Majesty had been advised to extend to the Soviet government, although subsequently the court made further inquiries of its own. The letters put in before ROCHE, J., stated that the Soviet government had not been recognised in any way, but that M. Krassin personally was regarded by the Foreign Office as a foreign representative who should be exempt from legal process, although this point was left to the better judgment of the courts, and on this evidence he held that the Soviet government was not a sovereign State. Before the Court of Appeal a further letter from the Foreign Office was admitted, which stated at a later date that His Majesty's government did recognise the Soviet government de facto, and on this further evidence alone the decision below was reversed. In both courts information communicated by the Foreign Office was received as being the proper material on the question of the status of the Soviet government of Russia, and neither court refused, or thought itself bound to refuse, to consider such information merely because it had been obtained by the parties, and by them submitted to the court. Both courts proceeded to consider the meaning and effect of the various communications, and, in view of the fact that, as ROCHE, J., puts it ([1921] 1 K.B. at p. 477), they were "as clear as the indeterminate position of affairs in connection with the subject-matter of the communications enabled them to be"; which, to be sure, was not luce clarius. I have no doubt that the construction was a matter for argument before and for decision by the courts. As it seems to me, no such question arises in the present case. Here there is an explicit statement that the Sultan of Kelantan is an independent Sovereign, and about this there is no possible ambiguity. To inquire what constitutes independence, and whether the treaty cited in the letter does or does not impair his independence, seems to me to be irrelevant. We should really question the correctness of the course taken by His Majesty in regarding this potentate as a Sovereign if we were to discuss the question how far the Sultan's sovereignty is reconcilable with the terms of the treaty.

The second question which arises, although narrower in scope, is no less important, namely, the question how far, if at all, His Highness the Sultan, who really is, and, in my opinion, ought to have been made, the formal respondent on the record, has submitted to the jurisdiction of the High Court. It is raised in this

way—first, whether he has in any way submitted himself to the jurisdiction to enforce the award as a judgment, which, I think, is strictly the only issue to be determined, and, secondly, whether he has in any way submitted his property to any process or all processes of execution of a judgment validly pronounced against him, either in respect of costs, where he has been the applicant, or in respect of the award itself. The latter raises a far-reaching and fundamental question, which, if answered in favour of the appellants, involves allowing the appeal and, as I can conceive, materially alters the law hitherto prevailing on this subject.

The Sultan's contract to arbitrate in accordance with the Arbitration Act, 1889, is not, either in itself or in combination with anything else in this case, a submission to the jurisdiction of the High Court. It is not an undertaking given to the court itself. It is an agreement inter partes, and no more. An agreement inter partes that the court shall be enabled to do something, which by law it cannot do, is of no avail, whether it is by statutory rules that the court is thus incompetent (*British Wagon Co., Ltd.* v. *Gray* (14)) or by a general rule of the common law, like that which gives or creates a foreign Sovereign's immunity. Ordinary persons can contract themselves out of the formalities which the orders and rules prescribe for proceedings: *Montgomery, Jones & Co.* v. *Liebenthal & Co.* (6). So, too, acting under statutory authority, the High Court allows service of its writ, or of notice of its writ, as the case may be, on parties outside the jurisdiction, who, if within it, would have been personally amenable. Sovereigns, however, are not amenable at all, except by their own consent, and there is no principle upon which such consent can be deemed to have been given short of action taken towards the court itself, such as is commonly called a submission to the jurisdiction. It is, therefore, necessary to find something voluntarily done by the foreign Sovereign in or towards the court, and to find in what is done something that really evinces an intention to submit. This seems to me to be beyond the limits of presumption or fiction, for the foundation of the jurisdiction is not any rule of municipal law, but the action of an independent personage, who himself is beyond its reach.

I refrain from expressing any opinion on this question, whether or not a foreign Sovereign, who has submitted to the jurisdiction by appearing in a proceeding in a municipal court, thereby submits himself, or his property, to any of the processes of execution in case judgment should be pronounced against him. The question has been discussed, but I agree with your Lordships in thinking that it does not arise for decision on this occasion. I only desire to say that, in refraining from dealing with the point, I am not to be taken as doubting the reasoning contained in the judgments in the garnishee proceedings between the present parties. I agree that the appeal should be dismissed.

LORD CARSON.—I must confess that if it was open to me to disregard the statements contained in the letter from the Secretary of State for the Colonies, that "Kelantan is an independent State and the present Sultan is the present sovereign ruler thereof," I should find great difficulty in coming to that conclusion of fact, having regard to the terms of the documents enclosed in the letter from the Secretary of State. It is, in my opinion, difficult to find in these documents the essential attributes of independence and sovereignty in accordance with the tests laid down by the exponents of international law. It is, however, unnecessary to pursue that investigation, or to examine the very ample material put before us in the arguments of counsel for the appellants, as I agree with your Lordships that the courts of this country are bound to take judicial notice of the status of any other country in accordance with the information afforded to them by the proper representative of the Crown. As Lord Esher, M.R., said in *Mighell* v. *Sultan of Johore* (3) ([1894] 1 Q.B. at p. 158):

> "When once there is the authoritative certificate of the Queen through her Minister of State as to the status of another Sovereign, that in the courts of this country is decisive."

A Indeed, it is difficult to see in what other way such a question could be decided without creating chaos and confusion, the more especially so when we consider that

> "many States, regarded as sovereign, do not exercise the right of self-government entirely independent of other States, but have their sovereignty limited and qualified in various degrees, either by the character of their internal constitution, by stipulations of unequal treaties of alliance, or by
B treaties of protection or of guarantee made by the third Power": HALLECK'S INTERNATIONAL LAW (3rd Edn.), vol. 1, p. 67.

And, in truth, it is the recognition of the status of the government which must be the main element to determine this question, the only proper evidence of which can be supplied by the officer representing the Crown.

C The cases upon this subject have been already referred to, and they are discussed at considerable length in the judgment of the Master of the Rolls. Treating, therefore, the government of Kelantan as a sovereign State, it follows that primâ facie, at all events, neither the government nor its property is subject to the jurisdiction of the courts of this country.

> "The principle to be deduced from all these cases is that, as a consequence of
D the absolute independence of every sovereign authority, and of the international comity which induces every sovereign State to respect the independence and dignity of every other sovereign State, each and every one declines to exercise by means of its courts any of its territorial jurisdiction over the person of any Sovereign or ambassador of any other State, or over the public property of any State which is destined to public use, or over the property of any
E ambassador, though such Sovereign, ambassador, or property be within its territory, and, therefore, but for the common agreement, subject to its jurisdiction": *The Parlement Belge* (1) (5 P.D. at pp. 214, 215).

It is necessary to note, with a view to subsequent consideration of the present case, that the real principle, as stated by LORD ESHER in the same case (ibid. at p. 207),

> "on which the exemption of every Sovereign from the jurisdiction of every
F court has been deduced is that the exercise of such jurisdiction would be incompatible with his regal dignity, that is to say, with his absolute independence of every superior authority."

This privilege every Sovereign or sovereign Power has a right to claim. The main contention, however, of the appellants in the present case is that, wherever a
G sovereign State has submitted to the jurisdiction of our courts, it waives its privileges, and must, for the purpose of doing justice, be treated in exactly the same way as any other litigant. The general proposition upon this subject is, I think, accurately stated in WESTLAKE'S PRIVATE INTERNATIONAL LAW (6th Edn.), s. 192, p. 259:

> "But a foreign State or person entitled to the privilege of exterritoriality,
H bringing an action in England, will be bound as a private corporation or person would be bound to do complete justice to the defendant with regard to the matters comprised in the action, and will be subjected to all cross-actions, counter-claims, defences, and steps of procedure which as between private parties would be competent to the defendant for the purpose either of obtaining such complete justice or of defending himself against the plaintiff's claim."

I The editor quotes PAULUS, Digest 5.1.22:

> "Qui non cogitur in aliquo loco judicium pati si ipse ibi agat, cogitur excipere actiones et ad eundem judicem mitti."

It is to be observed that the main principle underlying the cases referring to the exercise of jurisdiction by our municipal courts is that it was necessary that a sovereign Power should be considered to have waived their privileges and be treated as other litigants for the purpose of enabling complete justice to be done between the parties: see *King of Spain* v. *Hullett* (15), and also the judgment of JAMES, L.J., in *Strousberg* v. *Costa Rica Republic* (16). It is interesting to note that in the

former case, where the King of Spain unsuccessfully resisted an application that he should answer a cross-bill personally and upon oath, the argument used on his behalf was that contended for by counsel for the respondent as one of the reasons for resisting the grant of execution, namely:

> "It is impossible [said the Attorney-General (1 Cl. & F. at p. 345)] for the appellant to do so consistently with his independent sovereign character, according to the principles of the law of nations, as practised between all European States, and his admitted relation to this country as head of the kingdom of Spain."

It is, in applying this principle of equal treatment, that the Sovereign submitting to the jurisdiction has been ordered to give security for costs, and also security for damages—see *The Newbattle* (17)—and it is difficult to find any principle on which such orders should be permitted, if the Sovereign was not liable to the ordinary results flowing from the judgment and execution. Indeed, so far as I can ascertain from such researches as I have been able to make, there is no authority which limits the power of the courts in this country, when once a Sovereign has submitted to its jurisdiction, merely to decide questions at issue, and not to make a judgment effective by the issue of execution; the result of any such decision would have to make the decrees of our courts sterile and ineffective. It is true that in *The Newbattle* (17) Brett, M.R., stated the proposition in this way (10 P.D. at p. 35):

> "It has always, however, been held that if a sovereign prince invokes the jurisdiction of the court as a plaintiff, the court can make all proper orders against him. The court has never hesitated to exercise its powers against a foreign government to this extent. It is another question as to what may be the result of an application for execution by seizure of the plaintiff's ship, if the judgment should be against the plaintiffs."

But that is not a decision that the judgment of the court could not be enforced, and rather suggests that there may be questions as to the nature of the particular property which may be taken in execution. The real crux, however, is whether the government of Kelantan has waived its privileges, and, if so, how far in the circumstances disclosed in the present case. The deed of cancellation, under which the arbitration was held, contained, in cl. 21, a submission to arbitration by the government of Kelantan, which provides that

> "this shall be deemed a submission to arbitration within the Arbitration Act, 1889, or any statutory modification or re-enactment thereof for the time being in force the provision whereof shall apply so far as applicable."

The Arbitration Act, 1889, under the heading of "References by consent out of court," by the first section provides as follows:

> "A submission, unless a contrary intention is expressed therein, shall be irrevocable, except by leave of the court or a judge, and shall have the same effect in all respects as if it had been made an order of court."

The jurisdiction, therefore, of the court is to see that the submission is duly carried out; the machinery for making it effective attaches from the moment of the submission; a refusal to comply with an award made on a submission in writing is a contempt of court, and might in certain cases have been punished by attachment. I fail to see how the principles to which I have already referred, of doing complete justice where a Sovereign has waived his privileges, can be carried out if it is to be held, as it has been held apparently in this case, that at each step, when it is necessary to invoke the assistance of the court, the sovereign Power can claim such assistance, but can, when it is demanded by the other party, raise as a defence that he is protected by his sovereignty. Take, for instance, the present case. The arbitration was duly held in pursuance of the submission, and the sovereign Power duly appeared as a party, and when an award was made against him, claimed the right to appeal to the courts, and finally to your Lordships' House, to set aside the award under s. 11, and, no doubt, if he had been

successful would have claimed, and would have been held to be entitled, to levy execution against the appellant for the costs of such award. Similarly, if the award had been in his favour, he would have been entitled to claim, as the appellants now claim, under s. 12 of the Arbitration Act, 1889, to enforce the award "in the same manner as a judgment or order to the same effect." In such circumstances as these, how can it be said that, when the act of the sovereign Power has invoked the benefits of the procedure devised by the laws of this country for enforcing its claims or settling its disputes, "international comity which induces every sovereign State to respect the independence and dignity of any other sovereign State" requires that our courts should lend themselves to such palpable injustice as to refuse a mutual relief to both parties concerned? Or how can it be suggested that, in such circumstances, we would be acting upon the principles laid down in the cases I have already quoted, of doing complete justice between the parties, if we refused the application of the appellants? I do not myself see any difference in principle between the present case and those in which cross-actions were allowed in order that both sides should receive equal justice, nor do I think we are entitled to consider each step taken for the purpose of carrying out the proceedings necessary for making the award effective as a separate invocation of the jurisdiction of the court, which require a separate submission by the sovereign State to give it jurisdiction. Rather should we consider that the government of Kelantan, by agreeing to the submission which became an order of court and taking the course they did, are bound to treat the matter as one proceeding, in which the sovereign State has waived its privileges, and in which justice can alone be done by making the law applicable equally to both parties. In my opinion, this appeal should be allowed.

Appeal dismissed.

Solicitors: *Drake, Son & Parton*; *Burchells*; *Treasury Solicitor.*

[*Reported by* W. C. SANDFORD, ESQ., *Barrister-at-Law.*]

SUTHERLAND *v.* STOPES

[HOUSE OF LORDS (Viscount Cave, L.C., Viscount Finlay, Lord Shaw, Lord Wrenbury and Lord Carson), October 23, 24, 27, November 21, 1924]

[Reported [1925] A.C. 47; 94 L.J.K.B. 166; 132 L.T. 550; 41 T.L.R. 106; 69 Sol. Jo. 138]

Libel—Justification—Extent of plea—Application to facts and comments thereon—Justification of part of libel—Sufficiency of proof of substance of libel.

A plea of justification put forward by a defendant in a libel action means that all the words complained of were true, and covers not only the statements of fact contained in the alleged libel, but also any comments therein on those facts. Therefore, if, on such a plea, a verdict is returned in the defendant's favour there is no room for any consideration of the defence of fair comment. A plea of justification can be made to a part of the alleged libel; it need not extend to the whole. If such a plea is accepted by the jury, it is then open to them to consider whether the part of the alleged libel omitted from the justification has been proved by the plaintiff. A plea of justification must not be considered meticulously. It is affirmed if the truth is established of the substance or sting of the libel. Anything which is contained in the libel, but adds nothing to it, need not be justified.

Libel—Fair comment—Matters that must be proved—Truth of facts commented on—Public interest—Comment fairly and honestly made—Question for judge.

The defence of fair comment differs from that of justification in that the defendant who puts it forward does not take on himself the burden of proving that the comments which he has made are true. He must prove that the facts on which the comment is based are true and that the matter is of public interest, but he is entitled to succeed if he can satisfy the jury that the comments were fairly and honestly made. It is a question for the judge whether the words complained of go beyond the limit of fair criticism.

Libel—"Rolled-up" plea—Defence of fair comment only.

The "rolled-up" plea has been sometimes treated as containing two separate defences—(i) justification and (ii) fair comment. In fact the plea raises only one defence, that of fair comment. The averment that the facts were truly stated is made merely to lay the necessary basis for the defence of fair comment. That averment is not the subject of proof; the case is conducted on the footing that the facts are assumed to be true.

Notes. Applied: *Burton* v. *Board*, [1928] All E.R.Rep. 659. Considered: *Indor-Hart* v. *British Union for Abolition of Vivisection*, [1938] 2 K.B. 329.

As to the defences of justification and fair comment and the "rolled-up" plea, see 24 Halsbury's Laws (3rd Edn.) 43–48, 70–82, 95; and for cases see 32 Digest 90–102, 141–153.

Cases referred to:

(1) *Digby* v. *Financial News, Ltd.*, [1907] 1 K.B. 502; 76 L.J.K.B. 321; 96 L.T. 172; 23 T.L.R. 117; 51 Sol. Jo. 98, C.A.; 32 Digest 152, *1845*.

(2) *Dakhyl* v. *Labouchere* (1907), [1908] 2 K.B. 325, n.; 77 L.J.K.B. 728; 96 L.T. 399; 23 T.L.R. 364, H.L.; 32 Digest 150, *1823*.

(3) *McQuire* v. *Western Morning News Co., Ltd.*, [1903] 2 K.B. 100; 72 L.J.K.B. 612; 88 L.T. 757; 51 W.R. 689; 19 T.L.R. 471, C.A.; 32 Digest 151, *1826*.

(4) *Edwards* v. *Bell* (1824), 1 Bing. 403; 8 Moore, C.P. 467; 2 L.J.O.S.C.P. 42; 130 E.R. 162; 32 Digest 95, *1264*.

(5) *Morrison* v. *Harmer* (1837), 3 Bing.N.C. 759; 3 Hodg. 108; 132 E.R. 603; 32 Digest 96, *1277*.

(6) *Cooper* v. *Lawson* (1838), 8 Ad. & El. 746; 1 Per. & Dav. 15; 1 Will. Woll. & H. 601; 8 L.J.Q.B. 9; 2 Jur. 919; 112 E.R. 1020; 32 Digest 151, *1833*.

(7) *Van der Hoven* v. *Erasmus* (1922), T.P.D. 1.

(8) *Norton* v. *Bertling* (1910), 29 N.Z.L.R. 1099.

(9) *Henwood* v. *Harrison* (1872), L.R. 7 C.P. 606; 41 L.J.C.P. 206; 26 L.T. 938; 20 W.R. 1000; 32 Digest 145, *1735*.

(10) *Parmiter* v. *Coupland* (1840), 6 M. & W. 105; 9 L.J.Ex. 202; 4 Jur. 701; 151 E.R. 340; 32 Digest 73, *1019*.

(11) *Peter Walker & Son, Ltd.* v. *Hodgson*, [1909] 1 K.B. 239; 78 L.J.K.B. 193; 99 L.T. 902; 53 Sol. Jo. 81, C.A.; 32 Digest 143, *1742*.

(12) *Penrhyn* v. *Licensed Victuallers' Mirror* (1890), 7 T.L.R. 1, D.C.; 32 Digest 152, *1844*.

(13) *Aga Khan* v. *Times Publishing Co.*, *Dawson* v. *Same*, [1924] 1 K.B. 675; 93 L.J.K.B. 361; 130 L.T. 746; 40 T.L.R. 299, C.A.; 32 Digest 153, *1847*.

(14) *Clarke* v. *Taylor* (1836), 2 Bing.N.C. 654; 2 Hodg. 65; 3 Scott, 95; 5 L.J.C.P. 235; 132 E.R. 252; 32 Digest 93, *1250*.

(15) *Jones* v. *Spencer* (1897), 77 L.T. 536; 14 T.L.R. 41, H.L.; 30 Digest (Repl.) 287, *579*.

Appeal by the defendants from an order of the Court of Appeal (Bankes and Scrutton, L.JJ., Younger, L.J., dissenting) reversing the decision of Lord Hewart, C.J., in an action tried by him with a special jury in favour of the defendants.

A The plaintiff, Dr. Marie Stopes, brought an action against the defendants, Dr. H. G. Sutherland and Harding and More, Ltd., a firm of publishers, to recover damages for libel and for an injunction. The particulars of the claim and the facts relating to the case appear fully from the opinions of their Lordships. The defendants, by their defence, pleaded (i) that the words complained of in their natural meaning were true in substance and in fact; (ii) that the said words in their B natural meaning were fair and bona fide comment made and published without malice on matters of public interest; and (iii) in the alternative, that in so far as the said words consisted of allegations of fact the same were true in substance and in fact, and in so far as they consisted of expressions of opinion the same were fair comments made in good faith and without malice upon matters of public interest. At the trial LORD HEWART, C.J., left certain questions to the jury. These ques- C tions, together with the answers thereto, were as follows: (i) Were the words complained of defamatory of the plaintiff?—Yes. (ii) Were they true in substance and in fact?—Yes. (iii) Were they fair comment?—No. (iv) Damages, if any? —£100. Upon these findings, LORD HEWART, C.J., after hearing argument, entered judgment for the defendants upon the ground that the action was concluded in favour of the defendants by the jury's answer to the second question. The plaintiff D thereupon appealed to the Court of Appeal, and that court, by a majority, allowed the appeal and directed that judgment should be entered for the plaintiff in the action for £100. The defendants appealed.

Serjeant Sullivan, K.C., T. Mathew, H. V. Rabagliati and *Harold Murphy* for the appellants.

E *Sir Hugh Fraser* and *H. Metcalfe* for the respondent.

The House took time for consideration.

Nov. 21. The following opinions were read.

VISCOUNT CAVE, L.C.—This is an appeal by the defendants in the action from an order of the Court of Appeal in England reversing a judgment of LORD HEWART, F C.J., in their favour, and directing judgment to be entered for the plaintiff for £100 and certain costs.

The plaintiff, Mrs. Marie Stopes, who is a doctor of science and a doctor of philosophy of the university of Munich, but has no medical qualification, has for some time been engaged in a campaign in favour of a practice which is known as "birth control," but is more accurately described as the prevention of conception G by artificial means, and in connection with this campaign has published certain books and has established a mothers' clinic for constructive birth control in a poor district in Holloway. The defendant, H. G. Sutherland, is a bachelor of medicine and of surgery and a doctor of medicine of the university of Edinburgh, and is the author of a book called BIRTH CONTROL: A STATEMENT OF CHRISTIAN DOCTRINE AGAINST THE NEO-MALTHUSIANS, which was published by the other defendants, H Harding and More, Ltd., in March, 1922. This book, which is a controversial work designed to expose the dangers, social, medical, and moral, which the author considers to be involved in the artificial prevention of conception, contains in its seventh chapter (headed "Evils of Artificial Control"), and in a section headed "Specially Hurtful to the Poor," the following paragraph, which is admitted to refer to the plaintiff:

I "Secondly, the ordinary decent instincts of the poor are against these practices, and, indeed, they have used them less than any other class. But owing to their poverty, lack of learning, and helplessness, the poor are the natural victims of those who seek to make experiments on their fellows. In the midst of a London slum a woman who is a doctor of German philosophy (Munich) has opened a birth control clinic where working women are instructed in a method of contraception described by Professor McIlroy as 'the most harmful method of which I have had experience' (proceedings of the Medico-Legal Society, July 7, 1921). When we remember that millions are being spent by the

Ministry of Health and by local authorities—on pure milk for necessitous expectant and nursing mothers, on maternity clinics to guard the health of mothers before and after childbirth, for the provision of skilled midwives, and on infant welfare centres—all for the single purpose of bringing healthy children into our midst, it is truly amazing that this monstrous campaign of birth control should be tolerated by the Home Secretary. Charles Bradlaugh was condemned to jail for a less serious crime."

In consequence of the publication of the above paragraph the plaintiff brought this action against the defendants, claiming damages for libel and an injunction. The defendant Sutherland in his defence pleaded (i) that the words complained of in their natural meaning were true in substance and in fact; (ii) that the words in their natural meaning were fair and bona fide comment made and published without malice on a matter of public interest; and (iii) as an alternative plea, that in so far as the words complained of consisted of allegations of fact they were true in substance and in fact, and in so far as they consisted of expressions of opinion they were fair comments made in good faith and without malice upon matters of public interest. The defendants Harding and More put in a defence which was somewhat different in form, but for practical purposes it has been treated as being to the same effect as the defence of the defendant Sutherland. Particulars having been given and issue joined, the action went for trial.

The action was tried by the Lord Chief Justice with a special jury; and after a hearing which lasted for five days the learned judge put to the jury a series of questions which, with the answers given by the jury, were as follows: "(i) Question: Were the words complained of defamatory of the plaintiff? Answer: Yes. (ii) Were they true in substance and in fact? Yes. (iii) Were they fair comment? No. (iv) Damages, if any? £100." On the following day the Lord Chief Justice, after hearing arguments as to the meaning and effect of these findings, gave judgment for the defendants; and as the reasons which he gave for taking that course throw light upon the course of the case it is desirable to quote them in full. He said:

"In this case the jury, after a protracted deliberation extending to something like four hours, have found by their verdict that the words complained of in this action, while they were defamatory of the plaintiff, were true in substance and in fact. In the course which the case took that really became the main issue. On the one hand, nobody denied the sincerity, the ability, or the honesty of purpose of the plaintiff. On the other hand, there was no real evidence of ill will on the part of the defendants. Counsel for the defendants, at the conclusion of the case for the plaintiff, submitted to me that there was no evidence of malice and invited me in effect to say that upon the defence of fair comment it was not necessary to submit any question to the jury. My own mind inclined in that direction, but upon the whole I thought it was more satisfactory, inasmuch as I thought the matter ought to be wholly before the jury, to leave the question also to the jury, and I decided not to withdraw it. So it came about that at the conclusion of the matter there were two questions put to the jury: one of them upon the plea of justification, and the other upon the plea of fair comment. I have always understood that (in the words which have been quoted) it is a good defence to an action for libel that the words complained of are true in substance and in fact; and although, no doubt, suggestions were made and arguments were employed upon the one side and upon the other as to whether a particular element in the words complained of was fact or opinion, it was clearly put to the jury, I think—at least, it was put as clearly as I could put it myself—that it was for them to decide whether particular statements which had been the subject of observation on the part of learned counsel were fairly to be regarded as statements of fact or expressions of opinion. I pointed out to the jury again and again that the meaning of those words was a question entirely for them. After that direction they

A have found that the words complained of were true in substance and in fact. It does not appear to be possible to depart from the ordinary rule."

The plaintiff having appealed against this judgment to the Court of Appeal, that court did not disturb the verdict, but by a majority (BANKES, L.J., and WARRINGTON, L.J., YOUNGER, L.J., dissenting) allowed the appeal and directed judgment to be entered for the plaintiff for £100 and half the costs of the action. The decision B of the majority of the court was based on the view that the learned judge had invited the jury to distinguish between allegations of fact contained in the alleged libel and expressions of opinion, and to deal with the former under the plea of justification and with the latter under the plea of fair comment, and that, as under the latter head the finding of the jury was in favour of the plaintiff, she was entitled to judgment for the damages assessed by the jury and to a proportion of the costs. C Hence the present appeal.

I think it desirable at this point to say that, in my opinion, this House is not concerned with any question as to the desirability of the use of contraceptives, or as to the propriety of encouraging such use by the circulation of printed matter or in any other way. No such question has been or could be raised or argued in this D action, which is founded only upon an alleged libel upon the plaintiff as to the mode in which she has carried on her campaign; and, accordingly, I do not think that it would be proper for me to express an opinion upon the wider question. The real questions to be determined on this appeal are, first, what is the meaning and effect of the verdict of the jury?; and, secondly, whether there should be a new trial.

The answers of the jury to the second and third questions put to them by the trial judge appear at first sight to be inconsistent with one another. The plea of E justification—i.e., that the words complained of were true in substance and in fact —means that all those words were true, and covers, not only the bare statements of fact contained in the alleged libel, but also "any imputation which the words in their context may be taken to convey": per COLLINS, M.R., in *Digby* v. *Financial News, Ltd.* (1); and from this it has been held to follow that, if on such F a plea a verdict is found in the defendant's favour, there is no room for any discussion of the question of fair comment. "The plea of fair comment does not arise if the plea of justification is made good": per LORD LOREBURN in *Dakhyl* v. *Labouchere* (2) ([1908] 2 K.B. at p. 327). But, although this may be the ordinary rule, I agree with the Court of Appeal in holding that there is difficulty in applying it to the verdict in the present case. The Lord Chief Justice did undoubtedly, in G summing-up the case, draw a marked distinction between fact and opinion; and while he carefully and clearly instructed the jury that it was their duty to deal under the plea of justification with the "real sting of the matter" and the "real pith and marrow" of the statements made, he does appear to me to have invited them to deal under the category of fair comment with such parts of the alleged libel as consisted of mere expressions of opinion upon the facts alleged and proved. H I proceed, therefore, to deal with the verdict upon the assumption that the jury acted upon that principle.

In this view of the matter it is necessary to consider what parts of the paragraph complained of the jury were entitled to treat as containing the "real sting of the matter," or, in other words, what were the substantive charges made against the plaintiff as distinguished from the opinions expressed upon the conduct so imputed; I and it appears to me that upon a careful reading of the alleged libel those charges may be divided into three parts, as follows: (i) By the first two sentences, which must be read together, the defendants in effect stated that (to quote the interpretation put upon those sentences by the plaintiff in her statement of claim) the plaintiff was taking advantage of the ignorance of the poor to subject them to experiments. By this statement Dr. Sutherland meant, as he told the jury, not that at the plaintiff's clinic surgical experiments were made upon poor persons, but that they were there subjected to a social experiment, which was contrary to the laws of nature; and no doubt the jury, to whom it was left to determine the

natural meaning of the statement, were satisfied that the statement was reasonably to be understood in that sense. In any case they found this charge, which was plainly a statement of fact, to be true; and passages were quoted to your Lordships from the plaintiff's published works and the evidence in the case which were amply sufficient to entitle the jury so to find. (ii) By the third sentence of the paragraph complained of as a libel the defendants alleged that at the plaintiff's clinic working women were instructed in a mode of contraception which had been described by Professor McIlroy as the most harmful method of which she had had experience. With reference to this allegation the learned judge instructed the jury that in order to justify it the defendants must prove, not only that Professor McIlroy had used the quoted words with reference to a method of contraception (the use of a check pessary) recommended by the plaintiff at the clinic—as to which there was no question—but also that the method referred to was in fact of a harmful and dangerous nature. This charge, which was also a statement of fact, was found to be true; and there was undoubtedly evidence upon which the jury could find that the methods recommended by the plaintiff for the prevention of conception might not improbably be the cause of injury to the persons by whom they were used. This was particularly the case with regard to an apparatus called the "gold pin," which was said by several of the witnesses to be calculated to produce abortion. (iii) By the last two sentences of the alleged libel the defendants in effect charged the plaintiff with carrying on her campaign by means of literature not less obscene than that for which Charles Bradlaugh was prosecuted, and of such a nature as to infringe the criminal law which forbids such publications; and this charge, the most serious of all, was also found by the jury to be true in substance and in fact. Your Lordships' attention was called to passages in the plaintiff's books upon which the defendants had relied as supporting this charge, and those passages appeared to me to be of such a nature as fully to justify the finding of the jury. That all the above charges were treated at the trial as matters of fact to be considered under the plea of justification is clear from the circumstances that towards the end of the arguments counsel for the plaintiff handed to the Lord Chief Justice a note defining the statements of fact contained in the alleged libel in the following terms: "(a) experiment, (b) victims, (c) most harmful method, (d) crime, (e) more serious," and the summing-up by the learned judge proceeded on these lines. If, as the jury have found, all the above charges were true—if it be true that the plaintiff took advantage of the helplessness of the poor to subject them to experimental processes of a harmful and dangerous character and carried on her campaign by means of obscene publications which constituted a breach of the criminal law—what remains in the alleged libel to which the descriptions of "unfair comment" can have been intended by the jury to apply? SCRUTTON, L.J., in his judgment in the Court of Appeal, pointed to two statements in the paragraph complained of as being statements of opinion upon which a question of fair comment might arise, namely, (i) the statement referring to "the decent instincts of the poor", and (ii) the expression "monstrous campaign." I think that another expression, namely, that the offence of which Charles Bradlaugh was convicted was "less serious" than that of the plaintiff, may also be regarded as a statement of opinion; but apart from these three expressions I can find nothing in the alleged libel which the jury were entitled to rank under that category.

Then was there any evidence or other material upon which a reasonable jury could find that, assuming (as it must be assumed) that the charges above enumerated were true in substance and in fact, these expressions of opinion or any of them constituted unfair comment? This is plainly a question for the court, which has to determine whether the document is capable in law of being a libel: per COLLINS, M.R., in *McQuire* v. *Western Morning News Co., Ltd.* (3) ([1903] 2 K.B. at p. 111). I do not think that there was any such evidence. With regard to the first of these three statements, namely, the statement that the ordinary decent instincts of the poor are against the practice of using contraceptives, I doubt whether this is properly

A to be regarded as a comment upon the plaintiff's conduct at all. No doubt it is in a sense an expression of opinion; but it expresses the opinion of the writer, not as to the mode in which the plaintiff recommends the practice of birth control for adoption, but as to the practice itself. But, even assuming that the sentence contains a reflection upon the plaintiff, I am unable to understand how, having regard to the facts found to be true, the reflection can be said to be unfair. On B the other hand, the word "monstrous" is undoubtedly a comment, and, if unfair, might give cause for complaint; but if, as the jury have found, the campaign in question has been carried out by means of the circulation of obscene and criminal matter, and if the defendants were justified in so stating, then the addition of the epithet "monstrous" can add nothing to the libel. And a like observation applies to the indication by the writer of his opinion that the plaintiff's offence was more C serious than Bradlaugh's. If the substantive charge, that the campaign is obscene and criminal, may justly be made, a description of the same campaign as "monstrous" or "serious" is not a new and separate charge, but a mere shadow of the substantive charge for which a separate justification is not required. Upon this point there is considerable authority. Thus in *Edwards* v. *Bell* (4) BURROUGH, J., said (1 Bing. at p. 409) that:

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> "as much must be justified as meets the sting of the charge, and if anything be contained in a charge which does not add to the sting of it, that need not be justified."

So in *Morrison* v. *Harmer* (5), where the defendants had charged the plaintiffs with an impudent fraud and had referred to them as "scamps and rascals," it was held E that it was sufficient for the plaintiffs to establish the substance of their charge, and that they need not justify the additional words quoted; and TINDAL, C.J., said (3 Bing.N.C. at p. 767):

> "We cannot understand these words, however offensive, as containing any charge different and distinct from that of which the truth has been justified in the first plea; and we are not aware of any authority by which it is deter- F mined that the justification of the truth of a substantial implication contained in the libel is not sufficient unless it applies also to every epithet or term of abuse which may be found in the description of such imputation."

In *Cooper* v. *Lawson* (6) COLERIDGE, J., said (8 Ad. & El. at p. 753):

> "It would be much too strong to say that all such comments are to be sub- G mitted to the jury; for there are cases, one of which has been put, where the inference is so fair that if you prove the fact you prove the correctness of the comment."

It appears to me that the present case falls within the principle of these decisions, and that the epithets "monstrous" and "more serious," which in gravity fall far below the substantive charge and add nothing to it, need not be separately justified. H If this be so, then there was, as YOUNGER, L.J., held, no evidence whatever on which a rational verdict could be found to the effect that the comment was unfair, and the judgment of the Court of Appeal in favour of the plaintiff cannot stand.

There is one further point to be dealt with. It was contended on behalf of the plaintiff that, assuming that the judgment in her favour cannot stand, there should be a new trial on the ground of misdirection. It was said that the Lord Chief J Justice did not in any part of his summing-up ask the jury to say whether all the words of the alleged libel were or were not true, and that he so distinguished fact from comment that the jury may have excluded from the plea of justification a substantive part of the libel and dealt with it as comment. Having carefully read the summing-up with this point in mind, I do not think that this criticism is justified. The learned judge did, indeed, leave it to the jury to determine for themselves what parts of the words complained of were statements of fact and what parts were comment; but he invited them more than once to deal under the plea of justification with the real sting of the libel, and ultimately put to them

the question whether the words complained of, that is to say, all the words complained of, were true in substance and in fact. It may be that the learned judge might usefully have explained to the jury that if the words complained of were substantially true there was nothing upon which a verdict of unfair comment could be founded, or he might (as at one time he was inclined to do) have withdrawn that issue from the jury; but, if he was wrong in this, the error was not to the prejudice of the plaintiff. In my view, therefore, a new trial should not be ordered. For the above reasons I move your Lordships that this appeal be allowed, and the cross-appeal dismissed, that the order of the Court of Appeal be discharged and the judgment of the Lord Chief Justice restored, with costs here and below.

VISCOUNT FINLAY.—This is an action brought by Mrs. Stopes against Halliday Sutherland, the author, and Harding and More, Ltd., the publishers of a work containing words alleged to be a libel upon the plaintiff. Sutherland pleaded that the words were true in substance and in fact, and also, in the alternative, that they were fair comment on a matter of public interest. For the purposes of this appeal it is agreed that the publishers are to be treated as having raised the same defences. The case was tried before LORD HEWART, C.J., with a special jury. In answer to questions put by the Lord Chief Justice the jury found that the words complained of were defamatory of the plaintiff, that they were true in substance and in fact, and that they were not fair comment, and they assessed the damages, if any, at £100. Upon these findings the Lord Chief Justice entered judgment for the defendants. On appeal, a majority of the Court of Appeal (BANKES, L.J., and SCRUTTON, L.J.) gave judgment for the plaintiff with £100 damages, while YOUNGER, L.J., was of opinion that the appeal should be dismissed.

The plaintiff holds a degree in philosophy given by the university of Munich and has taken an active interest in the subject of birth control. She founded and manages a clinic for birth control at 61, Marlborough Road, Holloway, N., and has written and published several works on the subject. The defendant Sutherland is a doctor of medicine of the university of Edinburgh and is the author of a book entitled BIRTH CONTROL: A STATEMENT OF CHRISTIAN DOCTRINE AGAINST THE NEO-MALTHUSIANS, which contains the words complained of. The defendant Sutherland pleaded in para. 4 of his defence: "The said words in their natural meaning are true in substance and in fact." Paragraph 5 of his defence raised the defence of public comment on matters of public interest, and para. 7 was as follows: "In the alternative, if, which is denied, the said words bore or were understood to bear the meanings alleged, this defendant says that in so far as the said words consist of allegations of fact the same are true in substance and in fact and in so far as the said words consist of expressions of opinion the same are fair comments made in good faith and without malice upon such facts and upon such other matters as are referred to in para. 5 hereof, which said facts and other matters are matters of public interest." The defence contained particulars of para. 4 and of paras. 5 and 7. These defences are to be taken to have been also raised by the second defendants.

It is clear that the truth of a libel affords a complete answer to civil proceedings. This defence is raised by a plea of justification on the ground that the words are true in substance and in fact. Such a plea in justification means that the libel is true not only in its allegations of fact, but also in any comments made therein. The defence of fair comment on matters of public interest is totally different. The defendant who raises this defence does not take upon himself the burden of showing that the comments are true. If the facts are truly stated with regard to a matter of public interest, the defendant will succeed in his defence to an action of libel if the jury are satisfied that the comments are fairly and honestly made. To raise this defence there must, of course, be a basis of fact on which the comment is made. For a good many years past a practice has prevailed of raising this defence by what has been called the "rolled-up plea," but it will be found that this term is a misnomer based on a misconception of the nature of the plea. Such a plea

states that the allegations of fact in the libel are true, that they are of public interest, and that the comments upon them contained in the libel were fair. The allegation of truth is confined to the fact averred, and the averment as to the comments is not that they are true, but only that they were made in good faith, and that they are fair and do not exceed the proper standard of comment upon such matters. There has been a good deal of misconception as to the nature of this plea. It has been sometimes treated as containing two separate defences rolled into one, but it in fact raises only one defence, that being the defence of fair comment on matters of public interest. The averment that the facts were truly stated is merely to lay the necessary basis for the defence on the ground of fair comment. This averment is quite different from a plea of justification of a libel on the ground of truth, under which the defendant has to prove not only that the facts are truly stated but also that any comments upon them are correct. The nature and the effect of this defence are well stated and explained by WESSELS, P.J., in *Van der Hoven* v. *Erasmus* (7) in the Supreme Court of South Africa. I am unable to agree with the view taken upon the subject by the Court of New Zealand in *Norton* v. *Bertling* (8). Such a defence on the ground of fair comment will fail if the jury are satisfied that the libel was malicious or that it exceeded the bounds of fair comment.

On the question of fair comment, the law is, in my opinion, correctly stated by COLLINS, M.R., in *McQuire* v. *Western Morning News Co., Ltd.* (3):

> "It is, however, for the plaintiff, who rests his claim upon a document which, on his own statement, purports to be a criticism of a matter of public interest, to show that it is a libel—i.e., that it travels beyond the limit of fair criticism; and, therefore, it must be for the judge to say whether it is reasonably capable of being so interpreted."

In this passage LORD COLLINS followed on the lines laid down in the judgment of the court in *Henwood* v. *Harrison* (9). The judgment of the majority of the court (WILLES, BYLES and BRETT, JJ.) was delivered by WILLES, J., and in it will be found the following passage (L.R. 7 C.P. at p. 628):

> "But it is not competent for the jury to find that, upon a privileged occasion, relevant remarks made bona fide without malice are libellous. As LORD WENSLEYDALE said in the same case (*Parmiter* v. *Coupland* (10)), 'Every subject has a right to comment on the acts of public men which concern him as a subject of the realm, if he do not make his commentary a cloak for malice or slander.' It would be abolishing the law of privileged discussion and deserting the duty of the court to decide upon this as upon any other question of law, if we were to hand over the decision of privilege to the jury. A jury, according to their individual views of religion or policy, might hold the Church, the army, the navy, Parliament itself, to be of no national or general importance, or the liberty of the Press to be of less consequence than the feelings of a thin-skinned disputant. In actions of libel, as in other questions where questions of fact, when they arise, are to be decided by the jury, it is for the court first to determine whether there is any evidence upon which a rational verdict for the affirmant can be founded."

There are other authorities to the same effect which are conveniently collected by MR. GATLEY in his work on the law of LIBEL AND SLANDER (1st Edn.), pp. 364–367.

On consideration of the application for judgment on the findings of the jury, the Lord Chief Justice said:

> "Mr. Charles, at the conclusion of the case for the plaintiff, submitted to me that there was no evidence of malice, and invited me in effect to say that upon the defence of fair comment it was not necessary to submit any question to the jury. My own mind inclined in that direction, but upon the whole I thought it was more satisfactory, inasmuch as I thought the matter ought to be wholly before the jury, to leave that question also to the jury, and I decided not to withdraw it."

I think there can be no doubt that the Lord Chief Justice was right in so thinking as it would have been very unsatisfactory to deal with the point raised by counsel for the defendants before the facts had been ascertained by verdict. After the verdict the Lord Chief Justice, after hearing argument, entered judgment for the defendants. In stating his decision, the Lord Chief Justice refers to the submission so made by counsel. That submission was in effect that there was no evidence either of malice or of any excess in the comments, and on this ground I think that the decision of the Lord Chief Justice that judgment should be entered for the defendants was right. I do not, however, think in the very special circumstances of this case that the entry of judgment for the defendants can be supported simply on the ground of a verdict for the defendant on the plea of justification on the ground of truth. Of course, a clean finding for the defendant on a plea of justification entitles the defendant to judgment. But in the present case when the summing-up is looked at it is impossible to treat the finding of the jury as a finding that the whole libel, including comment as well as facts, is true. I read the summing-up as a direction to the jury that in considering the justification they were to find whether the statements of fact in the libel were true, while as to any portion of the libel consisting of comment, they were to say whether it was fair comment. The jury found that the facts were correctly stated, but as regards the comment they found that it was not fair. It is, therefore, in my judgment, impossible to deal with the case as if there had been a finding for the defendants upon the plea of justification in the ordinary way. The finding was merely that the facts had been proved.

On the plea of justification the question which ought to have been left to the jury was whether the libel, comments as well as averments of fact, was true. I cannot find that that question was put. In my opinion, the Lord Chief Justice in his summing-up divided averments of fact from comments, and it was as regards the former only (averments of fact) that the jury were asked whether they were true. The finding of the jury must be read as if they had said "the averments of fact in the libel, as distinguished from the comments, are true." Then in the answer to the third question the jury say that the comment was not fair. It does not, however, in my opinion, follow that there should be a new trial on the ground of misdirection. The jury have found that the facts are truly averred. Given these facts, there is nothing on which in point of law the finding that the comment was unfair can be supported. This is a question of law for the court, and, in my opinion, it could properly be answered only in one way, and the Lord Chief Justice and YOUNGER, L.J., were right in saying that on these findings judgment must be entered for the defendants.

What were the averments of fact in the libel? As formulated by counsel for the plaintiff, they will be found in the note of the Lord Chief Justice—I. Heads (a) and (b) relate to the sentence in the libel:

> "But, owing to their poverty, lack of learning and helplessness, the poor are the natural victims of those who seek to make experiments on their fellows."

II. Head (c) relates to the allegation in the libel that at the birth control clinic

> "working women are instructed in a method of contraception described by Professor McIlroy as the most harmful method of which she had had experience."

The jury were rightly told by the Lord Chief Justice that the question for them was whether these words, which were used by Professor McIlroy, were in fact true. III. Heads (d) and (e) relate to the following words: "Charles Bradlaugh was condemned to jail for a less serious crime." I proceed to deal with these three passages. Heads I and II may be conveniently treated together, and they are so dealt with in the summing-up. The Lord Chief Justice in his summing-up discusses at some length the question whether the term "experiment" may be properly applied to the methods advocated by the plaintiff. He points out that the

A word may bear either of two different meanings. It may be said that the whole system of what is called Neo-Malthusianism is an experiment or that experiments have been made in particular cases. On this point the Lord Chief Justice quotes Dr. Maurice Abbott-Anderson. He was asked: "Now can you express an opinion as to the stage to which the science of contraception has attained?" and he answers: "Yes, you see it is all experimental. There is no definite statement B made by anybody, anywhere, either by personal experience or in any book, that this or that method is a certain contraceptive." The Lord Chief Justice goes on:

> "It is all experimental. Now the defendant says: by the natural and ordinary interpretation of this phrase, what is meant is that steps have been taken to bring this new gospel, to apply this great social experiment to the poor, and C that that is bad. They take a step further and say that even if you put a limited meaning upon it, of course it is entirely for you to say what you think these words mean, remembering always the standard is what the reasonable reader would have conveyed to him by those words; they say further, if you take the more restricted meaning of the word 'experiment' something of that sort did go on."

D The Lord Chief Justice then refers to the two methods described by the plaintiff. The question whether the plaintiff's methods are experimental and whether experiments are in fact performed, are questions of fact and as such have been answered in the affirmative by the jury and they have found that as to the danger which attends the use of the pessary. I go on to deal with Head III, being the allegation in the libel that the crime of Bradlaugh was less serious than that of E the plaintiff. The conviction of Bradlaugh proceeded on the ground that his book describing and recommending methods of birth control was an obscene libel. The obscenity was simply in describing and recommending such methods of control. It will be found that the plaintiff's books not only advocate such methods, but contain what is obscene, whatever view may be taken of such methods.

I have gone through the allegations made as to matters of fact, but there remain F two sentences of the libel which were relied on as expressions of opinion and libellous. The first was contained in the words "the ordinary decent instincts of the poor are against these practices." This, it is said, was libellous. The plaintiff's contention on this point, when analysed, comes to this, that these words involve the expression of an opinion that there was something reprehensible in these practices which revolted the instincts of the poor. It appears to me that it is G impossible to hold that the bounds of fair comment are exceeded by the expression of an opinion honestly held that such practices are revolting to the healthy instincts of human nature. There is an old and widespread aversion to such methods on this ground. This sentiment was voiced by the historian of the DECLINE AND FALL OF THE ROMAN EMPIRE (EDWARD GIBBON) when in his fortieth chapter he referred to such practices as "detestable precautions." The other H passage relied on by the plaintiff for this purpose was as follows: "It is truly amazing that this monstrous campaign of birth control should be tolerated by the Home Secretary." It has been asserted that the epithet "monstrous" passed the limits of fair criticism. Whether the particular epithet is too strong or not must depend upon the nature of the facts upon which the defendant was commenting, namely, the clinic itself and the plaintiff's publications in support of it. The work I for the publication of which Bradlaugh was sentenced was, as I have pointed out, confined to the inculcation of methods of birth control. The plaintiff has done what Bradlaugh did, but she has done something more. We were referred in the course of the argument to certain passages in the books published by the plaintiff of such a nature that they were not read aloud. These books have a very large circulation, and for my part I cannot doubt that they are calculated to have a most deplorable effect upon the young of both sexes. It would be absurd to say that the epithet "monstrous" as applied to such a "campaign" passes the bounds of fair criticism, or that it was not fair comment to use language implying that such

passages as those to which I have referred aggravate the criminality of the obscene libel. A great deal has been said about the sincerity with which the plaintiff holds the doctrines which she teaches and carries into practice. One of the plaintiff's books is entitled A New Gospel to All Peoples. Her sincerity is not the question. If an obscene libel is published, the fact that it forms part of a campaign prosecuted with all sincerity affords no defence. The right of free speech is claimed for the advocates of the new gospel, but they must submit to have their tenets and their practices criticised. A French savant is reported to have said that if he had been consulted at the time of the creation of the world he could have given some hints of great value; and this appears to some extent to be the attitude of the plaintiff. I think it unfortunate that the plaintiff uses in connection with her clinic the title "doctor." She is a doctor of philosophy, but the use of the term "doctor" must lead a great many of the people who frequent the clinic to believe that the person in charge of it is a doctor of medicine. This is a common use of the term "doctor" in ordinary conversation, and where a "doctor" is found in charge of a clinic it would naturally be supposed that he is a doctor of medicine. Any person who is in fact a doctor of medicine would, of course, be subject to the disciplinary action of the General Medical Council.

I desire to add some comments upon the manner in which the Lord Chief Justice dealt with the facts of the case in their broader aspects. He begins this part of his summing-up by making some observations as to the manner in which, in dealing with the young, sex problems should be handled. These observations appear to me to be characterised by knowledge of the world and by sound common sense. Some instruction on such matters there must be, but it should be communicated by a father or mother or some person in loco parentis to the boy or girl individually, and not in classes. The Lord Chief Justice animadverts upon the mischief which might result from such teaching if indiscriminately given, and adopts the canon laid down in the course of the evidence:

> "sex teaching, yes, but in cold scientific language, not mixing up philosophy with emotion, not teaching such truths as need to be taught in the language of adjectives and rhetoric, but with austerity, with coldness, stating the facts and no more."

There should be nothing, he says, in the shape of "romantic emotional rhetorical rhapsody." I think that few will be found to say that these canons have been observed by the plaintiff in her treatment of these very delicate questions. A passage at the end of the summing-up seems to me to go to the root of the matter:

> "Now what is said here? Dr. Sutherland says that this is as bad as the Bradlaugh pamphlet and worse, and he says that in two respects. You have passages, he says, in these books, to which no parallel can be found in the pamphlet published by Mr. Bradlaugh—no parallel at all. Your attention has been directed to certain passages [the Lord Chief Justice says that he is not going to read them, and proceeds:] But just consider. The argument is that these are books which may be exposed for public sale indiscriminately, in great quantities, in order to fulfil a mission. The mission is variously described at various points of the argument. The teaching about sex is mixed up with the teaching about contraceptives. The teaching about contraceptives is mixed up with other matter. But it is all said to have been done in pursuance of a mission. Now you may think that, however desirable it may be that proper teaching about sex should be given properly and privately to young people, it is a calamity that books of this kind should be published broadcast. You may think so, or you may not think so, but whatever view you take about that question, you may ask yourselves this question: What legitimate purpose can be fulfilled by the insertion in these books—I do not re-read the passages, but I remind you of them, and I must use words which will remind you of them. . . . You know the passages, you know the context, you know the circulation of these books; can you say that they fall short of being obscene publications?"

I must add a few observations as to the proceedings in the Court of Appeal. BANKES, L.J., states his reasons towards the close of his judgment. What he says comes to this, that the Chief Justice left the plea of justification to the jury simply so far as averments of fact are concerned, and, therefore, their answers cannot be read as applying to comment. As I have already pointed out, that is perfectly true, but the lord justice does not deal with the question whether, when all the averments of fact are found to be true, there remains anything in the shape of comment as to which it could be said that there was evidence fit to be left to the jury to show that the comment was unfair. I pass to the judgment of SCRUTTON, L.J. I agree with him in thinking that the Lord Chief Justice took the opinion of the jury on the question of truth merely upon the averments of fact in the plea of justification. With regard to what I think is the real point of the case, the lord justice says this:

> "There was some faint suggestion before us that when you had ascertained what were really the allegations of fact in the libel, it was not possible for a reasonable jury to find that the comments on those facts were unfair. This point was not taken at the trial, and I think it must fail here."

The point was taken at the trial by counsel for the defendants, as appears from what was said by the Lord Chief Justice in a passage to which I have already referred, and whatever the merits of the argument I think it sufficiently appears from what the lord justice says that the point was taken in the Court of Appeal. The lord justice goes on to point out that the standard of what is considered depravity varies from time to time and that the standard may not be the same in 1923 as in 1877. He says:

> "From this point of view there was a wide field to be covered by the questions as to fair comment, to which the jury might address their minds as the tribunal representing ordinary current opinion at the time."

But after all said and done, the question really lies in a very small compass. It is this: Could any reasonable man say that on the facts found, which are really few and simple, the comments were excessive? The reason on which YOUNGER, L.J., bases his conclusion in favour of the defendants is this:

> "On what I conceive to be the narrowest permissible view of the answer to the second question, the defendants have, I think, justified to such extent as is required of them in such a case as this: the charge in respect of these matters of comment, in my judgment, on the principle laid down in such cases as *Morrison* v. *Harmer* (5), has been substantially met and answered in that justification."

It comes to this, that when the facts are found as they were here, there is no ground on which it can with any reason be said that the limits of fair comment were exceeded. I agree with the conclusion reached by the Lord Chief Justice and by YOUNGER, L.J. I think that the appeal should be allowed with costs here and below, and that judgment should be entered for the defendants.

LORD SHAW.—The respondent brought this suit for damages caused to her by an alleged libel appearing in a book entitled BIRTH CONTROL, &c., of which the appellant Sutherland was the author, and the other appellants, Harding and More, Ltd., were the printers and publishers. The words of the alleged libel have been quoted in extenso by the Lord Chancellor. As to the merits or otherwise of the allegations themselves, or the theories or practices with which the books of the respondent deal, or as to their scientific accuracy or inaccuracy, or the social or moral advantages or disadvantages which would follow from their adoption—upon all of these things I must resolutely decline to express any opinion whatsoever. I make no judgment upon the views of others, but, speaking for myself, in thus declining to enter upon a matter of deep contest in medical, sociological, and moral spheres, or even to be inclined to express or indicate any view or inclination of mind thereon, I am merely paying the respect which is due to the correct ambit

of a purely judicial task. This appeal presents questions of law, and, in my opinion, must accordingly on that footing alone be disposed of.

To make written language libellous, or spoken language slanderous, it is fundamental and essential that they be of and concerning a person, be untrue in substance and in fact, and be defamatory in nature. There is no exception to these rules, whether the language be the language stating fact or stating opinion. When facts are stated they can be justified as being, although defamatory and of and concerning the plaintiff, yet true; when opinions are stated they can be justified on precisely the same grounds—namely, that, although of and concerning the plaintiff and defamatory, yet they also are true. In the next place, when in the course of the statement of defamatory matter both facts and opinions are set forth, it is upon similar principles open to a defendant to say that the entirety, both fact and opinion, is true in substance and in fact. That was the present case. It was so pleaded and the trial was conducted by both parties upon that comprehensive defence. In every one of these cases, if the truth of the libel is affirmed by the jury, the case is at an end. There is no room for introducing fair comment or of perplexing the jury with the consideration of such a plea, when the defendant has justified the truth of all that he has said, whether in stating fact or expressing opinion. There are two qualifications which must be made upon this absolute rule. In the first place, truth must not be stated without being fully stated—that is to say, without context in the case of a libel, and without circumstances in the case of a slander, which would put a different complexion upon matter which is libellous or slanderous standing by itself, and would possibly or probably destroy altogether its character as such. In the second place, a statement of fact or of opinion which consists in the raking up of a long-buried past may, without an explanation—and, in cases which are conceivable, even with an explanation—be libellous or slanderous if written or uttered in such circumstances as to suggest that a taint upon character and conduct still subsists, and that the plaintiff is accordingly held up to ridicule, reprobation, and contempt. Subject to these qualifications, the rule as to justification in fact being exclusive, as a plea, of a plea of fair comment, in the sense of making the latter unnecessary, is, in my opinion, an absolute rule.

I recognise to the full the great difficulties in which the Lord Chief Justice of England was put in charging the jury, on account of the state of the authorities upon this question of procedure. It is further true that, while the defence of Dr. Sutherland did fully and comprehensively state of the entire libel that it was true in substance and in fact, both it and the defence of the publishers alternatively set forth a defence of "fair and bona fide comment made and published without malice on matters of public interest." It is interesting further to observe—the Bar equally with the Bench being apparently perturbed by the state of the authorities—that the "rolled-up plea" in defence was taken. It is thus expressed:

> "(7) In the alternative [that is, be it observed, an alternative or supposed alternative to two separate and distinct defences of the words being true in substance and in fact, and of the words being fair and bona fide comment], if, which is denied, the said words bore or were understood to bear the meanings alleged, this defendant says that in so far as the said words consist of allegations of fact the same are true in substance and in fact and in so far as the said words consist of expressions of opinion the same are fair comments made in good faith and without malice upon such facts and upon such other matters as are referred to in para. 5 hereof, which said facts and other matters are matters of public interest."

Such a statement of defence, arising not unnaturally from the state of the authorities to which I have alluded, is sheer surplusage, in view of the items of defence separately and articulately stated in that defence. It is, however, the "rolled-up plea," and in a little I shall consider what that means.

In those circumstances it becomes imperative and crucial to consider the course of the trial. Much was the subject of discussion as to the scope of fair comment

in this case. In my opinion, all this was necessary, because, whether fact or opinion, the trial was conducted most frankly and courageously, and, I may add, unwaveringly on the part of counsel for the defendants, on the footing that the libel in its entirety and in all of its contents was true in substance and in fact, whether statement, inference, or opinion, and it was met in a similar spirit by counsel for the plaintiff. I should explain further that in a plea of justification the defence that a matter of opinion or inference is true is not that the defendant truly made that inference, or truly held that opinion, but is that the opinion and inference are both of them true. A counsel does not lightly accept a burden of that character because the result is that, if it fail, the damages are in the ordinary case very substantially increased, the slander or libel being accentuated and continued in the proceedings at the trial itself. But when such a defence is undertaken in its entirety, and prevails, it does so in such a way as to leave nothing in the libel standing, and no further questions as to comment to be considered.

We had at your Lordships' Bar a most able and exhaustive discussion of the subject of what is known as the "rolled-up plea." In *Peter Walker & Son, Ltd.* v. *Hodgson* (11) VAUGHAN WILLIAMS, L.J., notes the origin of this plea. He says ([1909] 1 K.B. at p. 247):

> "This form of pleading, which I always think very indefinite and embarrassing, has, however, been adopted and sanctioned ever since the decision of MATHEW and GRANTHAM, JJ., in *Penrhyn* v. *Licensed Victuallers' Mirror* (12) and must now be accepted as proper pleading."

The *Penrhyn Case* (12) contains the pleading thus:

> "In so far as they consist of allegations of fact the said words are true in substance and in fact, and in so far as they consist of expressions of opinion they are fair comments made in good faith and without malice upon the said facts, which said facts are a matter of public interest."

Over and over again that plea has been repeated, until a stage has arrived when its meaning in plain English has been subjected by the courts in England to a construction apparently unwarranted by its language and certainly productive of confusion in practice. A very recent illustration may verify this. In *Aga Khan* v. *Times Publishing Co.* (13) SCRUTTON, L.J., in the course of his judgment, said ([1924] 1 K.B. at p. 682):

> "The two pleas (justification and fair comment) have been rolled into one, and since then there has been a great difference of opinion in the Court of Appeal on the question whether or not it was a plea of justification and fair comment or of fair comment only. The words 'in so far as the words consist of allegations of fact the said words are in their natural and ordinary meaning true in substance and in fact,' by themselves seem to me clearly to be a plea of justification, because they justify the words in their natural and ordinary meaning, and it is the natural and ordinary meaning which conveys the imputation of a defamatory character, and if I were left to myself I personally would direct particulars to be given of the facts which were alleged to be true and of the comments which were said to be fair."

If I also were left to myself, I should respectfully agree with the opinion and suggested direction stated in this last paragraph. Indeed, I go so far as to believe that a similar opinion must have underlain certain observations of LOREBURN, L.C., in *Dakhyl* v. *Labouchere* (2), and I must add that, if the rolled-up plea were interpreted and worked in this correct and sensible manner, then I should see nothing wrong with it. I must, however, make my best endeavour to interpret the true result of the authorities as they stand; and I cannot but be moved by the views of my noble and learned friends who have had a very wide experience upon what is after all purely a question of English practice.

Another case, *Digby* v. *Financial News, Ltd.* (1), must be mentioned. It went very far. LORD COLLINS, M.R., put it thus ([1907] 1 K.B. at p. 507):

"When a plea of justification is pleaded, it involves the justification of every injurious imputation which a jury may think is to be found in the alleged libel." A

So far so good, but the learned judge proceeds:

"This plea [that is, the rolled-up plea already cited] does not purport to be a plea of justification of the imputations, if any, contained in the libel; it is nothing of the sort, but is a plea intended to raise a totally different defence, that of fair comment." B

COZENS-HARDY, L.J., treats the defence as having "carefully abstained from placing on record a plea of justification." I think that error is apt to arise from the manner in which the word "justification" is used in regard to the composite plea. If it is meant to apply to justification simpliciter, that is to say to the whole libel, then it is undoubtedly sound to say that the rolled-up plea does not cover it. But I venture the opinion that the rolled-up plea never did profess a general justification. That plea is specifically limited. It means "Quoad facts,—true; quoad comments,—fair." No one denies that if a defendant puts such a plea in alone as a separate and articulate plea of specifically limited justification standing by itself, he would be entitled to carry on the case to judgment on the footing of being allowed to prove it. But when he has added to that another plea, which might also have been separately stated, to the effect that in so far as opinions were expressed they were fair comment, then the law (in which I reluctantly acquiesce) is that the rolled-up plea must be taken as a plea of fair comment only. The practical justification averred in it is not the subject of probation—that is ruled out; and finally the case is conducted solely on the footing that the facts are assumed to be true. Courts and practitioners will definitely act on this footing from this time forward. C D E

I have thought it right to deal with this topic out of respect to the judgments of the courts below and to the careful arguments at the Bar of the House. But I must add that although this fair comment plea has proved an awkward cross-current in the case, it is not and never was the main stream of it, for I repeat that the case was pleaded and fought to judgment upon the separately stated issue of complete justification. In the ordinary case justification of a libel is pleaded simpliciter et generaliter, for the simple reason (i) that there were no opinions in it, but only allegations of fact; or (ii), as in this case, that both opinions and allegations of fact were true; or (iii), also as in this case, that the opinions followed quite accurately from the facts; they were but the shadow of these, and introduced no matter which by itself would have been actionable. Once that justification is established, the verdict must be given for the defendant. F G

But a justification need not be to the whole, but may be to a part. If a man says that a certain neighbour of his was guilty of manslaughter and was also a thief, it is perfectly open to take a plea in justification of either charge only. In *Clarke* v. *Taylor* (14) TINDAL, C.J., said (2 Bing.N.C. at pp. 664, 665): H

"There can be no doubt that a defendant may justify part only of a libel containing several distinct charges . . . but if he omits to justify a part which contains libellous matter he is liable in damages for that which he has so omitted. The plea in the present instance does not affect to justify the whole of the publication, and we are to see whether the part omitted would by itself form a substantive ground of action for libel. I cannot say that it is of that description." I

It remains to be considered what are the conditions and breadth of a plea of justification on the ground of truth. The plea must not be considered in a meticulous sense. It is that the words employed were true in substance and in fact. I view with great satisfaction the charge of the Lord Chief Justice when he made this point perfectly clear to the jury, that all that was required to affirm that plea was that the jury should be satisfied that the sting of the libel or, if there were

more than one, the stings of the libel, should be made out. To which I may add that there may be mistakes here and there in what has been said which would make no substantial difference to the quality of the alleged libel or in the justification pleaded for it. If I write that the defendant on Mar. 6 took a saddle from my stable and sold it the next day and pocketed the money all without notice to me, and that, in my opinion, he stole the saddle, and if the facts truly are found to be that the defendant did not take the saddle from the stable but from the harness room, and that he did not sell it the next day but a week afterwards, but nevertheless he sold my saddle so taken and pocketed the proceeds, then the whole sting of the libel may be justifiably affirmed by a jury notwithstanding these errors in detail. In the second place, however, the allegation of fact must tell the whole story. If, for instance, in the illustration given, the facts as elicited show what my writing had not disclosed—namely, that the defendant had a saddle of his own lying in my harness room, and that he took by mistake mine away instead of his own and, still labouring under that mistake, sold it, then the jury would properly declare that the libel was not justified on the double ground that there were facts completely explaining in a non-criminal sense anything that was done, and the jury would disaffirm the truth of the libel because, although meticulously true in fact, it was false in substance.

Then, as to the breadth of the justification. When a plea of truth in substance and in fact is made it affirms the facts not only in the sense which I have mentioned, but it affirms all that attaches to them as their natural and reasonable meaning. I think that the charge of the Lord Chief Justice was correct upon that aspect of the case also. This point as to the breadth of the justification is an essential matter to be regarded where the "rolled-up plea" is taken, because that "rolled-up plea" by law assumes the truth of the facts in the libel and quoad opinion pleads a fair comment as to that. The assumption as to the facts being true must similarly be interpreted by the breadth to which I have referred—namely, that the facts, whether justified as true or assumed to be true, carry with them all that these facts reasonably and naturally imply. And, secondly, the point as to fair comment with regard to opinion is only reached when there is separate matter in the words used—separate matter of expressed opinion which goes beyond the natural meaning attaching to the facts but for all that may be held perfectly within the right of a free citizen, and not to contain any separate actionable matter.

It is satisfactory to know that this at least is long and well settled. In *Cooper* v. *Lawson* (6), a case decided nearly ninety years ago, it was held that one observation with which the libel concluded

> "not being a mere inference from the previous statement but introducing a substantive fact required a distinct justification, and therefore that on the trial of the issue it was properly left to the jury to say not only whether the evidence made out the facts first alleged, but also whether the imputation that the plaintiff had been hired was a fair comment."

Coleridge, J., remarked (8 Ad. & El. at p. 753) that

> "there are cases one of which has been put where the inference is so fair that if you prove the fact you prove the correctness of the comment. But this was not such a case. The comment introduced an additional fact, and then it was for the jury to say whether that was fairly done or not,"

and Lord Denman, C.J., said (ibid. at pp. 753, 754):

> "A comment may introduce independent facts a justification of which is necessary. The plea is perfectly good justifying a libel partly as the report of proceedings before a court, partly as stating that which is itself true, and partly as giving a fair and broad commentary on the facts stated upon which the comment may be a mere shadow of the previous imputation; but if it infers a new fact the defendant must abide by that inference of fact and the fairness of the comment must be decided by the jury."

In *Clarke* v. *Taylor* (14) VAUGHAN, J., said (2 Bing.N.C. at p. 666): "The point is whether any distinct act of criminality imputed to a plaintiff has been left unjustified"; and BOSANQUET, J., said (ibid. at p. 668):

> "Under the general issue the jury had to consider whether it (the libel charging the plaintiff with having acted in a great swindling concern at Manchester) amounted to such a charge or not. The jury have found justification to be proved, and that justification includes everything that is material in the charge."

Clarke v. *Taylor* (14) is very important, as undoubtedly the swindling transactions which were libelled as having taken place at Manchester were also in a separate part of the libel said or implied to have been continued at Leeds. This difference of locus, however, was held not to be indicative of a swindling transaction separately carried out at Leeds, but the court—a very powerful court—considered that the gist of the matter was, in truth, the charge of swindling at Manchester with a suggestion that there might have been a few days before a similar practice at Leeds. The sting of the substantive libel having been established as applicable to Manchester, and the jury having found for the defendants on that part of the libel applicable to Manchester which was justified, the court refused to enter a verdict for the plaintiff on the passage not justified—namely, that applicable to the preliminary visit to Leeds. I venture to think that *Clarke* v. *Taylor* (14) is of the very highest authority for showing that in libel cases a view meticulously taken, as I have mentioned, of the words of a libel, is not sought for, but the opinion of the jury is accepted as conclusive and final on justification if it applies truly to the substantial matter, criminal, nefarious, or contemptible, which the libel as a whole did affirm. But, in truth, one cannot but see that in numerous cases this defence of fair comment when taken is reached too soon. If the facts alleged be substantially true, and nothing is said in comment which adds to the sting thereof or produces separate libellous matter, then in all such cases the plea of fair comment should never be reached at all.

I purposely refrain from much of the law as developed more particularly in English authorities as to what is relevant or required to establish a plea of fair comment. The law upon that subject will no doubt demand early review. But I refrain because, in my opinion, the point of fair comment was never reached, or ought never to have been reached, in this case. The Lord Chief Justice did make a most proper attempt to present the issues of fact alleged to be raised by the libel separately and distinctly to the jury. He asked what those were, putting the question to the counsel for the plaintiff, and having received his items and tabulated these he charged the jury upon all of them; and, so charged, the jury found that all of them were justified. It is now pleaded, however, that one particular was not put separately to the jury, namely, that the facts being as alleged, the conduct of the plaintiff was monstrous. I think that such pleading comes too late; it is not, in my opinion, open to a party so acting to complain because some other item was not dealt with. But quite apart from that, it is to be noted that one of the facts affirmed by the jury was that the plaintiff had published criminal matter, that is to say, obscene libels. The whole of this part of the pleading seems to me an afterthought and to be without warrant. In the first place, the Lord Chief Justice was not asked to put separately to the jury on the issue of justification in fact whether the conduct was monstrous. In the second place, if he had been so asked he could have said most properly to the jury that if they have found the criminal action in the obscenity of the libels as just referred to, they need not trouble as to its being monstrous, for that, of course, would reasonably and naturally follow from their opinion upon the first point. I have to confess, accordingly, that, while the Lord Chief Justice, confronted with conflicting authorities, was placed in a position of difficulty, yet, in my opinion, he would have been warranted in stating broadly that if the justification in its entirety of all the libel

were proved the jury need not trouble about fair comment. I think that this should have been done. The case having been, however, left to them as if fair comment still remained in it, the jury—also manifestly in doubt—while affirming the truth of the libel as a whole have found unfair comment and gave a slender award of damages.

My difficulty in the case really arises upon the point whether in such circumstances a new trial should be ordered. I think that the jury ought to have had the point more plainly put to them, that if the facts and all that they reasonably implied were found true, then their consideration of the fair comment plea became unnecessary. I am much relieved upon this subject by these two considerations: First, of the view of the Lord Chief Justice in applying the verdict. When confronted with these manifestly inconsistent verdicts of the jury the Lord Chief Justice without difficulty affirmed, and, in my opinion, rightly affirmed, the law that once a verdict had been found that the libel was true in substance and in fact, no room was left for any fair comment. It may be asked, Why then was fair comment put to the jury? The reason why it was put to the jury was that, suppose the verdict of justification had been negatived, or had only been affirmed in part, then, but then alone, the plea of fair comment would have had to be considered. But that was not so. The plea of justification in its entirety succeeded, and I think that the learned Lord Chief Justice showed his true opinion—one which I respectfully think was right in law—and adopted the only logical course open to him in the circumstances by applying the entirety of the verdict in favour of the defendant. PATTESON, J., in *Cooper* v. *Lawson* (6) (8 Ad. & El. at p. 752) said:

> "I do not say in all cases where an alleged libel consists partly of comment it should be left to the jury to say whether the comment is fair, because if as the Attorney-General has put it the words were: 'He has murdered his father and therefore is a disgrace to human nature,' it would be ridiculous to ask whether the observation was or was not a fair comment."

Similarly in the present case the opinion expressed in the article to the effect that the plaintiff's conduct was criminal as described puts it out of the question to say that a jury so affirming could yet give damages for calling such conduct monstrous. The verdict accordingly, in my view, was properly applied.

But there is a further, and to my mind a cogent, reason why a new trial should not be granted. From what I have just observed, it could only be granted on the ground of technique, for it is manifest that the real struggle between the parties was as to the truth of the charges made. The learned counsel for both parties by their addresses put that plainly before the jury, and by the verdict of justification I think that the issue was in all its breadth settled on the affirmance of justification. What remains, namely, as to unfair comment, should not have arisen, and, in my opinion, cannot arise, unless your Lordships were of opinion that there has been a gross miscarriage of justice. The jury—on a point of fair comment which was logically out of the case after the affirmance of justification—have given a verdict which drops away altogether on a true application of their verdict on the main struggle and issue of the case. As LORD HERSCHELL expressed it in *Jones* v. *Spencer* (15) (77 L.T. at p. 538):

> "I think that the hesitation of a court to set aside the verdict of a jury is very natural and that it is expedient that verdicts of juries when that is the tribunal to determine the question between the parties should not be set aside except where one is satisfied that there has been a miscarriage because a verdict has been found that could not reasonably have been found if the attention of the jury had been directed to the whole of the facts of the case and to the question in issue which they have to determine."

Furthermore, I am of opinion that in this case Ord. 39, r. 6, plainly applies to the effect that:

"A new trial shall not be granted on the ground of misdirection . . . unless in the opinion of the Court of Appeal some substantial wrong or miscarriage has been thereby occasioned." A

I really cannot affirm that such a wrong was caused. To express the opinion that the conduct which the jury affirmed was monstrous seems to me not a separate finding of opinion at all, but a natural consequence. On these grounds I agree that the dissent of YOUNGER, L.J., was sound, that the application of the verdict B by the Lord Chief Justice was also sound, that his application should be affirmed, and the appeal allowed.

LORD WRENBURY.—The question of birth control is a question which has long engaged, and in the last fifteen or twenty years has, I believe, increasingly engaged, the attention of many thoughtful minds. From 1913 to 1916 C the National Birth Rate Commission included the investigation of this subject in its labours. In 1916 it reported to the President of the Local Government Board. The commission was subsequently reconstituted, and in the year 1918 took a mass of evidence upon, among other things, such questions as are dealt with in the plaintiff's books. The Bishop of Birmingham was chairman and many eminent persons of both sexes were members of the commission. Amongst them was the D plaintiff, Dr. Marie C. Stopes. The commission made a report in 1920. From "The Times" newspaper of Nov. 8 I have learned that the Birth Control Committee of this National Birth Rate Commission met this year on Nov. 7, under the presidency of the Bishop of Winchester, when Lord Dawson of Penn and others gave evidence. I mention these facts for the purpose of emphasising at the outset that the question of birth control is a question of grave—of very grave—importance. E To parents or prospective parents it is a question of personal importance. To others, and particularly to those who work among the poor, it is of public importance. To those who have at heart the welfare of the nation it is of national importance. There are cases in which the health and happiness of the woman are impaired by too rapid successions of conception. There are cases in which the parents' means do not allow of the proper maintenance, education and advance- F ment of more than a limited number of children. There are cases in which the mental or bodily health of the parents forbids, or ought to forbid, the procreation of defective children. There are those who think that in none of these cases ought control to be exercised. There are those who think otherwise. I express, of course, no opinion at all as to which are right and which are wrong, but so strong are the feelings of the one side and of the other that hard language may, perhaps, scarcely G create surprise. Whether the language oversteps the bounds and falls into the territory of libel is for a jury to decide. In many places, and, indeed, throughout the country, I believe, there have been established children's welfare clinics, to which mothers are invited to bring their babies to receive advice on all matters in regard to their management, such as nutrition, cleanliness, infantile maladies and the like. At such clinics the opportunity arises of helping the mothers (who are H poor women) with advice, not only as to their babies but as to the question of birth control, which to many of them is a question of vital importance, as to which they have neither the knowledge nor the means of acquiring the knowledge which more wealthy women obtain from their medical advisers. There are those who think that to extend the work of the clinics so as to include such advice to poor women is upon personal and upon public and upon national grounds right. The I plaintiff in this action is a lady who is of that opinion. In order to give poor working women such information as I have indicated, she opened a clinic in Marlborough Road, in the East End of London. She established and maintained it and provided there the services of a fully trained and certificated nurse, all entirely at her own expense. She also wrote certain books relating to birth control, and a very large number of them have been sold to the public. This is a very short statement of the facts as they stood at the time of the publication of the alleged libel upon which this action is brought. Upon the question whether birth control

A is desirable and legitimate or not I express, of course, no opinion at all; it is not material to do so; my purpose in that which precedes is to emphasise the gravity of the matter, and to indicate the subject with which I have to do.

The substance and gist of the alleged libel was that the plaintiff had exposed the poor to experiments, of which the poor, owing to their poverty, lack of learning and helplessness, were the natural victims, and had opened a birth control clinic B where working women were instructed in a method of contraception described by Professor McIlroy as "the most harmful method of which I have had experience," and had carried on a monstrous campaign of birth control, thus committing a crime more serious than that for which Charles Bradlaugh was condemned to jail. The alleged libel described the plaintiff as "a woman who is a doctor of German philosophy (Munich)." This was true. But she was also a doctor of science of C London University, a fellow of the University College of London, a fellow of the Geological Society, a fellow of the Royal Society of Literature of London, and a fellow of the Linnæan Society of London. It may be—I do not know, but it may be—that the jury thought that to describe her as "a woman who is a doctor of German philosophy" showed an animus against her of which they did not approve. I leave it to others much more conversant than I am with actions for libel to deal D with the question of that which is called the "rolled-up plea." All that I have to say upon it is this. A libel may, and generally does, contain both statements of fact and statements of opinion. If the jury are properly directed by the judge and if there is evidence to support their findings they and they alone are the absolute masters of the situation. It is for the jury to say which of the statements are statements of fact and which are statements of opinion, and to say whether those E which they find to be statements of fact are true and if they find the facts to be true then whether those which they find to be statements of opinion are fair comment. The pleadings ought to be in such form as to raise all those questions or all such of them as the parties desire to put in issue. The judge ought to direct the jury as to each of them. The parties are entitled to have the findings of the jury upon each of them. In the present case paras. 4, 5, and 7 of the defence F raised all these questions, and the parties were entitled to have the findings of the jury upon each one of them after proper directions from the judge in the matter. The first point, then, is to see what directions they received.

I turn to the summing-up of the Lord Chief Justice to see whether he directed the jury upon all of them. I think that he did. I agree that there is room for criticism of the summing-up in this respect. I should have been glad to find the G duty of the jury to discriminate fact and opinion more clearly stated. But I think that there is enough. For instance, the Lord Chief Justice says this:

> "They say two things and they say them still; and these are the real issues in this case. They say: so far as statements of fact in what is complained of is concerned, those statements of fact are true statements. So far as regards H what is expression of opinion, that expression of opinion is fair comment. Now in order that fair comment may be the issue, the matter upon which the comment is written must be a matter of public interest. And so, apart from the initial question whether these words were defamatory, and defamatory of the plaintiff, the questions which remain are, so far as statement is concerned, was the statement true? And so far as comment is concerned, was the com- I ment fair? . . . So you have to consider first of all under this head, what are the parts of those words complained of which are really statements of fact, and, having made up your mind upon that point, you proceed then to consider whether the real sting is or is not made good. Then for the rest you may think that—of course, it will be a matter entirely for you—a large part of that which is complained of the defence is fair comment."

Further, he speaks of fair comment as a structure built upon a foundation of truth —thus discriminating between the facts which are the foundation and the comment which is the structure built upon it, and he goes on to say:

"You want the two ingredients, true statement of fact, and upon the statement of fact comment which a reasonably fair-minded man might make, whether you agree with him or whether you profoundly disagree with him." A

Again, he says:

"There are expressions of opinion hitherto, but now it becomes an argument winding up with what you will have to determine—you will probably think that it is, but that, again, is a matter entirely for you—a statement of fact. . . . Taking the whole thing together he [the defendant] says 'I call this a monstrous campaign.' You may or may not think that he is right, but that is not the question. The question is: Within the wide words, the large words which I have read to you, is it such a comment as may be fairly made in the sense that it may be the honest expression of a view strongly held?" B C

When approaching the close of the summing-up and after stating the questions which he left to the jury, he says to them: "If you think that the statements were true and the comment was fair, there will be no question of damages at all." There is to be found in the above, I think, a sufficient direction.

In the result the Lord Chief Justice left to the jury four questions, and those four questions with the answers which the jury gave are as follows: (i) Were the words complained of defamatory of the plaintiff?—Yes. (ii) Were they true in substance and in fact?—Yes. (iii) Were they fair comment?—No. (iv) Damages, if any—£100. It has been contended before your Lordships that the second answer was a complete affirmation of justification, and that when once that answer was given there was no room for the answer which followed, namely, No. (iii). I cannot so read the questions and answers. I agree that No. (ii), if it stood alone, might be a complete acceptance of the plea of justification, but it does not stand alone. I ask myself first: What, as matter of construction, is the meaning of the words of the Lord Chief Justice as found in the questions? If the second question meant: "Are the statements both of fact and of opinion true," there was no room for the third question. The answer to the second question would have covered everything. It cannot be that it covered everything, for the Lord Chief Justice goes on to ask: "Were they fair comment?" As matter of construction I cannot stop, so to speak, in the middle of the sentence. To construe the document I must read the whole document, and reading the whole, I can give effect to it only by saying that No. (ii) means, were the words, so far as you find them to be statements of fact, true, and No. (iii) means were the words, so far as you find them to be statements of opinion, fair comment. Again, reading the questions and answers together, I look to find the meaning of the jury. The observations are the same as before. Their answer to No. (ii) must mean we find the statements of fact to be true, but to No. (iii) we answer that the statements of opinion are not fair comment. If this be right, it remains to consider whether there was evidence upon which the jury could find as they did that the comment was not fair. D E F G

Before referring in detail to the evidence, I pause to consider what were the subjects to which the evidence was directed. They were, in substance, two, namely, first the methods which the plaintiff recommended to prevent conception, and, secondly, the steps which she took to spread knowledge of those methods, and, in particular, the contents of the publications which she wrote and sold. The former it was contended were harmful, and were so pursued as to victimise poor and helpless people. The latter it was contended were obscene. It was not said and could not be said that the description and discussion of the construction, functions and control of any organ of the human body is necessarily obscene. If the description and discussion were in a medical treatise it would be impossible to say it was obscene. In literature intended for the general public it may or may not be obscene. It depends upon the manner of treatment. The subject-matter is not obscene; the method of dealing with the subject-matter may be obscene. Whether it is obscene or not is matter of opinion, or, at any rate, the jury may hold it to be matter of opinion. In any case it is matter for them to decide, and H I

by their answer to the third question they have, I think, answered the question in the negative. There are some parts of the human body as to which it is matter of no great moment to any man or woman whether he or she has or has not knowledge of their construction, their function, or their control. A man or a woman may go equally well through life, even if he or she knows little or nothing of the structure, functions or control of the liver, the kidneys, or the heart, or has never so much as heard of the thyroid gland. But it may well be that the same is not true of the organs of generation. They are capable of control and of abuse. As to these, knowledge of their construction, their functions and possible methods of their control may be not only legitimate but most expedient, and more particularly in the case of the woman. Those who think that it is legitimate and expedient are certainly entitled to hold that opinion and to do their best to impart the knowledge and assist man or woman to make use of it. The whole question is as to the manner in which the communication of the knowledge and the suggested application of the knowledge is made. Is it so made as to deprave and corrupt those whose minds are open to immoral influences? If it is not, then, however plain the language may be, it is not obscene. It is for the jury and the jury alone to answer these questions. I am not going to express, it is not my function to express, any opinion as to how they ought to be answered in this case. I am going only to look and see whether there was evidence upon which the jury could answer as they did. Was there evidence upon which twelve jurors could reasonably find that the comment in the libel was not fair, that the imputation of victimisation and of obscenity was not justified? [His Lordship read passages from the evidence and continued:] The jury had before them all the evidence which I have quoted. They had the plaintiff's books before them. They were in a position to judge and it was for them to judge whether they were written too little from a medical and too much from a sexual or emotional standpoint. They had, of course, a great deal more evidence. I express no opinion at all of my own upon the question whether the comment was fair or not. That is not for me; it is for the jury and for the jury alone. But I will say that, in my judgment, it is impossible to say that twelve reasonable jurors could not accept, and, if they thought fit, act upon, that evidence and find that the imputation conveyed by the language of the libel as to exposing to experiment the poor, who owing to their poverty, lack of learning, and helplessness were the natural victims of experiments and as to a monstrous campaign, amounting to a crime, more serious than that for which Charles Bradlaugh was condemned to jail was not justifiable. Imputations of victimisation of the helpless poor and of criminality deserving of imprisonment are not matters to be lightly regarded. They may well cut deep, and the more so in the case of a lady who is giving her time and her money to afford as she thinks—and as her opponents admit bona fide thinks—assistance to her poorer sisters. In my opinion, the majority of the Court of Appeal were right in upholding the verdict in the third answer, and giving judgment for the plaintiff in accordance with the finding of the jury upon the third question left to them.

This action I have no doubt was brought not so much to recover money as to re-establish a reputation damaged by libel. As a result of the judgment of this House the plaintiff will fail to recover the damages which the jury awarded. But it remains that a jury have found that the defendant's comment in the matter was not fair and that their finding in that respect fails to find its proper conclusion in damages by reason only of the fact that your Lordships are of opinion that after their answer to the second question was given the third question was for the reasons which your Lordships have assigned not open to them. I ought to add that, if I am wrong in the view which I have expressed as to the summing-up, and if the finding to the third question is not to have effect, then the plaintiff is, I think, entitled to a new trial, for in such case there will have been by reason of misdirection no proper trial of the issue of fair comment. In this view of the case, I have to take it that the learned Lord Chief Justice did not properly direct the jury to discriminate between fact and opinion and to answer this question, namely:

If you find that all those which you find to be statements of fact are true, then do you find that those which you find to be statements of opinion are fair comment? The plaintiff is entitled to an answer to that question. In my judgment, this appeal should be dismissed and the order of the Court of Appeal upholding the verdict of the jury on fair comment should be upheld; and if a majority of this House is of a contrary opinion then, in my judgment, there should be a new trial. But as upon both points the majority of your Lordships are of a different opinion this appeal must be allowed, and a new trial must be refused.

LORD CARSON.—The defendants in this action pleaded that the words complained of in the alleged libel in their natural meaning were true in substance and in fact, that is, a plea of justification. I have never heard a doubt expressed until this action that such a plea, if proved, is an answer to any action for defamation. The plea puts upon the defendant the onus of proving not only that the facts alleged to be defamatory are true, but also that any comments in so far as they contain statements or inferences of a defamatory character are also true. This plea, therefore, whether the alleged libel consists of facts only or of comments as well as facts, is a complete answer to any action for defamation.

> "It is sufficient, however, if the charge on the plaintiff's conduct in the libel is substantially met and answered in the justification. It is unnecessary to repeat any word which might have been the subject of the original comment. So much must be justified as meets the sting of the charge, but if anything be contained in a charge which does not add to the sting of it, that need not be justified": SELWYN'S NISI PRIUS, vol. 2, p. 1060 (12th Edn.).

The authorities referred to fully bear out the statement of the law as contained in this passage.

I have said so much because I cannot agree with the view expressed by BANKES, L.J., in the Court of Appeal in this case, when he says:

> "Under ordinary circumstances, when justification and fair comment are pleaded, and when it is in issue whether the words complained of are defamatory, the questions for the jury are: (i) Are the words defamatory? If yea, then (ii) are they statements of fact or expressions of opinion or partly one or partly the other? (iii) In so far as you find that they are statements of fact, are they true? (iv) In so far as they are expressions of opinion do they exceed the limits of fair criticism upon the matters of public interest?"

Such questions appear to me to overlook the real nature of a plea of justification which must stand or fall if so pleaded as complete answer to the whole of the libel complained of, and cannot be aided by a plea of fair comment, which is no longer relevant if once the plea of justification is found in favour of the defendant. There is a further paragraph in the judgment of the learned lord justice which, in my opinion, is open to the same criticism. He says:

> "I am not able to agree with the view taken by the Lord Chief Justice that this is a case in which the rule applies that a plea of fair comment does not arise if the plea of justification is made good. The rule applies, and applies only, in my opinion, when the justification affords a complete answer. There may be many cases of which the present is, in my opinion, an example, when a jury may consider that the facts are quite truly stated and yet that what they regard as expressions of opinion upon those facts are not fair."

If upon a plea of justification the jury do not find that the comments or expression of opinion so far as they contain defamatory matter and are substantial and material parts of the libel complained of are true, their duty would be to find against the defendant on the plea of justification which cannot be aided or supported by a finding on a plea of fair comment. In the course of the argument I asked counsel for the plaintiff if there was or could be a case in which a plea of justification, if proved and accepted by the jury, would not be a complete answer,

A and he very candidly replied in the negative. An examination of the proceedings in the present case can, I think, lead to no other conclusion than that it was fought throughout on the plea of justification. I agree with BANKES, L.J., when he says:

> "In his final speech to the jury counsel for the plaintiff clearly invited the jury to treat the libel as consisting entirely of statements of fact and to concentrate their attention on the two main charges, namely, that the plaintiff B was, in the language of the innuendo, taking advantage of the ignorance of the poor to subject them to experiments of a most harmful and dangerous nature and that she was guilty of a serious crime for which she should be imprisoned. If any possible doubt existed as to his attitude it is set at rest by the note of the Lord Chief Justice in which he summarises counsel's contention as to which of the statements in the libel are statements of fact."

C I may add also that the suggestion of a specific question to the jury as to whether the words complained of were true was suggested by counsel for the plaintiff and was agreed to by counsel on behalf of the defendants, who observed: "The other would be a plea that the libel, that is to say, fact plus deduction, was true in substance and in fact."

D BANKES, L.J., also quotes a passage from the closing address of counsel for the defendants, in which, among other matters, he states that

> "a plea of justification is a plea of justification not only of the words themselves simpliciter, but a plea of justification goes to the induction or meaning that is put upon the whole paragraph. You plead justification not only in respect of your plain statement of fact but also in respect of your inferences E both of fact and opinion."

As BANKES, L.J., observes:

> "The learned counsel is here accepting, as it seems to me, the challenge of counsel for the plaintiff to deal with the case as though the only issue was: Are the charges made by the defendants against the plaintiff true or are they not?"

F And he refers to the learned counsel's summing-up on this plea of justification:

> "I most respectfully invite you to find that that statement in its broadest meaning, the whole of that paragraph, whatever meaning you may ascribe to it, does not go one inch beyond the truth in substance and in fact."

When one turns to the summing-up of the Lord Chief Justice it is quite evident G that he specifically dealt with and explained to the jury the "facts" as put forward in counsel's requisition as already referred to and fully explained them and the evidence relating to them to the jury. Furthermore, after the verdict had been given and after argument upon the findings of the jury the Lord Chief Justice stated, in entering judgment for the defendants:

> "In this case the jury, after a protracted deliberation extending to something H like four hours, have found by their verdict that the words complained of in this action, while they were defamatory of the plaintiff, were true in substance and in fact. In the course which the case took that really became the main issue. . . . I have always understood that in the words which have been quoted it is a good defence to an action for libel that the words complained of were true in substance and in fact."

I I do not think that this House or any appellate tribunal can be too careful in ascertaining by an examination of the proceedings what was the course of the trial, and what was the real issue fought out by the assent of the parties on both sides. More especially is that necessary in a case where a defendant has frankly and fully taken upon himself the onus of all that is involved in such a plea as that of justification in a libel action, and any appellate tribunal ought to be slow in ordering a new trial in such circumstances unless there has been some substantial misdirection or other flaw in the conduct of the trial which they can at least say may reasonably have caused a miscarriage of justice. In the present case it is said

that by reason of the finding of the jury on the plea of fair comment, the jury indicate that they did not understand the position, and that this difficulty was brought about by some misdirection on the part of the Lord Chief Jusice. In my opinion, the jury ought not to have been allowed to consider the plea of fair comment at all when once they had found the justification proved, and I think that it would have been better if the Lord Chief Justice had so instructed them. I also agree that passages can be selected in the summing-up which seem to show some confusion between facts and opinions in relation to a plea of justification. But, as the Lord Chief Justice has pointed out, and as I think a careful examination of the whole proceedings shows in the course which the case took, the main issue was: Were the words complained of true in substance and in fact? On that plea the charge in the libel has been "substantially met" and so much has been justified "as meets the sting of the charge," and on that ground alone I should be prepared to set aside the order of the Court of Appeal and restore the judgment of the Lord Chief Justice. But I should also like to add that, if the answer to the plea of fair comment means that, notwithstanding the finding on the plea of justification, there were comments which were unfair, I agree with YOUNGER, L.J., that there was no evidence

> "on which a rational verdict could be found to the effect that these remaining comments of the defendants were either unfair or dishonest."

I cannot help thinking that some of the confusion and difficulty which has arisen in this case has been caused by reason of the form of plea which has been described before us as the rolled-up plea, and the cases cited before us show that not for the first time this form of plea has given rise to doubts and difficulties. That plea in the first defendant's statement of defence has nothing whatever to do with a plea of justification. It is not partly justification and partly fair comment, but fair comment pure and simple, no doubt in an altered form from the old one, but, nevertheless, fair comment only, and I desire to express my entire concurrence with the statement of LORD COLLINS, M.R., in *Digby* v. *Financial News, Ltd.* (1), which is as follows:

> "When a plea of justification is pleaded, it involves the justification of any injurious imputation which a jury may think is found in the alleged libel. This plea does not purport to be a plea of justification of the imputations, if any, contained in the libel; it is nothing of the sort but is a plea intended to raise a totally different defence, that of fair comment. Comment in order to be fair must be based upon facts, and if a defendant cannot show that his comments contain no mis-statements of fact, he cannot prove a defence of fair comment."

For the reasons which I have given, I agree with the motion proposed by the Lord Chancellor. But for the statements made by LORD WRENBURY I should not have thought it necessary, or opportune, in considering the legal problems which arise for decision in this case, to have said anything whatever upon the subject of the policy of birth control, or the merits or demerits of the plaintiff in the part which she plays in the furthering of that object. I feel bound, however, to say, after the speech of my noble and learned friend, that the recital of alleged facts and the views which he has expressed, which seem to me to be, and will be read by others as being, in sympathy with the acts of the plaintiff or her writings, and with certain evidence called on her behalf, must not in any sense be taken as representing my own views, if I had thought it relevant or necessary to discuss them. I speak only for myself, and I notice that the Lord Chancellor, LORD FINLAY, and LORD SHAW have not referred to these matters, a course which I had intended to adopt but for the statements of my noble and learned friend.

Appeal allowed.

Solicitors: *Charles Russell & Co.*; *Braby & Waller.*

[*Reported by* W. C. SANDFORD, ESQ., *Barrister-at-Law.*]

A

BRAGG *v.* BRAGG

[Probate, Divorce and Admiralty Division (Sir Henry Duke, P., and Horridge, J.), October 14, 1924]

B [Reported [1925] P. 20; 94 L.J.P. 11; 132 L.T. 346; 41 T.L.R. 8; 69 Sol. Jo. 73; 27 Cox, C.C. 729]

Husband and Wife—Summary proceedings—Maintenance order—Dissolution of marriage on wife's petition—Right of husband to discharge of maintenance order—Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 *Vict.*, *c.* 39), *s.* 7.

C Dissolution of the marriage by a decree absolute of divorce does not ipso facto terminate a maintenance order which a married woman has during the subsistence of the marriage obtained from a court of summary jurisdiction, nor does such termination of the marriage oblige the court of summary jurisdiction to discharge the order. It may do so, but the question whether the court shall vary or discharge the order is one for its discretion, under s. 7 of the Summary D Jurisdiction (Married Women) Act, 1895, on a consideration of the facts of the particular case.

Notes. Distinguished: *Pastre* v. *Pastre*, [1930] P. 80; *Mezger* v. *Mezger*, [1936] 3 All E.R. 130; *Gornall* v. *Gornall*, [1945] 2 All E.R. 186. Considered: *Kirk* v. *Kirk*, [1947] 2 All E.R. 118. Distinguished: *Prest* v. *Prest*, [1949] 2 All E.R. 790. Considered: *Abson* v. *Abson*, [1952] 1 All E.R. 370; *Chorlton* v. *Chorlton*, E [1952] 1 All E.R. 611. Approved: *Wood* v. *Wood*, [1957] 2 All E.R. 14. Referred to: *Natborny* v. *Natborny*, [1932] All E.R.Rep. 509; *Plunkett* v. *Plunkett*, [1937] 3 All E.R. 736; *Nowell* v. *Nowell*, [1951] 1 All E.R. 474; *Pooley* v. *Pooley*, [1952] 1 All E.R. 395; *Pilcher* v. *Pilcher*, [1955] 2 All E.R. 644; *Russell* v. *Russell*, [1956] 1 All E.R. 466; *Bowen* v. *Bowen*, [1958] 1 All E.R. 770.

As to maintenance orders by justices, see 12 Halsbury's Laws (3rd Edn.) 487 F et seq.; and for cases see 27 Digest (Repl.) 722–728. For Summary Jurisdiction (Married Women) Act, 1895, see 11 Halsbury's Statutes (3rd Edn.) 849; and for Married Women (Maintenance) Act, 1949, see ibid., vol. 28, p. 735.

Case referred to:

(1) *Johnson* v. *Johnson*, [1900] P. 19; 69 L.J.P. 13; 18 L.T. 791; 64 J.P. 72; 16 T.L.R. 26, D.C.; 27 Digest (Repl.) 727, *6940*.

G

Appeal by the husband from an order of the stipendiary magistrate, Leeds, refusing to discharge a maintenance order, which the wife had obtained against the husband on Aug. 15, 1919, whereby the husband was found guilty of desertion and ordered to pay her 17s. 6d. per week as maintenance for herself and two children, the custody of whom was given to her. On July 27, 1922, the wife obtained a H decree nisi for the dissolution of her marriage on the grounds of her husband's bigamy and adultery, and on Feb. 5, 1923, this decree was made absolute. The husband then took out a summons under the Summary Jurisdiction (Married Women) Act, 1895, for discharge of the order of Aug. 15, 1919, on the ground that, on the termination of the marriage by decree absolute of divorce, it had ceased to be operative, or if not, ought to be discharged. The stipendiary magistrate refused I to discharge the order in a considered judgment in the following terms:

"The wife of the respondent to a summons taken out by her under the Act of 1895, upon which an order was made, subsequently obtained a divorce from him. The only question I have to decide is whether I should on that ground discharge her order. It was contended on behalf of the husband that I had no option in the matter; that the relationship of husband and wife having ceased, there remains no ground on which such an order can be supported, and that it should be discharged under s. 7. That section provides that a court of summary jurisdiction may, upon cause being shown upon fresh evidence to

the satisfaction of the court, at any time alter, vary, or discharge such order. A somewhat similar provision is made by s. 9 of the Criminal Justice Administration Act, 1914. Fresh evidence means evidence of matters that could not with reasonable diligence have been discovered before the order was made, or of matters that have arisen since: per JEUNE, P., in *Johnson* v. *Johnson* (1) ([1900] P. at p. 21). In this sense the evidence proffered was no doubt "fresh evidence." Apart from this, which is a matter for discretion to be exercised judicially, there are two cases in which a court must discharge an order, that of adultery by the wife after the making of the order, and that of resumption of cohabitation by the parties. In all other matters the court has a discretion, including, in my judgment, the case of adultery by the wife committed before the making of the order, but discovered within the rule as to fresh evidence afterwards.

"It is not suggested in this case that the order was not properly made, or that any fact has since been discovered, which would have prevented the making of it. The objection here falls under a different category, namely, that since the order was made, the wife has become a single woman. It would appear that in this case no alimony was granted by the Divorce Court, or indeed applied for, and I will assume for the purpose of my judgment that, if applied for, it might still be granted there. I do not, however, think, having regard to the status of the parties, that it could be more conveniently dealt with there, but less conveniently, and I do not, therefore, consider that this matter of discharging this order could in any way be said to be appropriate to the provisions of s. 7 of the Act of 1895. I find nothing in this Act which limits the effect of an order properly made, or which can be reasonably construed to limit the operation of the order to such time as the applicant is still a married woman. The order being made against the husband for a matrimonial offence, and designed to make provision for his wife and children, I can see no reason why he should be relieved of that responsibility, because he has subsequently committed further matrimonial offences, upon which the wife has obtained a divorce.

"I am of opinion that the court has a discretion in these cases, and should not exercise it against a woman, who has subsequently obtained a divorce, unless some good cause is shown for such exercise. The husband's advocate was not in a position to show any reason why I should exercise my discretion in his client's favour. I do not think I am bound in law to do so, and I must therefore dismiss the application. Should circumstances arise to show that the operation of the order is unjust, the husband can take out a fresh summons."

Frampton for the husband.
Barnard for the wife.

SIR HENRY DUKE, P.—The learned magistrate gave very careful attention to this case, and has given the parties the advantage of a statement in detail of the grounds upon which he refused the husband's application. At first sight it seems anomalous that a woman, who has obtained, as a wife, an order for maintenance, to be provided by her husband, when she has put an end to the relation of husband and wife, may still say that the order for her maintenance by the husband subsists. It does not follow because it seems anomalous that that may not be the statutory provision, nor is it conclusive to show that it is contrary to common sense.

Dealing with the second position first, the state of the matter is this. Here was a husband, who deserted his wife, and who, while matters were in that position, was ordered by a magistrate to make a contribution to the maintenance of his wife and children. After some time the wife took proceedings for divorce on the ground that the husband had committed the further offences of bigamy and adultery, and she obtained a decree of dissolution of the marriage, but she still remained the mother and the custodian of the children. The magistrate had given her the

custody of the children, and this court in ordinary circumstances, if there had not been that order for custody, would have made such an order. So this married woman remains the custodian of the children, their natural guardian and their legal guardian, and is liable for their maintenance. There are grounds of common sense for holding that an order, which dealt with maintenance, and not, so far as that part of it goes, with any of the other obligations of married life, should continue to subsist.

That, however, does not conclude the matter. It is still necessary to see what are the limits of the statutory jurisdiction. Counsel for the husband made a shrewd remark, which went to the root of his own case. He said that the decree absolute had put an end, ipso facto, to the magisterial order, and that the husband had only gone to the magistrate to call his attention to the fact, and to get him to make an order discharging the previous order. If the previous order had, ipso facto, been discharged, the magistrate, of course, had no jurisdiction to do anything. He might express a pious opinion. If it had not been discharged, the discharge of it depends upon s. 7 of the Act of 1895. As HORRIDGE, J., pointed out, the husband is rather put in a dilemma by the two arguments, which are addressed to us. If the order is discharged by the decree absolute, there is no jurisdiction in the magistrate to entertain this summons; if the order is not discharged by the decree absolute, then he has a discretionary jurisdiction. Sections 4 and 5 of the Act of 1895 describe the persons who may resort to the jurisdiction and the relief they may get. The person in s. 4 is "any married woman" in various circumstances, that is, a woman who at the time of her resort to the court of summary jurisdiction is qualified by her condition. Section 5 describes what kind of order may be made; and s. 5 (c) provides for a

> "provision that the husband shall pay to the applicant personally or for her use, to any officer of the court . . . such weekly sum not exceeding £2 [now £5: see Married Women (Maintenance) Act, 1949, s. 1 (1)] as the court shall, having regard to the means both of the husband and wife consider reasonable."

Relevant to that is s. 5 (b), which is the provision for giving the wife the custody of the children, whom, of course, she would have to maintain.

In the present case an order was made giving effect to s. 5 (b) and (c). Counsel for the husband says the description of the payee as a "wife," and of the payer as a "husband," operates as a limitation of the rights of the wife and of the obligation of the husband. Counsel for the wife, on the other hand, says: "No. The Act describes persons who may claim remedies, and the words are mere words of description of persons standing in a certain relationship at the time the court of summary jurisdiction comes to deal with them," and he says, as I understand, that s. 7 is the section which limits the operation of the order, when it has once been obtained, by giving power to the court of summary jurisdiction upon fresh evidence to alter, vary, or discharge the order, and to increase or diminish the amount of the weekly payment. There is this proviso to s. 7:

> "If any married woman upon whose application an order shall have been made under this Act . . . shall voluntarily resume co-habitation with her husband, or shall commit an act of adultery, such order shall upon proof thereof be discharged."

That is the only limitation the legislature imposed. When this Act was passed in 1895 a woman, who added to desertion a grievance of her husband's adultery, might proceed for a divorce. One must assume that the authors of this Act and the legislature, which passed it, were aware of this elementary fact. They took the view, which this husband also took, that such an order, once made and while the parties are alive, is not got rid of except by an order of the court of summary jurisdiction, and that an application must be made.

On the whole, I think the husband was right in his original view that he must go to a court of summary jurisdiction to get rid of this order, although there has been a decree absolute of divorce, and it seems to me to follow from that that, if

there are no statutory grounds which discharge the husband from his obligation under the order, then before he can succeed he must satisfy the magistrate that justice requires that the order should be altered, varied, or discharged. He failed to satisfy the magistrate that the order ought to be altered, varied, or discharged. I entirely agree with the reasons upon which the magistrate founded that view. The magistrate thought it was a very convenient thing that this order should subsist, and that a court, which was close at hand to the parties, should be able to give the wife assistance if she needed it, or give the husband relief if he was entitled to it. I agree entirely with the reasoning of the learned magistrate, and on the whole I think this appeal fails.

HORRIDGE, J.—The question in this appeal is whether or not there is any provision in the Summary Jurisdiction (Married Women) Act, 1895, which limits the operation of orders made under s. 5 to the period of the existing marriage. I can find no such words. In s. 5 (c) the provision that "the husband" shall pay to the applicant personally merely defines the husband at the time of the application and order. The "applicant," of course, is the wife, but there are no words to show that the order itself is to be limited to the period of the marriage. That being so, the court of summary jurisdiction is thrown back on s. 7, and under that section it is a matter of discretion, which I think in this case the learned magistrate has properly exercised, and this appeal ought to be dismissed. The appeal was, accordingly, dismissed with costs.

Solicitors: *Ward, Bowie & Co.*, for *J. Wurzal*, Leeds; *Collyer, Bristow & Co.*, for *A. E. Masser*, Leeds.

[*Reported by* J. A. C. Skinner, Esq., *Barrister-at-Law.*]

THOMAS *v.* THOMAS

[Court of Appeal (Sir Ernest Pollock, M.R., Warrington and Sargant, L.JJ.), December 19, 1923, January 18, 1924]

[Reported [1924] P. 194; 93 L.J.P. 61; 130 L.T. 716; 40 T.L.R. 250; 68 Sol. Jo. 339; 22 L.G.R. 653]

Divorce—Desertion—Course of conduct, not single act—Termination—Question for the court—Consideration of all circumstances.

The matrimonial offence of desertion is, not a single specific act, but a course of conduct. Desertion is not terminated by the guilty party's requesting the other spouse to return to him and expressing contrition for what he or she has done and an intention to behave better in future. The question whether desertion has been determined by the conduct of the guilty party is one of fact to be determined in view of the circumstances of the case, including the conduct of the guilty party throughout, and conduct (e.g., cruelty by a husband to a wife) which occurred more than six months before a complaint to a court of summary jurisdiction.

Notes. Explained: *Bowron* v. *Bowron*, [1925] All E.R.Rep. 148. Considered: *Bennett* v. *Bennett*, [1939] 2 All E.R. 387; *Pratt* v. *Pratt*, [1939] 3 All E.R. 437; *Thomas* v. *Thomas*, [1946] 1 All E.R. 170. Applied: *Everitt* v. *Everitt*, [1949] 1 All E.R. 908. Distinguished: *Price* v. *Price*, [1951] 1 All E.R. 877. Referred to: *Clark* v. *Clark*, [1931] All E.R.Rep. 521; *Herod* v. *Herod*, [1938] 3 All E.R. 722; *Jordan* v. *Jordan*, [1939] 2 All E.R. 29; *Glenister* v. *Glenister*, [1945] 1 All E.R. 513; *Buchler* v. *Buchler* (1946), 175 L.T. 214; *Holborn* v. *Holborn*, [1947]

1 All E.R. 32; *Robinson* v. *Robinson*, [1947] W.N. 17; *Allen* v. *Allen*, [1951] 1 All E.R. 724; *Simpson* v. *Simpson*, [1951] 1 All E.R. 955; *W.* v. *W.* (*No.* 2), [1954] 2 All E.R. 829; *Roe* v. *Roe*, [1956] 3 All E.R. 478.

As to desertion generally, see 12 HALSBURY'S LAWS (3rd Edn.) 241 et seq.; and as to termination, see ibid., pp. 263–269. For cases see 27 DIGEST (Repl.) 333 et seq.

Cases referred to:

(1) *Russell* v. *Russell*, [1895] P. 315; 64 L.J.P. 105; 73 L.T. 295; 44 W.R. 213; 11 T.L.R. 579; 39 Sol. Jo. 722, C.A.; 27 Digest (Repl.) 356, *2948*.

(2) *Oldroyd* v. *Oldroyd*, [1896] P. 175; 65 L.J.P. 113; 75 L.T. 281; 12 T.L.R. 442; 27 Digest (Repl.) 289, *2349*.

(3) *Charter* v. *Charter* (1901), 84 L.T. 272; 65 J.P. 246; 17 T.L.R. 327, D.C.; 27 Digest (Repl.) 350, *2898*.

(4) *Wilkinson* v. *Wilkinson* (1894), 58 J.P. 415; 27 Digest (Repl.) 696, *6655*.

(5) *Sickert* v. *Sickert*, [1899] P. 278; 68 L.J.P. 114; 81 L.T. 495; 48 W.R. 268; 15 T.L.R. 506; 27 Digest (Repl.) 350, *2897*.

Also referred to in argument:

Beer v. *Beer* (1906), 94 L.T. 704; 54 W.R. 564; 22 T.L.R. 338, 367; 27 Digest (Repl.) 289, *2340*.

Cargill v. *Cargill* (1858), 1 Sw. & Tr. 235; 27 L.J.P. & M. 69; 31 L.T.O.S. 332; 4 Jur.N.S. 764; 6 W.R. 870; 164 E.R. 708; 27 Digest (Repl.) 349, *2893*.

Cudlipp v. *Cudlipp* (1858), 1 Sw. & Tr. 229; 27 L.J.P. & M. 64; 31 L.T.O.S. 318; 164 E.R. 705; 27 Digest (Repl.) 345, *2865*.

Ellis v. *Ellis*, [1896] P. 251; 65 L.J.P. 124; 75 L.T. 390; 60 J.P. 823; 45 W.R. 144; 12 T.L.R. 514, D.C.; 27 Digest (Repl.) 711, *6779*.

Gatehouse v. *Gatehouse* (1867), L.R. 1 P. & D. 331; 36 L.J.P. & M. 121; 16 L.T. 34; 27 Digest (Repl.) 357, *2954*.

Kay v. *Kay*, [1904] P. 382; 73 L.J.P. 108; 91 L.T. 360; 20 T.L.R. 521; 53 W.R. Digest 49; 27 Digest (Repl.) 335, *2789*.

Timmins v. *Timmins*, [1919] P. 75; 88 L.J.P. 78; 120 L.T. 544; 63 Sol. Jo. 287, D.C.; 27 Digest (Repl.) 728, *6943*.

Appeal by the husband from an order of a Divisional Court of the Probate, Divorce, and Admiralty Division.

The facts appear in the headnote and judgments.

Montgomery, *K.C.*, and *B. A. Leverson* for the husband.

Bayford, *K.C.*, and *Clifford Mortimer* for the wife.

Cur. adv. vult.

Jan. 18. The following judgments were read.

SIR ERNEST POLLOCK, M.R.—This was an appeal by Henry Thomas from an order made by the Divisional Court on May 29, 1923, whereby the court in part confirmed, and in part varied, an order made by the justices for the petty sessional division of Brynmawr upon a summons taken out under s. 4 of the Summary Jurisdiction (Married Women) Act, 1895, by Mary Ethel Thomas, the wife of the appellant, alleging desertion on his part. On Dec. 5, 1922, the summons was heard, and the justices after hearing the evidence of the wife, the husband, and others, found desertion proved, and ordered that the husband should pay £2 a week to his wife thenceforth. They further ordered that the wife should no longer be bound to cohabit with the husband and gave her the custody of the three children of the marriage. The Divisional Court by their order varied the order of the justices so far as it related to separation and the custody of the children, but confirmed the order of the justices made upon the question of desertion. It is from that part of the order of the Divisional Court that this appeal is brought. The question before us is whether the Divisional Court were right in confirming the order of the justices on the issue of desertion.

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It is argued on behalf of the husband that desertion is a continuing offence and that, inasmuch as, after they had parted in the manner hereinafter set out, the husband by subsequent acts endeavoured to get his wife to return to him, there could no longer be desertion on his part. The parties were married in 1915. The husband served in the war of 1914–1918, and, after his demobilisation in 1920, in February, 1921, he and his wife took a confectioner's business at Greenwich and lived together as man and wife at the place of the business.

The husband was found guilty of cruelty to his wife by the justices, and his counsel admitted to this court that he could not contend that there was not evidence before them sufficient to justify such a finding. Indeed, the evidence was clear. The justices found the desertion proved on the material date, namely Dec. 5, 1922, the date on which the case was before them, after estimating the conduct of the husband on the question of desertion by reference to his cruelty and general conduct up to the time when he sent his wife away from him, namely, June 16, 1922, at which date the desertion began. Since then he attempted to get his wife to return to him by trying to see her and writing letters to her. These are relied on, on his behalf, as acts of penitence inconsistent with and determining any intention to desert his wife. In my judgment, and for the reasons given by the President, the justices were right in considering the husband's conduct as a whole, and in deciding that the wife's refusal to return to cohabitation was not without just cause.

In the present case the husband acted with deliberation and determination to part from his wife. His conduct previously may be looked at to see if his act on June 16 ought to be regarded merely as an act of angry impulse. He had from time to time been guilty of gross cruelty to his wife; but three months before he had told her to go, and by repeated acts of cruelty he had shown that he valued his wife's presence but little. Then on June 16 he tells her to leave him. He is remonstrated with by his father-in-law, but adheres to his course. He adopts a plan whereby the children are divided between him and his wife. He retains the elder daughter deliberately. So the departure of the wife and the two children is insisted upon. Then he goes down to see his wife next day, and perhaps not unexpectedly she refuses to meet him. On July 7 he sent her a telegram calculated to awaken a mother's fears, and falsely reproaching his wife with want of care for the daughter whom he had, of set purpose, kept in his own charge. On various occasions he has written to try to persuade her to return to him, his letters containing expressions of repentance and promises of better behaviour in the future, but she refused.

It is contended for the husband that his so-called repentance must be accepted as the outstanding feature of his conduct during some eight or nine months, even though he might not be entitled to an order for restitution of conjugal rights in accordance with the principles laid down in *Russell* v. *Russell* (1) as interpreted in *Oldroyd* v. *Oldroyd* (2) ([1896] P. at p. 184). Why so? It must be a question for those who have to decide upon the evidence before them what weight and emphasis is to be given to and placed upon his cruelty, his indifference, his determination to get rid of his wife, his attempt to alarm her, and his sorrow when he realised the need of her. The justices decided upon all the facts before them, and estimated the quality of his actions on June 16 by reference to his conduct generally and found that his intention was to break off matrimonial relations with his wife. His subsequent efforts to get his wife to return to him and his assurances of amending his conduct must be tried by the same test. No doubt desertion can be put an end to by cohabitation; but it is a very different proposition to say that a husband can obliterate his previous conduct by subsequent offers, as to genuineness of which the wife may, upon reasonable grounds, entertain doubts. Desertion is not a single act complete in itself and revocable by a single act of repentance. The act of departure from the other spouse draws its significance from the purpose with which it is done, as revealed by conduct or other expressions of intention: see *Charter* v. *Charter* (3). A mere temporary parting is equivocal, unless and until its purpose and object is made plain.

A I agree with the observations of DAY, J., in *Wilkinson* v. *Wilkinson* (4) (58 J.P. at p. 416), that desertion is not a specific act, but a course of conduct. As GORELL BARNES, J., said in *Sickert* v. *Sickert* (5) ([1899] P. at p. 282):

> "The party who intends bringing the cohabitation to an end, and whose conduct in reality causes its termination, commits the act of desertion."

B That conduct is not necessarily wiped out by a letter of invitation to the wife to return. It must be for those who hear the whole evidence to decide whether the conduct amounting to desertion is no longer to be regarded so that there is no excuse for the refusal of the other spouse to return. For the reasons given by the Divisional Court, I am of opinion that the justices rightly heard the evidence submitted to them, and came to a proper conclusion upon legal principles. The appeal must be dismissed with costs.

C

WARRINGTON, L.J.—This is an appeal by a husband from an order of the Divisional Court of the Probate, Divorce, and Admiralty Division in substance affirming an order of justices made under the Summary Jurisdiction (Married Women) Act, 1895, upon a complaint by his wife that he had deserted her. The justices found as a fact that on June 16, 1922, the appellant deserted his wife by D compelling her to leave his house with the intention of breaking off matrimonial relations with her. Neither before the Divisional Court nor before us was this finding disputed, but it was contended that desertion, in order to be a sufficient ground of complaint, must be continuing at the time of the proceedings before the justices, and that in this case the husband had put an end to the desertion by requesting his wife to return to him and expressing contrition for what he had E done, and his intention of behaving better in the future, and that the refusal of his wife to comply with such request did not prevent the expressed wish on his part to resume cohabitation from having the effect of determining his previous desertion. The Divisional Court have held, affirming the view of the justices, that the question whether desertion continues is one of fact to be determined in view of the circumstances of the particular case, and that, it having been proved to the F satisfaction of the justices that prior to his desertion of his wife he had frequently ill treated her she was justified in refusing to comply with his request to return, and, therefore, the desertion had not been effectually determined.

In my opinion, this decision is correct. In the first place, there was ample evidence to support the finding of fact. The justices saw and heard the witnesses and accepted the evidence on the part of the wife. Their finding cannot be set G aside. It is true the last positive act of ill treatment referred to took place more than six months before the complaint to the justices, and, therefore, would not itself be a substantive ground for an order, but if the Divisional Court was right in law in holding that the question as to the effect of the husband's request is one to be determined in view of all the circumstances then the evidence as to previous ill treatment would clearly be relevant. I am of opinion that the view of the court H on this point was correct. It has been determined by this court that a decree for restitution of conjugal rights cannot be obtained by a party whose conduct affords reasonable grounds for a refusal by the other party to afford those rights (*Russell* v. *Russell* (1)). In my opinion, the same principle applies to the present case; there was ample ground for the wife's refusal to return, and, in those circumstances, I think the actual separation must continue to have the quality of desertion I by the husband; otherwise I see no alternative except to regard the wife as deserting him, which would be impossible.

That in certain circumstances—as, for instance, the keeping by the husband of another woman in the house—a request for a resumption of matrimonial relations would be ineffectual is admitted by counsel for the husband, and in the face of this it seems to me impossible to contend that other circumstances less strong, no doubt, but still affording reasonable cause for a refusal to return are not to be taken into consideration. The learned judges of the Divisional Court did not decide, nor do I, that, where there is nothing but a turning away of the wife

followed by a genuine expression of a desire on the husband's part for her return, the desertion would continue notwithstanding. In each case the question must be determined on its own merits and here I think, with the Divisional Court, that the wife had reasonable cause for her refusal to return, and therefore the desertion was not determined. I think the appeal should be dismissed.

SARGANT, L.J.—The acts of the husband on June 16, 1922, unquestionably amounted to "desertion" in the broad sense in which the word is used in matrimonial proceedings. On that date the husband, to use the words of the learned president,

> "in language of great coarseness and with conduct amounting to something approaching brutality ordered his wife to leave the matrimonial home and cast her off."

This was done in spite of a deliberate warning by her parents at the time that the consequences of his conduct might be permanent. As the direct and anticipated result of this conduct the wife with two of the three children left the matrimonial home at Greenwich and returned to her parents' house in Wales, where she continued to reside until after the hearing of her summons by the justices in December, 1922. If this were all, the matter would be perfectly clear. The doubt, and that a serious one, is caused by the conduct of the husband in the interval. On the morrow of his wife's departure he appears to have realised the serious consequences of his conduct. He followed his wife down to Wales, attempted, though without success, to obtain an interview with her, and has since written her a number of letters full of expressions of apparently sincere repentance, and of promises of amendment for the future, if she would resume cohabitation. These offers the wife very naturally has not been content to accept. In these circumstances the question to be solved is whether in December, 1922, at the date of the hearing of the wife's summons by the justices the husband's desertion continued or whether it had been terminated by his intermediate offers. In answering this question the justices and the Divisional Court have taken into consideration, not merely the one definite act of expulsion on June 16, 1922, but the whole conduct of the husband throughout, including the long series of acts of insult and cruelty of which that act was the culmination, and the attitude of the husband since that act. Having done so, they have come to the conclusion that the husband's conduct has not cured the original desertion and has resulted in a continuing negation of any reasonably acceptable matrimonial home. In my judgment, this view is one warranted by the facts, and one with which we ought not to interfere. It was strongly urged by counsel for the husband that, though the facts might be such as to justify the wife in resisting an application for restitution of conjugal rights, it does not follow that they are sufficient to establish a continuing desertion by the husband; and it was suggested that there might be a half-way house, an intermediate position in which the one spouse may be released from the obligation of cohabitation, while the other is, nevertheless, not guilty of a continuance of desertion. The reasoning of the learned President rather tends to negative this suggestion. But, in my judgment, it is unnecessary to decide this question for the purposes of this case. The conduct of the husband here is such, taken as a whole, as to have caused and to continue to cause an exclusion of his wife from any proper matrimonial home.

Solicitors: *Douglas Wiseman & Co.; Bridges, Sawtell & Co.*, for *Gibson, Harris & Hiley*, Brynmawr.

[*Reported by* J. L. Denison, Esq., *Barrister-at-Law.*]

A

PROUT *v.* HUNTER AND OTHERS

[Court of Appeal (Bankes, Scrutton and Sargant, L.JJ.), July 29, 30, 1924]

[Reported [1924] 2 K.B. 736; 93 L.J.K.B. 993; 132 L.T. 193; 40 T.L.R. 868; 69 Sol. Jo. 49; 22 L.G.R. 746]

B

Rent Restriction—Possession—Dwelling-house let unfurnished—Sublet furnished by tenant—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (11 & 12 *Geo.* 5, *c.* 17), *s.* 12 (2), *proviso* (*i*).

By s. 12 (2) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920: "This Act shall apply to a house or part of a house let as a C separate dwelling . . . and every such house or part of a house shall be deemed to be a dwelling-house to which this Act applies: Provided that—(i) this Act shall not . . . apply to a dwelling-house bona fide let at a rent which includes payments in respect of . . . use of furniture."

A landlord let to a tenant two unfurnished flats to which the Rent Restrictions Acts applied. The tenant furnished the flats and sublet them furnished D to sub-tenants. In an action in which the landlord claimed possession of the flats against the tenant and the sub-tenants,

Held: when the flats were let furnished they came within s. 12 (2), proviso (i); the Acts thereupon ceased to apply to them; and, therefore, the landlord was entitled to possession.

E **Notes.** Considered: *Gidden* v. *Mills*, [1925] All E.R.Rep. 123. Distinguished: *Leslie* v. *Cumming*, [1926] All E.R.Rep. 408; *Elner* v. *Lascelles*, [1928] 2 K.B. 486. Applied: *Ratinsky* v. *Jacobs*, [1929] 1 K.B. 24. Considered: *Haskins* v. *Lewis*, [1930] All E.R.Rep. 227; *Fordree* v. *Barrell* (1931), 95 J.P. 141; *E. Moss, Ltd.* v. *Brown*, [1946] 2 All E.R. 557; *Baker* v. *Turner*, [1950] 1 All E.R. 834; *Stagg* v. *Brickett*, [1951] 1 All E.R. 152. Distinguished: *Francis Jackson Developments, Ltd.* v. *Hall*, [1951] 2 All E.R. 74. Considered: *Davies* v. *Gilbert*, [1955] F 1 All E.R. 415. Referred to: *Abrahart* v. *Webster*, [1925] 1 K.B. 563; *Phillips* v. *Hallahan*, [1925] 1 K.B. 756; *Thompson* v. *Rolls*, [1926] All E.R. 257; *Lloyd* v. *Cook*, *Goodge* v. *Broughton*, *Simson* v. *Miatt*, *Bartram* v. *Brown*, *Barker* v. *Hutson*, [1928] All E.R.Rep. 201; *Gee* v. *Hazleton*, [1932] 1 K.B. 179; *Palser* v. *Grinling*, *Property Holding Co., Ltd.* v. *Mischeff*, [1948] 1 All E.R. 1; *John M. Brown, Ltd.* G v. *Bestwick*, [1950] 2 All E.R. 338; *Hutchinson* v. *Jauncey*, [1950] All E.R. 165; *Anspatch* v. *Charlton Steam Shipping Co.*, [1955] 1 All E.R. 693; *Goodrich* v. *Paisner*, [1956] 2 All E.R. 176; *British Land Co.* v. *Herbert Silver* (*Menswear*), *Ltd.*, [1958] 1 All E.R. 833.

As to the letting of furnished houses, see 23 Halsbury's Laws (3rd Edn.) 748–751; and for cases see 31 Digest (Repl.) 652–655. For Increase of Rent, &c., Act, H 1920, see 13 Halsbury's Statutes (2nd Edn.) 981, and for Rent Act, 1957, see ibid., vol. 37, p. 550.

Cases referred to:

(1) *Glossop* v. *Ashley*, [1922] 1 K.B. 1; 90 L.J.K.B. 1237; 125 L.T. 842; 85 J.P. 234; 37 T.L.R. 827; 65 Sol. Jo. 695; 19 L.G.R. 593, C.A.; 31 Digest (Repl.) 673, *7687*.

I (2) *Phillips* v. *Barnett*, [1922] 1 K.B. 222; 91 L.J.K.B. 198; 126 L.T. 173; 38 T.L.R. 39; 66 Sol. Jo. 124; 20 L.G.R. 1, C.A.; 31 Digest (Repl.) 674, *7695*.

(3) *King* v. *York* (1919), 88 L.J.K.B. 839; 35 T.L.R. 256, D.C.; 31 Digest (Repl.) 634, *7427*.

Appeal from an order of the Divisional Court allowing an appeal from Lambeth County Court.

The landlord, Constance Mary Prout, claimed to recover possession of two flats, Nos. 13 and 16, Argburth Mansions, Brixton, which she had let unfurnished, on

a weekly tenancy, to the defendant, Mrs. Lavinia Hunter. All the flats were within the operation of the Rent Restrictions Acts. On Nov. 9, 1923, the landlord served on the tenant Hunter notice to quit Nos. 13 and 16 on or before Nov. 19, 1923. She also served copies of the notice on the two sub-tenants who were also defendants in the proceedings. The defendants refused to give up possession, and the landlord brought actions in the Lambeth County Court, claiming against all the defendants possession of the two flats, and mesne profits from the defendant Hunter. At the trial of the actions it was contended for the landlord that the defendant Hunter used the two flats Nos. 13 and 16 as business premises, the business being that of letting them as furnished apartments, and, consequently, that the Rent Restrictions Acts afforded the defendants no protection. The county court judge held (i) that they were not business premises, and (ii) that, notwithstanding the sub-letting as furnished flats, the defendants were entitled to the protection of the Rent Restrictions Act, 1920, and he dismissed the actions. The landlord appealed to the Divisional Court which allowed her appeal. The tenant and sub-tenants then appealed to the Court of Appeal.

Maurice Healy for the tenant and sub-tenants.
Archibald Safford for the landlord.

During the argument reference was made to s. 9 (1), s. 10, and s. 12 (2) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, which provide as follows:

"Section 9. (1) Where any person lets, or has, before the passing of this Act, let any dwelling-house to which this Act applies, or any part thereof, at a rent which includes payment in respect of the use of furniture, and it is proved to the satisfaction of the county court on the application of the lessee that the rent charged is yielding or will yield to the lessor a profit more than 25 per cent. in excess of the normal profit as hereinafter defined, the court may order that the rent so far as it exceeds such sum as would yield such normal profit and 25 per cent. shall be irrecoverable, and that the amount of any payment of rent in excess of such sum which may have been made in respect of any period after the passing of this Act shall be repaid to the lessee. (2) For the purpose of this section "normal profits" means the profit which might reasonably have been expected from a similar letting in the year ending on August 3, 1914.

Section 10. Where any person after the passing of this Act lets any dwelling-house to which this Act applies or any part thereof at a rent which includes payment in respect of the use of furniture, and the rent charged yields to the lessor a profit which, having regard to all the circumstances of the case, and in particular to the margin of profit allowed under the last preceding section of this Act, is extortionate, then, without prejudice to any other remedy under this Act the lessor shall be liable on summary conviction to a fine not exceeding £100, and the court by which he is convicted may order that the rent so far as it exceeds the amount permitted by the last preceding section of this Act shall be irrecoverable, and that the amount of any such excess shall be repaid to the lessee, but any such order shall be in lieu of any other method of recovery prescribed by this Act."

Sections 9 and 10 were repealed by the Rent Act, 1957, Sched. 8, Parts I and II. The relevant parts of s. 12 (2) are set out in the headnote.

BANKES, L.J.—This is an appeal from a decision of the Divisional Court, and it raises a short and clear point in the sense that there is no dispute as to what the issue is, but there is in reference to the issue the same difficulty in construing the Act as one has appreciated in reference to other questions. The facts are these. The landlord let a dwelling-house, to which the Rent Restrictions Acts applied, unfurnished to a tenant. That tenant, without going into occupation herself, furnished the house and sublet it as a furnished house. The landlord gave the

A tenant notice to quit and contended that, as the house was, at the time she gave the notice to quit and at the time the notice expired, let as a furnished house, the statutes did not apply, and she was, therefore, entitled to recover possession of the premises upon the expiration of the notice. The tenant, on the other hand, contended that the statutes did apply at the time of the letting to her, that it had not ceased to apply to the premises, and that the landlord was not entitled to recover B possession.

If the tenant's contention is to prevail it would result in this very extraordinary consequence, namely, that, if a landlord let a dwelling-house to which the Act applied to a tenant and that tenancy was afterwards determined, and the landlord then furnished the premises and let them to another and different tenant, it would be open to that tenant to contend that the statute still applied to the premises. C If that is the necessary result of the statute, it would, in my opinion, result in an absurdity, and I should endeavour to put some different construction upon the statute if it were possible. I think that counsel for the landlord has convinced me that not only is it possible to do so, but that it is the obviously correct construction of the statute so to read it as to come to the conclusion that it ceases to apply to this house if and as soon as it is let as a furnished house and comes within the D exception contained in the proviso to s. 12 (2) (i) of the Act.

A difficulty was pointed out in the course of the argument as to reconciling the provisions of ss. 9 and 10 of the Act of 1920 [repealed by Rent Act, 1957] with the proviso to s. 12 (2) of that Act, but I think that counsel for the landlord supplied the construction which gets over that difficulty. The proviso is in these terms:

E "Provided that—(i) this Act shall not, save as otherwise expressly provided, apply to a dwelling-house bona fide let at a rent which includes payments in respect of board, attendance, or use of furniture,"

and counsel points out that the statute operates in two directions, if I may use that expression. It operates to protect the tenant as regards the amount of rent F which he may be compelled to pay, and it also operates in protection of the tenant in reference to the right of his landlord to eject him. He points out that ss. 9 and 10 deal exclusively with the question of the rent which a landlord may properly charge in respect of a furnished house, and says that the true construction of the proviso is that the Act shall not, save as otherwise expressly provided, apply to a dwelling-house bona fide let at a rent which includes payments in respect of G furniture. The "otherwise expressly provided" is to be found in ss. 9 and 10, which, as I have said, deal only with the question of rent, so that when you are considering the question, not of rent, but of ejectment, there is no provision in the statute excepting the house from the application of this proviso. In this way the difficulty is got over which seemed a very real one in reconciling ss. 9 and 10 with the proviso in s. 12. Counsel then went on to deal with the argument in H this way. He said: The statute applies to dwelling-houses and the dwelling-houses to which it applies are to be ascertained by reference partly to the rent [now the rateable value: see Rent Act, 1957, Sched. 8, Part I] which is paid for them and partly to the use to which they are put. There is no question here in reference to the rent which is paid for the house, because the standard rent of this particular dwelling-house would bring it within the statute. The only question I is as to the use to which the flat in question is put. Under sub-s. (2) of s. 12 the statute is dealing with the question of the status of the house rather than with the occupation of a particular tenant, because it says that "this Act shall apply to a house or part of a house let as a separate dwelling" save as otherwise expressly provided, and if the true meaning of the subsection is as stated above, then, when you apply the proviso which says that

"this Act shall not . . . apply to a dwelling-house bona fide let at a rent which includes payments in respect of board, attendance, or use of furniture,"

if at the material time the status of the house is that of a house let as a furnished

house, it is immaterial that it may at some other time come within the statute, because at that other and for this purpose immaterial time its status was not that of a furnished house. A

In my opinion, that is the true construction to be put upon this difficult statute for the purpose of deciding this particular question. There is also another reason, as it seems to me, why that construction should be put upon s. 12, and that reason is to be found in s. 15 (3), which provides: B

> "Where the interest of a tenant of a dwelling-house to which this Act applies is determined, either as the result of an order or judgment for possession or ejectment, or for any other reason, any sub-tenant to whom the premises or any part thereof have been lawfully sublet shall, subject to the provisions of this Act, be deemed to become the tenant of the landlord on the same terms as he would have held from the tenant if the tenancy had continued." C

If one puts the construction upon the statute which the learned county court judge has put, assume the case where the landlord has let, and, on failure of the tenant to pay rent, brings an action and recovers possession. In those circumstances the sub-tenant would become the tenant of the landlord upon the same terms as the original tenant—the new person who has taken the house would continue at the old rent. That seems to me to lead to such an absurdity that I cannot think it is the true construction of the statute. D

Our attention has also been called to the construction contended for by the tenants in reference to the provision of the statute of 1923, but I need not refer to that. It seems to me to be quite in accordance with the decision of this court in *Glossop* v. *Ashley* (1) to deal with this particular case upon the same ground, namely, that what the Act is contemplating and dealing with, and what the court has to consider, is the status of the dwelling-house at the material time when the claim for recovery of possession is made. For these reasons I think that the decision of the Divisional Court was right and that the appeal must be dismissed. E

SCRUTTON, L.J.—I agree. During the war of 1914–18, for reasons which it is not necessary to specify, the supply of houses became unequal to the demand and the ordinary consequence under ordinary economic laws followed, namely, that landlords were able to, and did in fact, ask a much higher rent for their houses than was possible before the war. Great public feeling was aroused by the demands for rent and the ejectments for non-payment of rent, and Parliament passed Rent Restriction Acts which had two objects: (i) to prevent the rent being raised beyond the pre-war standard, and (ii) to prevent tenants being turned out of houses even if the term for which they had originally agreed to take a house had expired. That legislation was in terms limited to dwelling-houses, to the house or part of a house let as a separate dwelling, and, for some reason which we need not inquire into, Parliament thought it right to say that the provisions of the Act should not apply, "save as otherwise expressly provided," to dwelling-houses let at a rent which included payments in respect of board, attendance, or use of furniture, that is to say, they excluded furnished houses and furnished apartments from the benefits that they were conferring upon tenants of unfurnished dwelling-houses or apartments. The words "save as otherwise expressly provided" appear to refer to ss. 9 and 10, which give the tenant of furnished apartments a protection as to the rent charged by reference to the normal profit before the war; but there was nothing inserted in the Act giving tenants of furnished apartments the benefit of any provision preventing their being ejected after the expiration of their terms. F G H I

That being so, this state of facts arises in this case. A landlord has let to a tenant, unfurnished, three separate flats—that is to say, there were three separate lettings. The tenant lives in one of the flats; the other two the tenant sublets, but she sublets them furnished, and the question then arises: Are the flats which the landlord let to the tenant unfurnished, and which the tenant has let to a sub-tenant furnished, within the protection of the Act at all? The landlord says: This Act does not apply to these dwelling-houses, i.e., these flats, because they are let

A at a rent which includes payments for the use of furniture. The tenant says: You let the flats to me unfurnished, and, therefore, they are within the Act. It is quite true that as regards my sub-tenant I can turn him out without being fettered by the Act, because as between me and my sub-tenant the flat is not within the Act, but as between you and me it is. The matter is complicated by a provision in the Act [see s. 12 (6) of the Act of 1920] that when the Act has become B applicable to a dwelling-house it shall continue to apply thereto whether or not the dwelling-house continues to be one to which this Act applied. What Parliament exactly meant by those latter words is not clear. We have had that section before us already in a case where three dwelling-houses were altered and converted into one factory: *Phillips* v. *Barnett* (2), and counsel for the tenants there went so far as to argue that once the Act applies to a building and land, whatever happened C to the building, even if it were pulled down and another building was erected, the effect of s. 12 (6) was that the land and whatever was erected upon it continued within the Act. We declined to accede to that argument, and I think we said that where there was no longer the dwelling-house which had been originally let, but something different, s. 12 (6) was of no use to the tenant and the premises were outside the Act. I think we should have come to the same conclusion if the facts D had been that what had been a dwelling-house was, without structural alteration, re-let entirely as business premises, and I think the reason would have been the same—that there was no longer a dwelling-house to which the Act applied, but something different, namely, business premises. I think, following that reasoning, that we should also say in the present case that there is no longer a dwelling-house which is within the Act, but there is a furnished house or furnished apartments, E to which the Act has expressly said its provisions shall not apply.

There are other reasons in support of that view with regard to the odd consequences which would follow if it were not so. If, according to the Act, the landlord turns out the tenant, any sub-tenant holds from the original landlord upon the terms upon which he originally held from the tenant who was his landlord, and the effect of that provision in such a case at the present seems to me to be F that, if the landlord turned out the tenant for non-payment of rent, the sub-tenant would at once hold of him furnished apartments at the furnished apartments rent, and by the express terms of the Act the landlord would be unable to turn the sub-tenant out, because the Act did not apply to him. To suggest either that the sub-tenant holds the furnished apartments, but holds them at a rent applicable to unfurnished premises, or that in some way he has got himself out of the pro- G visions of the Act which say that the Act shall not apply to a furnished dwelling-house, appear to me to be impossible consequences in view of the wording of the Act. I think the decision that I have indicated also follows the lines upon which this court decided *Glossop* v. *Ashley* (1). In that case there was a tenancy and a sub-tenancy, and the question was which of the two was to decide the amount of the standard rent. I certainly took the view, and I do not think my brothers H dissented from it upon the particular facts of the case, although they very cautiously did not go as far as I did in stating what they thought was the principle, namely, that the Act looks at the occupying tenant, the rent paid by him, and the character of his occupation, and not at the various stages of tenancy of people who do not occupy up to the ultimate landlord. In this case I also think that one should look at the occupying tenant of the premises, the sub-tenant who holds them I furnished and the nature of his tenancy—that is, to that which is the matter which the Act does or does not intend to protect, and for reasons which it is quite immaterial to discuss or even understand. Parliament did not give protection to persons who held furnished apartments except in the matter of rent, and did not give them the protection in the matter of the reasons for which alone they may be ejected.

For these reasons I have come to the same conclusion as the Divisional Court arrived at, namely, that the landlord here can eject his tenant from these premises without being subject to the restrictions imposed by the Act, and the only matter

in which I differ from the Divisional Court is that BAILHACHE, J., at any rate, would have decided the other way but for the decision in *Glossop* v. *Ashley* (1). I think I should have decided the same way even if *Glossop* v. *Ashley* (1) had not been in existence. I think that decision is right.

SARGANT, L.J.—I am of the same opinion. It is to be observed that, in the words of SANKEY, J., in *King* v. *York* (3), which I do not understand have been dissented from, "the Act applies to objects, not to persons; it operates in rem and not in personam," and in considering the operation of the Act it would be a mistake to attach too much importance to the actual terms of the tenancy between the two persons between whom the litigation arises. The Act applies, of course, only to houses under a certain rent and only applies to dwelling-houses, and the term "dwelling-houses" has reference only to unfurnished dwelling-houses. In determining the status of the house in question for the purpose of seeing whether it comes within the Act or not, it is, or may be, necessary, where there is a large number of tenancies and sub-tenancies affecting the house, to see from the evidence which of those tenancies is the really material one to be considered. In *Glossop* v. *Ashley* (1) it was held that, at any rate for the purpose of determining the rental value of the house, the material bargain was the bargain that had been made with the occupying tenant, and that upon the ground—at any rate so far as SCRUTTON, L.J., is concerned, and I desire to concur with him—that the object of the Act was primâ facie to protect the occupying tenant. If the status of the house as regards the rent is to be ascertained by looking at the position of the occupying tenant, it seems to me that here there is quite as much reason, perhaps more reason, to determine the status of the house with regard to whether the tenant can be evicted by considering the position of the occupying tenant. In each of the present cases the occupying tenant is a person to whom a house has been let furnished, and the person who comes here and asks to be protected under the Act is in no sense an occupying tenant, but is a person who, no doubt for good reasons, has taken the flat or the dwelling-house for the express purpose of sub-letting it at a profit furnished—a perfectly innocent and proper thing to do, but one which, in my view, is not protected by the Act. The dwelling-house here must, in my judgment, be considered with reference to its actual occupation as being therefore a dwelling-house let at a rent which included payments in respect of furniture and accordingly as being outside the operation and protection of the Act. In my view the appeal should be dismissed.

Appeal dismissed.

Solicitors: *H. I. Sydney & Co.*; *Dallimore, Pilbrow & Co.*

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

COCKBURN *v.* SMITH

[Court of Appeal (Bankes, Scrutton and Sargant, L.JJ.), February 29, 1924]

[Reported [1924] 2 K.B. 119; 93 L.J.K.B. 764; 131 L.T. 334; 40 T.L.R. 476; 68 Sol. Jo. 631, C.A.]

Landlord and Tenant—Liability of landlord for failure to repair—Block of flats—Roof retained in occupation of landlord—Damage to tenant of flat by escape of water from roof.

In 1920, under an agreement between the plaintiff and the predecessors of the defendant, as landlords, the plaintiff became a quarterly tenant of a flat on the top floor of a block of flats. There was no demise of any part of the roof of the block. The landlords undertook to keep the entrance hall, staircases, passages, and landings in good repair. In June, 1921, signs of damp appeared in the bedroom in which the plaintiff slept, and, when paying the June rent, she notified the landlords' agents of what had occurred. No steps were taken by them to ascertain the cause of the damp or to remedy it. In October, 1921, there was an escape of water from a gutter which caused serious damage to the plaintiff's flat. As a result of living in damp surroundings the plaintiff suffered from rheumatism. In an action by her against the landlords,

Held: the landlords were under a duty to take reasonable care to ensure that a part of the whole premises retained by them in their occupation and under their control were not in such a condition as to cause damage to parts demised to others; the covenant by the landlords to keep the passages, staircases, &c., in repair could not, by the application of the maxims expressio unius exclusio alterius or expressum facit cessare tacitum; and, therefore, the plaintiff was entitled to succeed.

Notes. Considered: *Cunard* v. *Antifyre, Ltd.*, [1932] All E.R.Rep. 558; *Bishop* v. *Consolidated London Properties, Ltd.*, [1933] All E.R.Rep. 963. Applied: *Sleafer* v. *Lambeth Met. B.C.*, [1959] 3 All E.R. 378. Referred to: *Kiddle* v. *City Business Premises, Ltd.*, [1942] 2 All E.R. 216; *Prosser & Son, Ltd.* v. *Levy*, [1955] 3 All E.R. 577.

As to a landlord's liability to a person in possession of a part of premises of which the landlord also holds part, see 23 Halsbury's Laws (3rd Edn.) 562, 563, 573, 574. For cases see 31 Digest (Repl.) 97 et seq., in particular p. 104.

Cases referred to:

(1) *Hargroves, Aronson & Co.* v. *Hartopp*, [1905] 1 K.B. 472; 74 L.J.K.B. 233; 92 L.T. 414; 53 W.R. 262; 21 T.L.R. 226; 49 Sol. Jo. 237, D.C.; 31 Digest (Repl.) 103, *2482*.

(2) *Hart* v. *Rogers*, [1916] 1 K.B. 646; 85 L.J.K.B. 273; 114 L.T. 329; 32 T.L.R. 150; 31 Digest (Repl.) 104, *2483*.

(3) *Miller* v. *Hancock*, [1893] 2 Q.B. 177; 69 L.T. 214; 57 J.P. 758; 41 W.R. 578; 9 T.L.R. 512; 37 Sol. Jo. 558; 4 R. 478, C.A.; 31 Digest (Repl.) 100, *2471*.

(4) *Fairman* v. *Perpetual Investment Building Society*, [1923] A.C. 74; 92 L.J.K.B. 50; 128 L.T. 386; 87 J.P. 21; 39 T.L.R. 54, H.L.; 31 Digest (Repl.) 101, *2472*.

(5) *Carstairs* v. *Taylor* (1871), L.R. 6 Exch. 217; 40 L.J.Ex. 129; 19 W.R. 723; 31 Digest (Repl.) 103; *2481*.

(6) *Ross* v. *Fedden* (1872), L.R. 7 Q.B. 661; 41 L.J.Q.B. 270; 26 L.T. 966; 36 J.P. 791; 36 Digest (Repl.) 164, *878*.

(7) *Gill* v. *Edouin* (1894), 71 L.T. 762; 11 T.L.R. 93; 39 Sol. Jo. 98; 15 R. 109; affirmed (1895), 72 L.T. 579; 11 T.L.R. 378, C.A.; 36 Digest (Repl.) 295, *411*.

(8) *Blake* v. *Woolf*, [1898] 2 Q.B. 426; 67 L.J.Q.B. 813; 79 L.T. 188; 62 J.P. 659; 47 W.R. 8; 42 Sol. Jo. 688, D.C.; 31 Digest (Repl.) 99, *2464*.

(9) *Carlisle Café Co.* v. *Muse Bros. & Co.* (1897), 67 L.J.Ch. 53; 77 L.T. 515; 46 W.R. 107; 42 Sol. Jo. 67; 31 Digest (Repl.) 26, *1844.*

(10) *Colebeck* v. *Girdlers Co.* (1876), 1 Q.B.D. 234; 45 L.J.Q.B. 226; 34 L.T. 350; 40 J.P. 596; 24 W.R. 577; 31 Digest (Repl.) 378, *5067.*

(11) *Pomfret* v. *Ricroft* (1669), 1 Wms. Saund. 321; 2 Keb. 543, 569; 1 Sid. 429; 1 Vent. 26, 44; 85 E.R. 454; 31 Digest (Repl.) 133, *2713.*

(12) *Rickards* v. *Lothian*, [1913] A.C. 263; 82 L.J.P.C. 42; 108 L.T. 225; 29 T.L.R. 281; 57 Sol. Jo. 281, P.C.; 36 Digest (Repl.) 37, *177.*

(13) *Cavalier* v. *Pope*, [1906] A.C. 428; 75 L.J.K.B. 609; 95 L.T. 65; 22 T.L.R. 648; 50 Sol. Jo. 575, H.L.; 31 Digest (Repl.) 386, *5124.*

(14) *Rylands* v. *Fletcher* (1868), L.R. 3 H.L. 330; 37 L.J.Ex. 161; 19 L.T. 220; 33 J.P. 70 H.L.; affg. S.C. sub nom. *Fletcher* v. *Rylands* (1866), L.R. 1 Exch. 265; revsg. (1865), 3 H. & C. 774; 36 Digest (Repl.) 282, *334.*

(15) *Dobson* v. *Horsley*, [1915] 1 K.B. 634; 84 L.J.K.B. 399; 112 L.T. 101; 31 T.L.R. 12, C.A.; 31 Digest (Repl.) 101, *2474.*

Appeal from an order of GREER, J., in a non-jury action.

The plaintiffs were Gertrude Harriet Cockburn and D. G. Cockburn, an infant suing by her mother and next friend. On Sept. 13, 1915, the elder plaintiff entered into an agreement in writing whereby she became tenant to the then owners of a flat, No. 16, Prebend Mansions, Chiswick, for a year certain. She continued to occupy the flat from year to year till Mar. 23, 1920, on which date she became a quarterly tenant at an increased rent. On Dec. 31, 1920, the defendants became lessees of the whole building, Prebend Mansions, for 81½ years from Dec. 25, 1917, and owners of the reversion on the tenancy of the elder plaintiff, who, in March, 1921, attorned tenant to the defendants by paying her rent to them. By the agreement of Sept. 13, 1915, the landlords agreed to let

> "all that suite of rooms known as No. 16, Prebend Mansions, High Road, Chiswick . . . together with coal bunker No. 16 in the building of which the premises form part."

The tenant agreed, among other things, not to allow persons or children under her control to loiter in the entrance hall or passages or on the landings or stairs of the building, and not to suffer the entrance hall, passages, landings, or stairs to be littered, but to use them only for the purpose of ingress, egress, and regress, and not to leave or suffer to be left any obstacle in or upon them; to keep the water closets, bath, lavatory basins, sink, cisterns, and all waste and other pipes connected with the premises clean, and open and in proper repair, and to be responsible for all damage occasioned to the premises and the other parts of the building through improper use or the bursting, overflowing, or stopping up of the said water closets, bath, lavatory basins, sink, cisterns, and water pipes; to keep all flues and chimneys regularly swept, restore broken windows and make good all other damage to the premises caused by her or her servants; and to deliver up the premises at the expiration of the tenancy in as good order and condition as the same were in at the date of the agreement. The agreement contained these further provisions:

> "12. Subject to the tenant duly and punctually paying the said rent and observing and fulfilling all the agreements on her part herein contained the landlords will keep the entrance hall staircases passages and landings sufficiently lighted and in good repair and will pay all rates taxes and charges (including water rate but excluding the gas and electric rate) payable in respect of the said premises. 13. The landlords shall not be responsible for any losses or injuries arising from . . . the negligence of any of the other tenants of the building or the negligence or misfeasance of any of the landlords' servants."

Clause 14 contained a proviso for re-entry, and proceeded:

> "But so long as the tenant continues to observe and perform the agreements and conditions herein contained and on the tenant's part to be observed and performed the tenant may quietly hold and enjoy the premises during the

said term without any lawful interruption by the landlords or any person claiming through under or in trust for the landlords."

The elder plaintiff's flat was situated on the top floor of Prebend Mansions. It consisted of a dining-room in front, a bedroom behind it, a kitchen and offices behind that, then a small bedroom, and the elder plaintiff's bedroom at the back. During the tenancy of the flat considerable damage was done to the flat owing to the stop-end of a gutter on the roof having rotted and dropped out, with the result that some of the rain-water from the roof, instead of passing down the outlet pipe, flowed on to the wall of the dining-room of the flat. Further damp, attributable to this defect and to another defect of a similar nature, was occasioned to other rooms in the flat. The first signs of damp appeared in June, 1921, and in paying her June rent the elder plaintiff gave notice to the landlords' agents of what had occurred, but no steps were taken to repair the roof. There was a further escape of water in October, causing serious damage to the plaintiff's flat. The elder plaintiff communicated again with the office of the defendants' agents, stating what had occurred, but no steps were taken until December when the defendants' agent visited the flat. On Jan. 2, 1922, a builder began work on the roof and gutters of the mansions. The stop-end of the gutter was replaced in the first week in January, but the gutter which ran along the roof above the elder plaintiff's flat was not cleaned out until the end of January or the beginning of February. In December the elder plaintiff was taken ill, and, according to the diagnosis of her doctor, she was suffering from rheumatism, due to living in damp surroundings. She was advised by her doctor to leave the flat. But, notwithstanding her doctor's advice, the elder plaintiff continued to occupy the flat with her daughter. By the middle of March her daughter was found to be suffering from rheumatism. The plaintiffs brought an action against the landlords. The elder plaintiff sought to recover damages for the loss sustained by her by reason of damages caused to her furniture and injury to her health, which she alleged were due to the breach by the landlords of an implied term in the contract of tenancy to keep the outside of the building, in which the flat was contained, together with the roof, guttering, and gutter pipes in good repair and condition during the tenancy, and, alternatively, she alleged that the damages were occasioned by a breach of duty independent of the contract arising from the fact that, as landlords, the defendants retained control of the outside of the premises and of the roof, guttering, and gutter pipes. The daughter also claimed damages against the defendants for negligence in failing to take reasonable steps to see that the roof, guttering, and gutter pipes were kept in good order and repair. GREER, J., found that the illness from which the elder plaintiff and her daughter suffered was due to the damp surroundings in which they lived after the walls had become saturated in October, but that it was not reasonable for them to remain there as long as they did, and that, if the elder plaintiff had acted reasonably, she would have obtained accommodation elsewhere, and would thereby have lessened her own damage, and probably have avoided the damage suffered by her daughter. He held that, in the absence of any term in the contract, express or implied, to that effect, the landlords were under no obligation to keep in repair the roof and the gutters or any part of the premises which were not included in the tenancy agreement. The defendants were, therefore, not liable to the plaintiff for the damage which she suffered in consequence of the defective roof and guttering, nor were they liable for the damage suffered by the plaintiff's daughter, with whom there was no contract of tenancy. The elder plaintiff appealed.

Holman Gregory, *K.C.*, and *S. H. Lamb*, for the plaintiff, referred to *Hargroves, Aronson & Co.* v. *Hartopp* (1), *Hart* v. *Rogers* (2), *Miller* v. *Hancock* (3), *Fairman* v. *Perpetual Investment Building Society* (4), *Carstairs* v. *Taylor* (5), *Ross* v. *Fedden* (6), *Gill* v. *Edouin* (7), *Blake* v. *Woolf* (8).

Sir H. Maddocks and *B. L. O'Malley*, for the defendants, referred to *Carlisle*

Café Co. v. *Muse Bros. & Co.* (9), *Colebeck* v. *Girdlers Co.* (10), *Pomfret* v. *Ricroft* (11), *Rickards* v. *Lothian* (12). A

BANKES, L.J.—The plaintiff, who held a flat from the defendants, complains of injury to her health by reason of water penetrating the walls of her flat through breach of duty on the part of her landlords. GREER, J., has held that the landlords were not liable, although he was of opinion that they and their servants or agents were negligent in not having attended to the defective gutter between the wall of the plaintiff's flat and the wall of the adjoining premises. In case he should prove wrong in his decision on the question of liability, he awarded £205 as the damages suffered by the plaintiff. B

I want to make it plain at the outset that this is not a case of a letting of the whole house, where, without an express covenant or a statutory obligation to repair, the landlords would clearly be under no liability to repair any part of the demised premises, whether the required repairs were structural or internal, and whether the landlords had or had not notice of the want of repair. In the present case the plaintiff took only part of the building—the top flat. What she took is quite clear from the words of the agreement of tenancy. It was a suite of rooms, No. 16, Prebend Mansions, together with coal bunker No. 16 in the building of which the premises formed part. The contention that because the rooms include the walls, therefore, they include the roof also, is one to which I cannot assent. On the construction of this document, and assuming that there were other tenants holding on similar terms, it is clear that the landlords did not demise the roof to anyone, but kept it in their own control entirely, and, therefore, it does not make much difference whether we are considering the roof of the plaintiff's flat, or the roof of the adjoining flat, which, I assume, was occupied by another tenant on similar terms, and the roof of which was also retained by the landlords in their own occupation and control. The trouble arose from a defect in the guttering in the roof of the building which contained the plaintiff's flat and the adjoining flat, where the two buildings join. A down spout takes water from the roof of the building, but the guttering became defective and choked from want of cleansing, and water thus escaped, penetrated the wall of the plaintiff's flat, and made it so damp that her health was seriously affected. C D E F

In these circumstances the question is what duty the landlords owed to the tenant in relation to this defective guttering. It cannot now be suggested that there was any agreement, express or implied, which can accurately be described as an agreement to repair the roof or the guttering, but there is a line of authorities to show that a landlord is under an obligation to take reasonable care that the premises retained in his occupation are not in such a condition as to cause damage to the parts demised to others. In some of these authorities it was not necessary to decide the point expressly, because, in the opinion of the court, there was no want of reasonable care; but three of these cases indicate that, if it had been necessary to define the duty of the landlord, it would have been defined in the terms I have suggested. In *Carstairs* v. *Taylor* (5), where a rat made a hole in a rain-water cistern on an upper floor occupied by the landlord, who had let the lower floor to the plaintiff, and water escaping from the cistern wetted the tenant's goods, the Court of Exchequer held that, as there was no want of reasonable care on the landlord's part, the tenant could not recover. MARTIN, B., said (L.R. 6 Exch. at p. 222): G H I

> "Now I think that one who takes a floor in a house must be held to take the premises as they are, and cannot complain that the house was not constructed differently. Probably the defendant was under a liability to use reasonable care in keeping the roof secure, but he cannot be held responsible for what no reasonable care and vigilance would have provided against."

Much the same language is used by WRIGHT, J., in *Gill* v. *Edouin* (7). In *Ross* v. *Fedden* (6), where the facts were similar, BLACKBURN, J., said (L.R. 7 Q.B. at p. 661):

A "Negligence is negatived, and probably, if the defendants had got notice of the state of the valve and pipe and had done nothing, there might have been ground for the argument that they were liable for the consequences."

But the point was expressly decided in *Hargroves, Aronson & Co.* v. *Hartopp* (1), where damage was caused by water overflowing from a gutter which had become B stopped up, and the landlord, having notice of a stoppage, did nothing to remove the obstruction. The court held that the landlord must take reasonable care to prevent that portion of the premises which was kept under his own control from causing damage in respect of those portions which were demised to the tenant and that the plaintiffs had established the liability of the defendants. The authority of that case has been recognised in *Cavalier* v. *Pope* (13) and *Fairman* v. *Perpetual* C *Investment Building Society* (4).

Whether this duty arises out of a contract between the parties, or is an instance of the duty imposed by law upon an occupier of premises to take reasonable care that the condition of his premises does not cause damage, I prefer not to decide. LORD BUCKMASTER speaks of it as a contractual obligation ([1923] A.C. at p. 81), and GREER, J., as arising out of contract. There is much to be said for that view, D but it is an immaterial question. If the duty is imposed by law, the point on which GREER, J., decided in favour of the landlord in the present case does not arise, and the tenant's right to damages is clear as soon as it is established that the landlords were guilty of negligence. On that question of negligence it is impossible to interfere with the learned judge's conclusion. In October, 1921, the landlords or their agents had notice of the state of the walls which called for E immediate attention, but nothing was done until the following February. Counsel for the landlords relied on *Blake* v. *Woolf* (8) as exempting them from liability, because they communicated to a firm of builders the state of things. But mere communication is not enough to exonerate them. If the builder takes the work in hand the employer may be absolved on the principle of *Blake* v. *Woolf* (8), but that case has no application where the builder does nothing, and where the F employers know that their communication is producing no result, I have no difficulty in finding that they are negligent. If they are liable the damages have been assessed by the learned judge at £205.

The remaining question arises on the assumption that the duty upon the landlords arises out of contract. It is said that the landlords have expressly agreed to do certain repairs—namely, to keep the entrance hall, staircases, passages, and G landings in good repair—and that this must be the full extent of their liability on the principle that expressio unius exclusio alterius or, as the learned judge has held, by an application of the maxim expressum facit cessare tacitum. I cannot agree that either maxim applies in this case. No doubt, if a landlord demises premises to a tenant, there is ground for arguing that the tenant, expressly agreeing to do certain repairs to the demised premises, is not liable to do other repairs. In the H present case the landlords have demised the suite of rooms with the usual fittings and appurtenances, and, although they have not expressly granted any licence to use stairs or passages, they have, by restricting the user of them, impliedly granted such a licence. They have expressly undertaken a corresponding obligation to keep them in a condition in which they can be used. But the roof of the building, I the means of excluding rain and water and of keeping the flat habitable, is not among the premises expressly or impliedly demised or granted. In my opinion, express agreements concerning premises demised or granted do not exclude tacit agreements concerning matters which are neither demised nor granted, and I cannot think either party contemplated that because the landlords had agreed to keep the entrance hall, staircases, passages, and landings sufficiently lighted and in good repair, they should therefore be relieved of all duty to take reasonable care that the roof and gutters should not be in such a condition as to render the demised premises uninhabitable. For these reasons I think the appeal should be allowed.

SCRUTTON, L.J.—The habit of living in flats contained in one building and served by a common staircase gives rise to difficult questions concerning the responsibility for accidents happening on the staircases to tenants of the flats and tradesmen and visitors frequenting them. These questions were discussed and elucidated in *Fairman* v. *Perpetual Investment Building Society* (4). The present case raises the question of the landlords' liability for defects in the common guttering in the common roof covering the building which contains the flats. The plaintiff occupies one of the top flats in a large building covered by a roof which is provided with guttering for conducting rain-water for the common benefit of all the flats. In June, 1921, she gave notice to the landlords that signs of damp had appeared in one of her bedrooms. In October the signs of damp increased and spread to the dining-room and other rooms. This incursion was found to be due to the fact that part of the guttering, the stop-end, as it is called, had fallen away, so that water which ought to have found its way down the outlet pipe escaped and ran down the side of the wall containing the plaintiff's flat. As soon as this happened notice was given to the landlords, but nothing was done till January. From October till the end of January water was running down the wall and entering the flat. The plaintiff's health was injured, and she sustained damage which the learned judge has assessed at £205.

In my opinion, there is enough here to impose a liability upon the landlords at common law. They have constructed for their own purposes an artificial system for collecting water and have allowed the water to escape owing to a defect in their system of which they have had notice and to remedy which they have done nothing. If this had happened between two adjoining houses and water had escaped to one of them owing to a defect in an artificial construction upon the other, it is admitted that the case would have fallen within the principle of *Rylands* v. *Fletcher* (14). But, as was pointed out by WRIGHT, J., in *Gill* v. *Edouin* (7) (71 L.T. at p. 763), there are exceptions which modify the rule in *Rylands* v. *Fletcher* (14), and reduce the duty of insuring against damage to an obligation to take reasonable care that damage does not occur. One of these exceptions is where the premises on which the artificial construction is erected and the premises damaged by the escape of water are in one house and the construction is erected for the use of both premises. In this case the occupier of the latter premises takes the ordinary risks of damage from escaping water. This is the fourth exception mentioned in *Gill* v. *Edouin* (7), of which *Ross* v. *Fedden* (6) is an example; and it cannot be said that the landlord who collects the water must keep it in at his peril. *Ross* v. *Fedden* (6) and *Hargroves, Aronson & Co.* v. *Hartopp* (1) justify me in holding that in cases of this class the person who maintains the artificial construction is liable for the consequences of escaping water if after notice of a defect he omits to use reasonable care to repair it.

These cases rest on the liability which arises from artificial creation of a danger. In *Hart* v. *Rogers* (2), an action for damages caused by water leaking through the roof of a flat, the plaintiff recovered on the footing of an absolute duty upon the landlord, and not merely a duty to take reasonable care, to repair the roof. The state of the authorities then was that the decision of the Court of Appeal in *Miller* v. *Hancock* (3), though doubted and explained, had not been overruled and the process of explaining it implied a failure on the part of BOWEN, L.J., to express in precise language his views on elementary principles. It was not brought to the attention of the judge who decided *Hart* v. *Rogers* (2) that the Court of Appeal in *Dobson* v. *Horsley* (15) had explained *Miller* v. *Hancock* (3) and he thought he was still bound by that decision. *Miller* v. *Hancock* (3) has now been overruled in *Fairman's Case* (4), and *Hart* v. *Rogers* (2) is no longer an authority that the landlord in a like case is under an absolute duty to keep the roof in repair. In my view, his duty may be based upon that modified doctrine of *Rylands* v. *Fletcher* (14), which is applicable where he retains in his control an artificial construction which becomes a source of danger to his tenant. I reserve the question whether this is also a contractual liability arising out of the relation of landlord and tenant.

In either case there is ample ground for holding the landlords liable. The appeal must, therefore, be allowed.

SARGANT, L.J.—I agree. The first thing to be considered is the subject-matter of the demise. That is part of a building which in its entirety contains four tiers of flats some of which are placed side by side. The demised portion is described as

> "all that suite of rooms known as No. 16, Prebend Mansions . . . together with coal bunker No. 16 in the building of which the premises form part."

A common roof extends over those flats, which are laterally contiguous; therefore, there is no real ground for contending that because one of the flats was a top flat the demise of that flat included the portion of the roof which covered it and with it the flats below. The demise included only the suite of rooms. The roof after that demise remained in the occupation of the landlords as it had been before the demise. Defects arose in the guttering. I agree that the landlords were guilty of negligence in making no effort to remedy the defect. As a result the flat became damp, and the appellant suffered injury and incurred expense in consequence.

Hargroves, Aronson & Co. v. *Hartopp* (1), which has received the approval of the House of Lords, is a direct authority that the tenant of a flat is in these circumstances entitled to recover; but it is not quite clear whether the landlord's duty is founded on some implied covenant or obligation in the contract of tenancy or from the circumstances that the landlord retains physical possession of the roof and lets the flat to the tenant. In my view, it is not necessary to decide that difficult question. The view most favourable to the landlords is that their liability arises from an implied covenant. The learned judge has dealt with the case on that footing, and I will do the same, only observing that, if the obligation arises from the fact of retaining possession of the roof, that obligation cannot be displaced by any express covenant affecting the premises the subject-matter of the contract of tenancy. Assuming that there is an implied contract arising out of the agreement of tenancy, that may be displaced by an express contract relating to the same subject, the maxim Expressio unius exclusio alterius, or Expressum facit cessare tacitum, would be applicable. But here there is no express contract relating to the roof. The express stipulations relate only to the subject-matter demised and the methods of access thereto; and when it is decided that the roof is outside the demise and a separate hereditament which remains in the possession of the landlord, those maxims cease to apply, because there is no express contract affecting it, while there is ex hypothesi an implied contract affecting it—an implied contract which is not displaced by express contracts relating to subject-matters which are within the demise. Therefore, the learned judge was wrong in holding that an express contract relating to the staircases and approaches involved any modification or exclusion of the implied contract relating to a different subject-matter—namely, the roof and the guttering. He has assessed the plaintiff's damages at £205 and she should have judgment for that amount.

Appeal allowed.

Solicitors: *Williams & Tremayne*; *Maude & Tunnicliffe*, for *Taylor, Simpson & Mosley*, Derby.

[*Reported by* W. C. SANDFORD, ESQ., *Barrister-at-Law.*]

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P. SAMUEL & CO., LTD. *v.* DUMAS

[HOUSE OF LORDS (Viscount Haldane, L.C., Viscount Cave, Viscount Finlay, Lord Sumner and Lord Parmoor), November 2, 6, 8, December 10, 11, 1923, February 25, 1924]

[Reported [1924] A.C. 431; 93 L.J.K.B. 415; 130 L.T. 771; 40 T.L.R. 375; 68 Sol. Jo. 439; 16 Asp.M.L.C. 305; 29 Com. Cas. 239, H.L.]

B

Insurance—Marine insurance—Institute Time Clauses—Warranty—Limitation of insurance on freight—Inclusion of insurance against war risks—Insurable interest—Interest of mortgagee of ship—Perils of the sea—Fortuitous accident or casualty—Scuttling of vessel—Cause of loss scuttling, not resulting incursion of water.

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By a mortgage, consisting of an agreement and a statutory first mortgage which was to be registered in Greece, but, in fact, never was, a shipowner purported to mortgage his ship to secure moneys due, and to become due, upon a current account. He assigned to the mortgagee all the shares in the ship and all present and future policies on the ship or freight, and he covenanted to insure the ship and freight and keep them insured and to deliver to the mortgagee the policies duly endorsed, or give the mortgagee a broker's guarantee that he held the policies solely for the mortgagee, and he appointed the mortgagee his attorney in his name to sue for all insurance moneys on the ship. The owner covenanted to pay the sums for the time being due and mortgaged the whole interest of the ship free from incumbrances. The plaintiffs, who were shipbrokers, took out, in pursuance of the covenant in the deed, a time policy for twelve months "and/or as agents as well in their own name as for and in the name of all and every other person or persons to whom the same doth, may, or shall appertain in part or in all" against perils of the sea, "and of all other perils, losses and misfortunes that . . . shall come to the hurt, detriment, or damage of the said . . . ship, &c., or any part thereof." The policy included No. 22 of the Institute Time Clauses which contained this warranty: "freight . . . insured for twelve months or other time.—Any amount not exceeding 25 per cent. of the value of hull and machinery as stated herein, but if the insurance be for less than twelve months, the 25 per cent. to be proportionately reduced." In fact hull and machinery were insured for £110,000 and freight for £27,500, both for twelve months, against marine risks, and hull and machinery for £110,000 and freight for £27,500 against war risks, the latter insurances being for six months only. During the currency of the policy the ship was scuttled with the connivance of the owner, but not with the connivance or complicity of the mortgagee. In an action on the policy by the plaintiffs on behalf of the mortgagee,

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Held, by VISCOUNT CAVE, L.C., VISCOUNT FINLAY and LORD PARMOOR, VISCOUNT HALDANE expressing no opinion and LORD SUMNER dissenting: (i) the mortgagee was "interested" in the adventure within s. 5 (2) of the Marine Insurance Act, 1906, and so had an insurable interest within s. 5 (1); (ii) although the mortgagee and the shipowner were interested in the same adventure their interests were not inseparably connected and the mortgagee was not a party to the owner's fraud, and, accordingly, the misconduct of the owner did not avoid the policy as against the mortgagee; but (iii) the word "insured" in the warranty in cl. 22 of the Institute Time Clauses covered all kinds of marine insurance, war risks as well as marine risks, and so the insurance of freight against war risks for £27,500 for six months only constituted a breach of the warranty; and (iv) the term "perils of the sea" referred only to fortuitous accidents and casualties; the scuttling of the vessel, and not the resultant

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incursion of water was the real and effective cause of the loss of the vessel; and, therefore, the mortgagee was not entitled to recover.

Small v. *United Kingdom Marine Mutual Insurance Association* (1), [1897] 2 Q.B. 311, overruled.

Notes. Distinguished: *Lind* v. *Mitchell*, [1928] All E.R.Rep. 447. Considered: *Pateras* v. *Royal Exchange Assurance* (1934), 78 Sol. Jo. 569; *Canada Rice Mills, Ltd.* v. *Union Marine and General Insurance Co.*, [1940] 4 All E.R. 169. Referred to: *The Christel Vinnen*, [1924] P. 208; *La Compania Martiartu* v. *Royal Exchange Assurance Corpn.* (1924), 131 L.T. 741; *Banco de Barcelona* v. *Union Marine Insurance Co.* (1925), 30 Com. Cas. 316; *Wadsworth Lighterage and Coaling Co., Ltd.* v. *Sea Insurance Co.* (1929), 35 Com. Cas. 1; *Forestal Land, Timber and Railways Co.* v. *Rickards, Middows, Ltd.* v. *Robertson, Howard Bros. & Co.* v. *Kahn*, [1940] 4 All E.R. 96; *Rickards* v. *Forestal Land, Timber and Railways Co., Robertson* v. *Middows, Ltd., Kahn* v. *Howard Bros. & Co.*, [1941] 3 All E.R. 62; *Yorkshire Dale Steamship Co.* v. *Minister of War Transport*, [1942] 2 All E.R. 6; *Atlantic Maritime Co. Inc.* v. *Gibbon*, [1953] 2 All E.R. 1086.

As to the perils insured against by a marine policy, see 22 Halsbury's Laws (3rd Edn.) 73 et seq.; and as to insurable interest, see ibid., p. 96 et seq. For cases see 29 Digest 102 et seq., 197 et seq.

Cases referred to:

(1) *Small* v. *United Kingdom Marine Mutual Insurance Association*, [1897] 2 Q.B. 42; 66 L.J.Q.B. 412; 76 L.T. 326; 13 T.L.R. 290; 8 Asp.M.L.C. 255; 2 Com. Cas. 133; affirmed, [1897] 2 Q.B. 311; 66 L.J.Q.B. 736; 76 L.T. 828; 46 W.R. 24; 13 T.L.R. 514; 8 Asp.M.L.C. 293; 2 Com. Cas. 267, C.A.; 29 Digest 110, *656*.

(2) *Reischer* v. *Borwick*, [1894] 2 Q.B. 548; 63 L.J.Q.B. 753; 71 L.T. 238; 10 T.L.R. 568; 7 Asp.M.L.C. 493; 9 R. 558, C.A.; 29 Digest 206, *1650*.

(3) *Leyland Shipping Co.* v. *Norwich Union Fire Insurance Society, Ltd.*, [1918] A.C. 350; 87 L.J.K.B. 395; 118 L.T. 120; 34 T.L.R. 221; 62 Sol. Jo. 307; 14 Asp.M.L.C. 258, H.L.; 29 Digest 229, *1858*.

(4) *Mountain* v. *Whittle*, [1921] 1 A.C. 615; 90 L.J.K.B. 699; 125 L.T. 193; 65 Sol. Jo. 415; 15 Asp.M.L.C. 255, H.L.; 29 Digest 127, *799*.

(5) *Wilson, Sons & Co.* v. *Xantho* (*Cargo Owners*) (1887), 12 App. Cas. 503; 56 L.J.P. 116; 57 L.T. 701; 36 W.R. 353; 3 T.L.R. 766; 6 Asp.M.L.C. 207, H.L.; 29 Digest 197, *1567*.

(6) *Hamilton, Fraser & Co.* v. *Pandorf & Co.*, (1887), 12 App. Cas. 518; 57 L.J.Q.B. 24; 57 L.T. 726; 52 J.P. 196; 36 W.R. 369; 3 T.L.R. 768; 6 Asp.M.L.C. 212, H.L.; 29 Digest 203, *1624*.

(7) *Trinder, Anderson & Co.* v. *Thames and Mersey Marine Insurance Co., Trinder, Anderson & Co.* v. *North Queensland Insurance Co., Trinder, Anderson & Co.* v. *Weston, Crocker & Co.*, [1898] 2 Q.B. 114; 67 L.J.Q.B. 666; 78 L.T. 485; 46 W.R. 561; 14 T.L.R. 386; 8 Asp.M.L.C. 373; 3 Com. Cas. 123, C.A.; 29 Digest 196, *1562*.

(8) *E. D. Sassoon & Co.* v. *Western Assurance Co.*, [1912] A.C. 561; 81 L.J.P.C. 231; 106 L.T. 929; 12 Asp.M.L.C. 206; 17 Com. Cas. 274, P.C.; 29 Digest 199, *1584*.

(9) *Jones* v. *Nicholson* (1854), 10 Exch. 28; 2 C.L.R. 1236; 23 L.J.Ex. 330; 23 L.T.O.S. 146; 156 E.R. 342; 29 Digest 224, *1810*.

(10) *Trim Joint District School Board of Management* v. *Kelly*, [1914] A.C. 667; 83 L.J.P.C. 220; 111 L.T. 305; 30 T.L.R. 452; 58 Sol. Jo. 493; 7 B.W.C.C. 274, H.L.; 34 Digest 270, *2300*.

(11) *Nutt* v. *Bourdieu* (1786), 1 Term. Rep. 323; 99 E.R. 1119; 29 Digest 223, *1804*.

(12) *Doe d. Sheppard* v. *Allen* (1810), 3 Taunt. 78; 128 E.R. 32; 31 Digest (Repl.) 187, *3195*.

(13) *Stamma* v. *Brown* (1742), 2 Stra. 1173; 93 E.R. 1108; 29 Digest 222, *1785*.
(14) *Gordon* v. *Rimmington* (1807), 1 Camp. 123, N.P.; 29 Digest 215, *1717*.
(15) *Boehm* v. *Bell* (1799), 8 Term. Rep. 154; 101 E.R. 1318; 29 Digest 804, *2510*.
(16) *Matthews* v. *Smallwood*, [1910] 1 Ch. 777; 79 L.J.Ch. 322; 102 L.T. 228; 31 Digest (Repl.) 419, *5483*.
(17) *Bank of England* v. *Vagliano Bros.*, [1891] A.C. 107; 60 L.J.Q.B. 145; 64 L.T. 353; 39 W.R. 657; 7 T.L.R. 333; 3 Digest 244, *703*.
(18) *Stainbank* v. *Fenning* (1851), 11 C.B. 51; 20 L.J.C.P. 226; 17 L.T.O.S. 255; 15 Jur. 1082; 138 E.R. 389; 29 Digest 116, *706*.
(19) *Ajum Goolam Hossen & Co.* v. *Union Marine Insurance Co.*, *Hajee Cassim Joosub* v. *Ajum Goolam Hossen & Co.*, [1901] A.C. 362; 70 L.J.P.C. 34; 84 L.T. 366; 17 T.L.R. 376; 9 Asp.M.L.C. 167, P.C.; 29 Digest 195, *1547*.
(20) *Bentsen* v. *Taylor, Sons & Co.* (2), [1893] 2 Q.B. 274; 63 L.J.Q.B. 15; 69 L.T. 487; 42 W.R. 8; 9 T.L.R. 552; 4 R. 510, C.A.; 12 Digest (Repl.) 391, *3032*.
(21) *British and Foreign Marine Insurance Co.* v. *Gaunt*, [1921] 2 A.C. 41; 90 L.J.K.B. 801; 125 L.T. 491; 37 T.L.R. 632; 65 Sol. Jo. 551; 15 Asp.M.L.C. 305; 26 Com. Cas. 247, H.L.; 29 Digest 95, *527*.
(22) *Castellain* v. *Preston* (1883), 11 Q.B.D. 380; 52 L.J.Q.B. 366; 49 L.T. 29; 31 W.R. 557, C.A.; 29 Digest 52, *156*.
(23) *Cullen* v. *Butler* (1816), 5 M. & S. 461; 105 E.R. 119; 29 Digest 224, *1815*.
(24) *Heyman* v. *Parish* (1809), 2 Camp. 146; 11 R.R. 688.
(25) *Thames and Mersey Marine Insurance Co.* v. *Gunford Ship Co.*, *Southern Marine Mutual Insurance Association* v. *Gunford Ship Co.*, [1911] A.C. 529; 80 L.J.P.C. 146; 105 L.T. 312; 27 T.L.R. 518; 55 Sol. Jo. 631; 12 Asp.M.L.C. 49; 16 Com. Cas. 270, H.L.; 29 Digest 123, *765*.
(26) *Thames and Mersey Marine Insurance Co.* v. *Hamilton, Fraser & Co.* (1887), 12 App. Cas. 484; 56 L.J.Q.B. 626; 57 L.T. 695; 36 W.R. 337; 3 T.L.R. 764; 6 Asp.M.L.C. 200, H.L.; 29 Digest 197, *1575*.
(27) *North British and Mercantile Insurance Co.* v. *London, Liverpool and Globe Insurance Co.* (1877), 5 Ch.D. 569; 46 L.J.Ch. 537; 36 L.T. 629, C.A.; 29 Digest 124, *782*.
(28) *Davidson* v. *Burnand* (1868), L.R. 4 C.P. 117; 38 L.J.C.P. 73; 19 L.T. 782; 17 W.R. 121; 3 Mar.L.C. 207; 29 Digest 194, *1538*.
(29) *Midland Insurance Co.* v. *Smith* (1881), 6 Q.B.D. 561; 50 L.J.Q.B. 329; 45 L.T. 411; 45 J.P. 699; 29 W.R. 850; 29 Digest 322, *2644*.
(30) *Thompson* v. *Hopper* (1856), 6 E. & B. 172; 25 L.J.Q.B. 240; 26 L.T.O.S. 308; 2 Jur.N.S. 608; 4 W.R. 360; 119 E.R. 828; 29 Digest 195, *1550*; subsequent proceedings (1858), E.B. & E. 1038; 27 L.J.Q.B. 441; 32 L.T.O.S. 38; 5 Jur.N.S. 93; 6 W.R. 857; 120 E.R. 796, Ex. Ch.; 29 Digest 205, *1642*.
(31) *Wilson* v. *Jones* (1867), L.R. 2 Exch. 139; 36 L.J.Ex. 78; 15 L.T. 669; 15 W.R. 435; 2 Mar.L.C. 452, Ex. Ch.; 29 Digest 116; *709*.
(32) *Ebsworth* v. *Alliance Marine Insurance Co.* (1873), L.R. 8 C.P. 596; 42 L.J.C.P. 305; 29 L.T. 479; 2 Asp.M.L.C. 125; 29 Digest 113, *676*.
(33) *Dudgeon* v. *Pembroke* (1874), L.R. 9 Q.B. 581; 43 L.J.Q.B. 220; 31 L.T. 31; 22 W.R. 914; 2 Asp.M.L.C. 323; on appeal (1875), 1 Q.B.D. 96; 24 W.R.Dig. 278, Ex. Ch.; on appeal (1877), 2 App. Cas. 284, H.L.; 46 L.J.Q.B. 409; 36 L.T. 282; 25 W.R. 499; 3 Asp.M.L.C. 393, H.L.; 29 Digest 157, *1131*.
(34) *Grant, Smith & Co. and McDonnell, Ltd.* v. *Seattle Construction and Dry Dock Co.*, [1920] A.C. 162; 89 L.J.P.C. 17; 122 L.T. 203; 29 Digest 199, *1585*.
(35) *Davenport* v. *R.* (1877), 3 App. Cas. 115; 47 L.J.P.C. 8; 37 L.T. 727, P.C.; 31 Digest (Repl.) 525, *6480*.

(36) *Lord Darnley* v. *London, Chatham and Dover Rail. Co.* (1867), L.R. 2 H.L. 43; 36 L.J.Ch. 404; 16 L.T. 217; 15 W.R. 817, H.L.; 12 Digest (Repl.) 491, *3691.*

(37) *Fenton* v. *Thorley & Co., Ltd.*, [1903] A.C. 443; 72 L.J.K.B. 787; 89 L.T. 314; 52 W.R. 81; 19 T.L.R. 684; 5 W.C.C. 1, H.L.; 34 Digest 266, *2264.*

(38) *The Chasca* (1875), L.R. 4 A. & E. 446; 44 L.J.Adm. 17; 32 L.T. 838; 2 Asp.M.L.C. 600; 41 Digest 417, *2603.*

(39) *Anghelatos* v. *Northern Assurance Co., Ltd., London Joint City and Midland Bank, Ltd.* v. *Same* (1924), 39 T.L.R. 629; 14 Ll.L.Rep. 361; affirmed (1924), 40 T.L.R. 813; 68 Sol. Jo. 812; 30 Com. Cas. 31; 19 Ll.L.Rep. 255, H.L.; 29 Digest 207, *1663.*

Appeal by the plaintiffs from an order of the Court of Appeal (reported [1923] 1 K.B. 592), reversing the judgment of BAILHACHE, J.

The plaintiffs, P. Samuel & Co., Ltd., insurance brokers, sued on a policy of marine insurance, in which they were named as the assured, on behalf of D. G. Anghelatos, the owner of the steamship *Grigorios*, and one Percy Samuel, who carried on business as P. Samuel & Co., and was a mortgagee of the steamship. By a mortgage agreement dated Sept. 13, 1920, and made between Anghelatos (thereinafter called "the shipowner") and Percy Samuel, carrying on business as P. Samuel & Co. (thereinafter called "the mortgagee"), it was recited that the shipowner was the absolute owner free from incumbrances of the steamship formerly called the *Grindon Hall*, but then called the *Grigorios*, and intended to be registered under the Greek flag at Piræus in Greece, and that the mortgagee had agreed to advance to the shipowner the sum of £22,500 upon having repayment of the same and any other moneys to become due from the shipowner to the mortgagee with interest secured as thereinafter appearing and upon delivery to the mortgagee of (a) a statutory or formal first mortgage of the steamship duly executed and registered in Greece (thereinafter referred to as "the said mortgage"); (b) good and approved policies of insurance upon the vessel as thereinafter provided; (c) the said indenture itself; and (d) bills of exchange. It then assigned all the 100/100th shares in the vessel

> "and all policies cover notes slips certificates of entry effected or hereafter to be effected granted or issued on the said steamship and on its appurtenances and also on the freight and outfit of the said steamship and also in respect of the protection and indemnity of the said steamship and the full benefit thereof all powers rights remedies and authorities thereunder and in particular with full power for the mortgagee in the name of the shipowner or otherwise to ask demand sue for and recover the said insurance moneys including the right to compromise any claim or suit and to receive the said insurance moneys or any moneys payable by way of compromise and to give valid and effectual discharges for the same and all the right title interest and demand of the shipowner of in and to the said steamship policies and premises To hold the premises hereby assigned unto the mortgagee as security for the payment of all moneys secured by the said mortgage and of all moneys which may hereafter become payable under any of the provisions hereof."

By the indenture the shipowner covenanted with the mortgagee as follows:

> "1. The shipowner shall pay to the mortgagee the said sum of £22,500 on or before Mar. 13, 1921, together with interest for the same at the rate of 1½ per cent. per annum above the Bank of England rate current for the time being from Sept. 13, 1920, and will also pay all other moneys which may be or become due under the security of the said mortgage and of these presents upon the dates whereon the same shall be or become payable or upon demand and until payment the same shall carry interest at the rate aforesaid. 2. In addition to the interest above provided for the shipowner shall pay to the mortgagee on the execution of these presents a commission of one-half per cent. on the said loan. 3. The shipowner will immediately upon the execution hereof

hand to the mortgagee his acceptances for the whole of the principal sum aforesaid. 4. The shipowner shall be entitled to repay the whole or any part of the said principal sum of £22,500 or such amount as may from time to time remain outstanding at any earlier period than that herein stipulated for upon giving fourteen days' previous notice in writing to the mortgagee of his intention to make such repayment and any interest included in the outstanding bills shall be deducted pro rata. . . . 6. The shipowner will without delay take such steps as may be necessary to effect the complete registration of the said steamship as a Greek steamship. . . . 9. The shipowner will at all times during the continuance of this security insure and keep insured the said steamship and her freights whether at home or at sea against all losses perils and misfortunes usually covered by marine insurance with first-class insurance offices or underwriters or mutual associations as the mortgagee shall from time to time in their (sic) discretion approve, and in effecting any such insurance the shipowner will also duly pay the premiums and other sums necessary to keep the said policies in force and produce the receipts therefor to the mortgagee or his agents and will immediately after effecting any such insurance deliver to the mortgagee the stamped policies therefor duly endorsed or give to the mortgagee the guarantee of a broker approved by the mortgagee that he holds such policies solely on account and for the benefit of the mortgagee. . . . 11. In the event of any claim arising under the hereinbefore mentioned policies of insurance . . . the proceeds of the insurance and all other moneys received shall be applied in the case of a partial loss in reinstating the damage which shall have been sustained and in the event of a total loss in repaying to the mortgagee the balance which shall then remain owing hereunder with interest and all costs charges and expenses which have been reasonably incurred by the mortgagee and any balance shall be paid to the shipowner. All other sums received under such policies of insurance . . . shall be applied in discharging the claim in respect of which they are paid. . . . 18. The shipowner for the purpose of giving effect to and carrying out the provisions of this indenture hereby constitutes and appoints the mortgagee to be his true and lawful attorney for him and in his name to ask demand receive sue for and recover all insurances and other moneys of the said steamship which may become due and owing under the security of the said statutory mortgage and of these presents with full power to compromise any claim or suit and to receive any moneys payable by way of compromise and to do such other acts and things in the name of the shipowner or otherwise as the mortgagee may in his absolute discretion deem to be necessary for the due preservation and enforcement of the said security and on receipt of any such money as aforesaid including any money payable by way of compromise to give proper receipts and discharges for the same. And whatever the mortgagee shall lawfully do in the premises the shipowner does hereby and will thereafter ratify and confirm."

The statutory mortgage was headed "Mortgage (to secure account current, &c.)," and was dated Sept. 13, 1920. After describing the *Grindon Hall*, to be re-named *Grigorios*, and stating that she was registered at Piræus in Greece, it proceeded:

"Whereas I Denis Anghelatos . . . shipowner am indebted in an account current to Messrs. Samuel & Co. . . . brokers and by an agreement under seal bearing even date herewith and made between myself and the said Samuel & Co. it has been agreed that all moneys now or hereafter to become owing to the said Samuel & Co. in respect of the said account shall become due and payable at the times and in the manner provided in the said agreement with interest as therein specified and if no time is provided for repayment of any such moneys then it is agreed that the same shall be payable on demand Now I the said Denis Anghelatos, covenant with the said Samuel & Co. and their assigns to pay to him or them the sums for the time being due on this security, whether by way of principal or interest, at the times and manner aforesaid

A And for the purpose of better securing the said Samuel & Co. the payment of such sums as last aforesaid, I do hereby mortgage to the said Samuel & Co. 100/100th shares, of which I am the owner in the ship above particularly described, and in her boats, guns, ammunitions, small arms, and appurtenances. Lastly I for myself and my heirs (sic) covenant with the said Samuel & Co. and their assigns that I have power to mortgage in manner B aforesaid the above mentioned shares and that the same are free from incumbrances."

The policy of insurance was effected on Oct. 19, 1920, by one F. T. Whelar, the manager of the plaintiffs. It was a time policy, and was taken out by the plaintiffs

C "and/or as agents as well in their own name, as for and in the name and names of all and every other person or persons to whom the same doth, may, or shall appertain in part or in all,"

for twelve calendar months from Sept. 25, 1920, to Sept. 25, 1921. The amount insured was £24,000, part of a larger amount of £110,000 insured upon hull and machinery of the *Grigorios*, against adventures and perils of the seas and other contingencies, including barratry, of the master and mariners,

D "and of all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said . . . ship, &c., or any part thereof."

The policy included No. 22 of the Institute Time Clauses, as follows:

"Warranted that (except as hereinafter mentioned) the amount insured for account of assured and/or their managers on . . . freight . . . shall not exceed E 15 per cent. of the values of the hull and machinery as stated herein but this warranty shall not restrict the assured's right to cover . . . (2) Freight and/or chartered freight and/or anticipated freight on board or not on board, insured for twelve months or other time. Any amount not exceeding 25 per cent. of the value of hull and machinery as stated herein, but if the insurance be for less than twelve months, the 25 per cent. to be proportionately reduced. . . . F Provided always that a breach of this warranty shall not afford underwriters any defence to a claim by mortgagees or other third parties who may have accepted this policy without notice of such breach of warranty."

On the same day F. T. Whelar effected for the benefit of P. Samuel an insurance on freight for six months against war perils to the amount of £27,500. The mort- G gage was never registered according to Greek law; and the evidence went to show that it never could have been so registered, because the amount secured thereby was an uncertain amount. On Feb. 26, 1921, the *Grigorios* was lost about nine miles from Cape de Gata on a voyage from Philippeville on the coast of Algeria to the Tyne with a cargo of iron ore.

The plaintiffs claimed upon the policy for the benefit both of the owner and H P. Samuel. The defendant Dumas was the underwriter whose name was first on the list of subscribers of the policy. The Court of Appeal held (by Bankes, L.J., and Eve, J.) (i) that the mortgagee had an insurable interest in the ship, although the mortgage was never registered in Greece; (ii) that the mortgagee's interest was intended to be separately covered by the policy, and was not merely derivative from the owner's interest; and (iii) (Scrutton, L.J., dissenting) that the mortgagee I was not debarred from asserting that the ship was lost by perils of the sea; (iv) that there had been a breach of warranty, notwithstanding that the insurance on freight was against war risks and that the mortgagee could not recover on the policy. The mortgagee appealed.

Sir John Simon, K.C., A. T. Miller, K.C., and *S. L. Porter* for the appellants.
R. A. Wright, K.C., and *W. L. McNair* for the respondent.

The House took time for consideration.

Feb. 25. The following opinions were read.

VISCOUNT CAVE.—The steamship *Grigorios* (formerly the *Grindon Hall*) was purchased by one Denis Anghelatos, a Greek subject, on Sept. 13, 1920, and on the same day she was removed from the British register and received a provisional certificate of Greek nationality which enabled her to fly the Greek flag pending registration in Greece. On the same day Anghelatos, who was already indebted to his bankers, Messrs. Samuel & Co., in a considerable sum, borrowed from them a further sum of £22,500 to enable him to pay off a charge on the *Grigorios* on the terms that he should give them a mortgage on the ship to secure the whole of his current account. Accordingly, on Sept. 13, 1920, Anghelatos executed in favour of Samuel & Co. two documents, namely, first a mortgage of the ship in British statutory form to secure his account current, and, secondly, a deed whereby he assigned the ship as security for the £22,500 and all other moneys due or to become due from him, and covenanted (among other things) to effect the complete registration of the ship as a Greek steamship and to insure her and her freight against all perils as the mortgagees should approve. While the advance and mortgage were being negotiated Mr. Percy Samuel, who carried on business as Samuel & Co., told Anghelatos that he would have to insure the steamship against all risks through the appellants, P. Samuel & Co., Ltd. (brokers who looked after insurances for the banking firm), for not less than £100,000, and in the presence of Anghelatos instructed Mr. Whelar, the manager of the appellant company, to see that this insurance was effected. Anghelatos also desired Mr. Whelar to get the freight insured against all risks for £27,500. The appellant company, accordingly, opened three slips and procured them to be underwritten by the respondent Dumas and other underwriters—namely (i) a slip for insuring the hull and machinery of the *Grigorios* against marine risks in a sum of £110,000 for a period of twelve months; (ii) a slip for insuring the freight of the same vessel against marine risks in a sum of £27,500 for the same period; and (iii) a slip for insuring the hull and machinery in £110,000, the freight (f.i.a.) in £27,500 and the disbursements (f.i.a.) in £16,500, all against war risks, for a period of six months only. In the month of October, 1920, policies of insurance in accordance with the above slips were duly issued and delivered to the mortgagee. On Feb. 26, 1921, the *Grigorios*, while on a voyage from Philippeville to the Tyne, foundered in calm weather off the coast of Spain and became a total loss.

On May 20, 1921, the appellants commenced this action against the respondent Dumas on his policies of insurance on the vessel, alleging that the vessel had been lost either by war perils or by ordinary marine perils. Similar actions were commenced against the other underwriters responsible, on their policies. The respondent, among other defences which will be referred to later, pleaded that the loss was due to the wilful misconduct and fraud of Anghelatos and his agents in procuring or conniving at the sinking of the ship, and at the hearing of the action the trial judge (Bailhache, J.) found this plea to be proved. He, accordingly, dismissed the claim on the war risk insurance, but, holding that his finding of fraud against the owner did not prevent the broker from recovering on behalf of the mortgagee under the marine risk insurance, and overruling the other defences raised by the respondent, he gave judgment against the respondent on the marine risk policy for his proportion of the loss. On appeal to the Court of Appeal that court reversed the decision of the trial judge and dismissed the action. The judgment of the Court of Appeal was founded principally on the ground that there had been a breach of No. 22 of the Institute Time Clauses, which were incorporated in the marine policy. The material parts of that clause were as follows:

> "(1) Warranted that (except as hereinafter mentioned), the amount insured for account of assured and/or their managers on premiums, freight, hire, profit, disbursements, commissions, or other interests (policy proof of interest or full interest admitted), *or on excess or increased value of hull or machinery however described*, shall not exceed 15 per cent. of the values of the hull and machinery as stated herein, but this warranty shall not restrict the assured's

A right to cover. . . . (2) Freight and/or chartered freight and/or anticipated freight on board or not on board, insured for twelve months or other time.—Any amount not exceeding 25 per cent. of the value of hull and machinery as stated herein, but if the insurance be for less than twelve months the 25 per cent. to be proportionately reduced."

B The value of the hull and machinery as stated in the policy was £110,000, and, accordingly, the maximum amount which the assured was entitled under the warranty to cover by p.p.i. or f.i.a. policies on freight, &c., was, for a twelve months' insurance, 25 per cent. of the stated value, or £27,500, and for a six months' insurance one-half of that sum, or £13,750; and as the freight had in fact been insured with the knowledge of the mortgagee for the full £27,500 for six C months only, the court held the warranty to have been broken, and dismissed the action on that ground. A plea that the breach of warranty had been waived by the respondent was disallowed. In addition to the above ground SCRUTTON, L.J., expressed the opinion that, the ship having been intentionally scuttled with the connivance of the owner, the loss did not fall within the policy either as a loss by perils of the sea or under the general words; but the other members of the court D held themselves precluded by the decision of the Court of Appeal in *Small* v. *United Kingdom Marine Mutual Insurance Association* (1) from deciding the case on that ground. Thereupon the present appeal was brought.

It is convenient to deal first with the point upon which all the judges of the Court of Appeal decided the case against the appellant as, if their decision on that point is right, the remainder of the questions argued do not arise. Upon the E question whether there was, in fact, a breach of the warranty contained in cl. 22 of the Institute Time Clauses, I agree with a unanimous judgment of the Court of Appeal. That clause contained a warranty or condition that the amount insured on freight, &c. (p.p.i. or f.i.a.), should not exceed (in the event which happened) 12½ per cent. of the stated value of the hull and machinery, or £13,750, and, as the f.i.a. insurance of the freight against war risks was for £27,500, there was a F clear breach of the warranty unless the word "insured" in the warranty is to be confined to insurances against the perils insured against by the policy in question, that is to say, to insurances against marine perils only to the exclusion of war perils. I see no sufficient ground for so restricting the meaning of the word. The word "insured" in a policy of marine insurance primâ facie covers all insurances against sea risks, including war risks; and there is in the policy in question in this G case no context sufficient to cut down the natural meaning of the word. It is true that the insurer of a ship against ordinary marine risks is not directly interested in the amount of the insurance of the freight against war risks. But it is said that an over-insurance of freights by honour policies against war risks may tempt the owner to throw away his ship with a view to claiming under the war risk policies, and, alternatively, under the ordinary marine policies, and so may involve the H marine underwriters in litigation and loss; and certainly the course of events in the present case supports that view. Upon the whole I think that the word "insured" must be construed in its natural and ordinary sense, and as including all kinds of marine insurance; and on this point I desire to adopt the reasoning of SCRUTTON, L.J., who said ([1923] 1 K.B. at p. 624):

I "It is argued by the mortgagees and found by the judge that, as this is an insurance against war perils, it does not affect a policy on marine perils because, as the judge says, the marine underwriter would not have to pay a loss by war perils. This involves reading into the policy the words 'against marine perils' in the first line of cl. 22 after the words 'amount insured.' I see no reason for inserting these words, and every reason for not inserting them. Warranties are construed strictly. The reason for this warranty is that the insured should not by heavy insurances p.p.i. have an opportunity of over-valuing his ship and a temptation to lose her. This temptation is just as great if the over-valuation and over-insurance are on war risk policies as if they are

on marine policies. Indeed, so long as war risks producing loss by sinking may be argued to be losses by perils of the sea, by the incursion of sea water, war risk policies may be very important to the marine underwriter. In the present case the attempt was first made to recover on a fictitious explosion as a war risk, and then changed to a claim in respect of a marine peril."

But, while I am satisfied that there was a breach of the warranty, I think that the respondent Dumas is prevented from taking advantage of it by the circumstance that he was himself a party to the excessive insurance on freight which constituted the breach. Section 34 (3) of the Marine Insurance Act, 1906, provides: "A breach of warranty may be waived by the insurer." Now a right may be waived either by express words or by conduct inconsistent with the continuance of the right; and even where there is no actual waiver, the person having the right may so conduct himself that it becomes inequitable for him to enforce it. Here the respondent, who must be assumed to have been aware that the assured was prevented by the terms of the policy of insurance on the vessel from taking out honour policies on the freight for six months for any sum in excess of £13,750, joined in the issue of such policies for double that amount and took his share of the premiums on those policies; and I can conceive no conduct more inconsistent with an intention on his part to enforce the restriction. It is argued that at the moment when the representative of the respondent initialled the war risk slip the amount underwritten if apportioned between the ship, freight, and disbursments was not in excess of the amount allowed; but the answer is that the slip then already contained the words: "Hull and machinery, £110,000; freight, f.i.a., £27,500; disbursements, f.i.a., £10,500," and specified the period as six months, so that it was obvious on the face of the document that the underwriters were taking a share in an insurance of that character and amount and expected and intended it to be carried through. Further, when the policy was issued in October, it was known that the full amount specified in the slip had been underwritten; and Mr. Dumas through his representatives, who must be taken (in the absence of any evidence to the contrary) to have acted with his authority, was a party to the issue of the policy. In my opinion, the respondent and the other underwriters who took that course are prevented by waiver or acquiescence from treating the marine policy on the vessel as void for breach of the warranty.

In view of my opinion on the above point, it becomes necessary to deal with the other points argued on behalf of the respondent, and I propose to deal with them in the order in which they arise.

First, it is said that, as the *Grigorios* was a Greek ship at the time of her loss and neither the ship nor the mortgage upon her had then been registered in Greece, the mortgagee had no valid security upon the ship and so had no insurable interest. Upon this point I accept the finding of the learned trial judge that before you can have a valid mortgage on a Greek ship under Greek law the ship and the mortgage must be registered in Greece, and the mortgage must be for a specific sum and not merely for the balance of a current amount, and that these conditions were not complied with; but, nevertheless, I agree with his view that the mortgagee in this case had an insurable interest. Section 5 of the Marine Insurance Act, 1906, provides as follows:

"(1) Subject to the provisions of this Act, every person has an insurable interest who is interested in a marine adventure. (2) In particular a person is interested in a marine adventure where he stands in any legal or equitable relation to the adventure or to any insurable property at risk therein, in consequence of which he may benefit by the safety or due arrival of insurable property, or may be prejudiced by its loss or by damage thereto or by the detention thereof, or may incur liability in respect thereof."

In the present case the appellant held a British mortgage on the ship and a deed of covenant which recited an agreement by the owner to deliver to the mortgagee a "formal first mortgage of the said steamship duly executed and registered in

A Greece," and contained a covenant by him to "take such steps as might be necessary to effect the complete registration of the said steamship as a Greek steamship:" and he was entitled in equity to enforce these agreements. This being so, I think it impossible to say that he was not interested in the adventure within the meaning of the above section; and, if so, he clearly had an insurable interest to the extent of the sum secured by the mortgage. This decision is in accordance with such B authorities as *Boehm* v. *Bell* (15) and *Wilson* v. *Jones* (31).

Secondly, it is said that the mortgagee was not originally insured by the policy sued upon, but was a mere assignee of the policy from the owner, and, accordingly, that as the owner, having scuttled his ship, could not sue upon the policy, this defence is available under s. 50 (2) of the Act against the mortgagee. In my opinion, the evidence shows clearly that Mr. Samuel, the mortgagee, was an C original party to the insurance, which was effected on his personal instructions, and that the brokers, when they took out the policy

> "as well in their own name as for and in the name and names of all and every other person or persons to whom the same doth, may, or shall appertain in part or in all,"

D intended to and did enter into the contract of insurance on behalf of the mortgagee as well as on behalf of the owner. This was sworn to by three witnesses, who were neither cross-examined nor contradicted on this point; and I think that the learned judge was fully entitled to find (as he did) that the policy was to be taken out on behalf of the mortgagee to secure the joint interest of himself and the mortgagor, and that there was no question of an assignment. If so, that disposes of this point.

E But thirdly, it is argued that, assuming that the insurance was for the joint benefit of the mortgagee and the owner, still it was avoided by the misconduct of the owner. Section 55 (2) of the Act provides that "the insurer is not liable for any loss attributable to the wilful misconduct of the assured;" and it is argued that, where two persons interested in the same property or adventure are jointly insured by one policy, the misconduct of either is sufficient to avoid it. In support F of this contention, a well-known American authority (DUER ON MARINE INSURANCE, Lecture III, s. 15) was cited; and it was pointed out that the proposition contended for is not inconsistent with the English case of *Trinder, Anderson & Co.* v. *Thames and Mersey Marine Insurance Co.* (7), which was a case of negligent navigation and not of wilful misconduct. There is force in this argument, but I am not prepared to say that in the present case it should prevail. It may well be that, G when two persons are jointly insured and their interests are inseparably connected so that a loss or gain necessarily affects them both, the misconduct of one is sufficient to contaminate the whole insurance: PHILLIPS ON INSURANCE (5th Edn.), vol. I, s. 235. But in this case there is no difficulty in separating the interest of the mortgagee from that of the owner; and if the mortgagee should recover on the policy, the owner will not be advantaged, as the insurers will be subrogated as H against him to the rights of the mortgagee. In such a case the "assured" referred to in s. 55 (2) is the particular assured to whom it is sought to make the insurer liable. In my opinion, therefore, this contention also fails.

Lastly, it is said on behalf of the respondent that, the ship having been wilfully scuttled by the direction of the owner, the loss is not covered by the policy sued upon. In that policy the perils insured against are defined (in the ordinary terms) I as perils

> "of the seas, men-of-war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and counter-mart, surprisals, takings at sea, arrests, restraints and detainments of all kings, princes, and people, of what nation, condition, or quality soever, barratry of the master and mariners, and of all other perils, losses and misfortunes that have or shall come to the hurt, detriment, or damage of the said goods and merchandises, and ship, &c., or any part thereof."

In considering whether the loss of the ship falls within these words, it is necessary first to determine what was the proximate cause of the loss, for it is provided by

s. 55 of the Act (which reflects the law as previously established) that, unless the policy otherwise provides, the insurer is liable only for losses proximately caused by a peril insured against. Now it was found as a fact by the learned trial judge that the *Grigorios* was thrown away by the master and engineers and some of the crew with the connivance of the owner, and he was apparently satisfied that this was done by deliberately letting water into the ship and into the bilge connections and afterwards causing a sham explosion which induced the innocent members of the crew to leave the ship with those who were guilty and to refrain from using the pumps. The vessel in fact sank very slowly and did not disappear until thirteen hours after the explosion. In these circumstances the question is whether the proximate cause of her sinking was the act of letting the water into the vessel, or the actual inrush of the water. Apart from authority, I should feel no doubt that the former is the true view. There appears to me to be something absurd in saying that, when a ship is scuttled by her crew, her loss is not caused by the act of scuttling but by the incursion of water which results from it. No doubt both are part of the chain of events which result in the loss of the ship, but the scuttling is the causa causans. The scuttling is the real and operative cause—the nearest antecedent which can be called a cause; and the subsequent events—the entry of sea water, the slow filling of the hold and bilges, the failure of the pumps and the break-up of the vessel—are as much parts of the effect as is the final disappearance of the ship below the waves. If one turns to the cases, then, notwithstanding a dictum of LORD CAMPBELL on the argument of the demurrer in *Thompson* v. *Hopper* (30) (6 E. & B. at p. 192) and the decision on the appeal in *Small's Case* (1) to which I will refer later, I think that the balance of authority is in favour of the same view. In *Reischer* v. *Borwick* (2), where a ship damaged by collision with a snag in the river was temporarily repaired, but on the leak again opening foundered and was lost, it was held that the collision was the proximate cause of the loss; and that case was approved and followed by this House in *Leyland Shipping Co.* v. *Norwich Union Fire Insurance Society, Ltd.* (3), where, a ship having been torpedoed and having sunk two days afterwards in consequence of the damages caused, it was held that the torpedoing was the proximate cause of the loss. There are many other authorities to the same effect, but these two cases are sufficient to illustrate the point, and it is hardly necessary to have recourse to the maxim dolus circuitu non purgatur: *Thompson* v. *Hopper* (30), which, perhaps, applies only as against persons who are parties to the dolus. On the whole I think that the scuttling of the *Grigorios* was the proximate cause of her loss.

Then, was the loss a loss by perils of the sea? Surely not. The term "perils of the seas" is defined in Sched. 1 to the Act as referring only to "fortuitous accidents or casualties of the seas." The word "accident" may be ambiguous, and has even been held in another connection to include a wilful murder: *Trim Joint District School Board of Management* v. *Kelly* (10), but the word "fortuitous," which is at least as old as *Thompson* v. *Hopper* (30), involves an element of chance or ill luck which is absent where those in charge of a vessel deliberately throw her away. In *Wilson, Sons & Co.* v. *Xantho* (*Cargo Owners*) (5), LORD HERSCHELL said that in order that there might be a peril of the seas

> "there must be some casualty, something which could not be foreseen as one of the necessary incidents of the adventure. The purpose of the policy is to secure an indemnity against accidents which may happen, not against events which must happen."

In *Hamilton, Fraser & Co.* v. *Pandorf & Co.* (6), LORD BRAMWELL approved the definition of LOPES, L.J., "it is a sea damage occurring at sea and nobody's fault." In *E. D. Sassoon & Co.* v. *Western Assurance Co.* (8), LORD MERSEY, in delivering the judgment of the Judicial Committee of the Privy Council, adopted a similar view, which is also to be found in the judgment of the Judicial Committee in *Grant Smith & Co. and McDonnell, Ltd.* v. *Seattle Construction and Dry Dock Co.* (34). On this view the expression "perils of the sea," while it may well

include a loss by accidental collision or negligent navigation, cannot extend to a wilful and deliberate throwing away of a ship by those in charge of her.

Against this strong current of authority there is to be set the decision of the Court of Appeal in *Small* v. *United Kingdom Marine Mutual Insurance Association* (1). There, in an action by a mortgagee under a policy of marine insurance, it was alleged by way of defence that the ship had been wilfully cast away by her master, who was also a part owner and mortgagor; and upon the argument of the preliminary question whether this plea was a sufficient defence to the claim, it was held by the trial judge (MATHEW, J.), that, assuming the plea to be true, the loss was due to barratry and the mortgagee, who had taken part in appointing the master, could recover on that ground. On appeal, the Court of Appeal agreed with that decision, but also expressed the opinion that, if the mortgagee had taken no part in appointing the master, he could have recovered as for a loss by "perils of the sea." With the latter opinion I am unable to agree. It appears to me to be inconsistent not only with the statute afterwards passed, but also with the decisions of this House and of the Judicial Committee; and I think that *Small's Case* (1) must stand on the ground of the barratry alone. In the present case there is no question of barratry, the owner having been a party to the fraud and the mortgagee having taken no part in appointing the master and crew. With regard to the general words "and of all other perils, &c.," it has been repeatedly held that they are to be construed as applying to perils of the same kind as those which have been previously specified: see *Thames and Mersey Marine Insurance Co.* v. *Hamilton, Fraser & Co.* (26), where the decisions are reviewed; and this rule has now been made statutory: Marine Insurance Act, 1906, Sched. I, r. 12. It follows that a loss by scuttling is not covered by those words.

For the above reasons I am of opinion that this appeal fails on the ground last stated, and I move your Lordships that it be dismissed, with costs.

VISCOUNT FINLAY.—This action was brought to recover for a total loss on the steamer *Grigorios* on behalf of the owner, Anghelatos, and a mortgagee, Percy Samuel, upon a marine risks policy. The vessel foundered off the south coast of Spain on Feb. 26, 1921. The case was tried before BAILHACHE, J. He found that the vessel was scuttled by the master and engineers and some of the crew, with the connivance of the owner, Anghelatos. Anghelatos did not appeal against this decision. This, of course, disposed of any claim by the owner; but the case has been proceeded with on behalf of the mortgagee, who was not in any way implicated in the fraud of Anghelatos. The vessel had been British, but was taken off the register on being bought by Anghelatos, who is a Greek subject, and was provisionally recognised as a Greek vessel.

The first issue raised was as to the existence of the mortgage. BAILHACHE, J., found, though there was no legal mortgage according to Greek law, that Anghelatos had entered into a valid agreement with Samuel for a mortgage to secure his advances and that the latter had a right to call for a mortgage to be executed with all proper formalities. He, therefore, found that Samuel had an insurable interest as mortgagee. The Court of Appeal agreed with him, and I take the same view. It was further objected to Samuel's claim that he took the policy of insurance as assignee from Anghelatos. If this had been the case, the assignee would be on no better footing than the assignor. This point, however, is disposed of by the finding of BAILHACHE, J., with which the Court of Appeal agreed, that the policy had in fact been effected on behalf of Samuel, the mortgagee, as well as on behalf of Anghelatos, the owner. His title, therefore, would not be impaired by the fraud of Anghelatos, as he took directly from the insurers. I proceed upon the basis that this finding also is correct. A third objection was made, based on the allegation that the insurance was made subject to a condition and that the condition had been broken. This condition is contained in the twenty-second of the Institute Time Clauses which are attached to the policy. It was alleged that the assured had violated this condition inasmuch as on a war risks policy he had insured the

freight f.i.a. in excess of the amount permitted by cl. 22. BAILHACHE, J., overruled this objection, because, as he said, the further insurance on a war risks policy could not affect the underwriter upon the marine risks. The Court of Appeal, however, held that the condition had been broken as the object of the clause was to guard against persons who made over-insurance, p.p.i. or f.i.a., in respect of any risk, whether within or without the marine risks policy. The Court of Appeal accordingly entered judgment for the underwriters on this point, holding that by the infringement of this condition the policy was avoided. I agree with the view which the Court of Appeal took of the meaning of this clause. It was, however, urged that one of the underwriters on the policy sued on, Dumas, was a party to the further insurance, and it was argued for the plaintiff that this concurrence by Dumas in the further insurance prevented him from treating it as avoiding the policy sued on. I do not think that this "waiver," as it was called, is established on the materials before the House, but I do not rest my decision upon cl. 22. In my opinion, all the defendants are entitled to judgment upon another and a much broader ground.

The action was brought, as I have said, on behalf of the owner and on behalf of the mortgagee. Any claim on behalf of the owner is, of course, out of the question, as it was he that scuttled the ship. Can the innocent mortgagee recover? Can he, in virtue of his independent right as one of the assured under the policy, claim in respect of the loss of the vessel? This will be found to resolve itself into the inquiry whether the loss can be considered as a loss by perils of the sea. The loss was not by barratry, as the captain, in destroying the vessel, was acting under the orders of the owner, and the captain was not in the service of the mortgagee. It follows that, to recover, the mortgagee must show that the sinking of the vessel by the entrance of the sea water which followed from the scuttling can be considered as a loss by perils of the sea, as otherwise the loss would not be from a peril covered by the policy. The answer to this question must primarily depend upon an examination of the language of the Marine Insurance Act, 1906. When the law has been codified by such an Act as this, the question is as to the meaning of the code as shown by its language. It is, of course, legitimate to refer to previous cases to help in the explanation of anything left in doubt by the code, but, if the code is clear, reference to previous authorities is irrelevant. LORD HERSCHELL put this point with great force and clearness in *Bank of England* v. *Vagliano Bros.* (17), and there can be no doubt that his statement of the law there made is correct.

I, therefore, begin with the examination of the Marine Insurance Act, 1906, itself. The relevant passages are three in number—s. 3, s. 55, and the seventh of the rules for construction of policy contained in Sched. 1 to the Act. Section 3 (2) of the Act provides ". . . there is a marine adventure where—(a) Any ship, goods, or other moveables are exposed to maritime perils." The section defines maritime perils as follows:

> " 'Maritime perils' means the perils consequent on, or incidental to, the navigation of the sea, that is to say, perils of the sea, fire, war perils, pirates, rovers, thieves, captures, seizures, restraints and detainments of princes and peoples, jettisons, barratry, and any other perils either of the like kind or which may be designated by the policy."

If entrance of water in consequence of scuttling by the owner is a "maritime risk" it must be because it is included under the term "perils of the sea," which is the first in the enumeration of the varieties of maritime risks. There is no other head in the clause under which it could fall apart from barratry. By s. 55 of the Act:

> "(1) Subject to the provisions of this Act, and unless the policy otherwise provides, the insurer is liable for any loss proximately caused by a peril insured against, but, subject as aforesaid, he is not liable for any loss which is not proximately caused by a peril insured against. (2) In particular—(a) the insurer is not liable for any loss attributable to the wilful misconduct

of the assured, but unless the policy otherwise provides he is liable for any loss proximately caused by a peril insured against, even though the loss would not have happened but for the misconduct or negligence of the master or crew. . . ."

By sub-s. (1) the insurer is liable "for any loss proximately caused by a peril insured against." It is obvious that the proximate cause of the loss, and, indeed, its only cause, was in the present case the act of scuttling. It was for the purpose of letting in the sea water that the holes were made and all that followed was the inevitable consequence of what had been so done. There is a marked distinction between such a case as the present and a case where the hole has been made by negligence, e.g., by carelessly leaving a valve open, as in *Davidson* v. *Burnand* (28). In that case the weight of the cargo brought the discharge pipe below the water level and in consequence of a valve being negligently left open water entered from the discharge pipe and damaged the cargo. That clearly was an accident incident to the carriage of goods, while in the present case the hole was wilfully made for the purpose of letting in the water. In another reported case arising under a bill of lading, rats gnawed a hole in a pipe which passed through the rice cargo, with the result that sea water entered and damaged the rice (*Hamilton, Fraser & Co.* v. *Pandorf & Co.* (6)). In that case also the hole was the result of an accidental cause incident to the carriage of goods on a ship. If a man for the purpose of damaging the rice had made the hole in the pipe the damage would have been the result of an act directed by human intelligence for the very purpose and there would be nothing in the nature of an accident about the occurrence. I use the word "accident" in its ordinary sense and not in the somewhat artificial sense in which it has sometimes been used in cases relating to Acts for compensation of workmen.

The terms of r. 7 of the Rules for Construction of Policy in Sched. 1 to the Act are directly in point:

> "The term 'perils of the seas' refers only to fortuitous accidents or casualties of the seas. It does not include the ordinary action of the winds and waves."

The scuttling of this vessel occurred on the seas, but it was not due to any peril of the seas; it was due entirely to the fraudulent act of the owner. The scuttling was not fortuitous, but deliberate, and had nothing of the element of accident or casualty about it. Storms are "fortuitous"; the ordinary action of the waves is not, and fraudulent scuttling is even more decisively out of the region of accident. The entrance of the sea water cannot for this purpose be separated from the act which caused it.

I might rest my judgment on the terms of the statute, which show that a peril of the seas must be fortuitous, while here the sea water was let in deliberately. But as the greater part of the argument has been devoted to a discussion of the authorities apart from the statute, it is desirable that I should deal also with this aspect of the case. I may observe, however, that the authorities relied upon by the appellant were anterior in date to the Marine Insurance Act, the latest being in 1897, and on the view of LORD HERSCHELL as to the effect of a codifying Act any earlier authorities inconsistent with the terms of the Act would cease to apply when it came into operation.

The main authority relied upon by the appellant is *Small's Case* (1). That case was heard by MATHEW, J., and his decision proceeded entirely on the ground of the barratry of the master which was covered by the express terms of the policy. He said:

> "The mortgagee in this case [Small] took part in placing Wilkes in the position of master; and Wilkes, if he committed a barratrous act, would be guilty of a fraudulent breach of trust against his mortgagee as well as against his co-owners."

The underwriters appealed. Both LORD ESHER, M.R., and A. L. SMITH, L.J., agreed with the finding of MATHEW, J., that Small had taken part in the appointment

of Wilkes as captain, so that the act of Wilkes would be barratrous as against Small just as it was against the co-owners. On that view the case has no application to the appeal now under consideration. But both LORD ESHER and A. L. SMITH, L.J., in their judgments, put the case in the alternative, saying that if Wilkes was not appointed by Small then Small could have recovered as for a loss by a peril of the seas. This was not at all necessary for the decision, but the appellant in the present case is quite entitled to say that these two eminent judges did give it as an alternative reason for supporting the decision of MATHEW, J. This House, however, is certainly not bound by what they said, although any opinion expressed by either of these two very eminent masters of maritime law deserves the most respectful consideration. Nor has there been any such general acceptance of the doctrine as to cause any difficulty as to overruling it, if in the opinion of this House it is erroneous. In my opinion, the view so expressed was erroneous and did not correctly state the law as it stood before the Marine Insurance Act, 1906. The true view of the common law on this point is that which is embodied in the Act itself. The sea water cannot in a case of scuttling be regarded as the cause of the loss. The cause was the fraudulent act which admitted it into the ship. The view that the proximate cause of the loss when the vessel has been scuttled is the inrush of the sea water, and that this is a peril of the sea, is inconsistent with the well-established rule that it is always open to the underwriter on a time policy, to show that the loss arose, not from perils of the seas, but from the unseaworthy condition in which the vessel sailed: see ARNOULD ON MARINE INSURANCE (10th Edn.), s. 799. When the vessel is unseaworthy and the water consequently gets into the vessel and sinks her, it would never be said that the loss was due to the perils of the sea. It is true that the vessel sank in consequence of the inrush of water, but this inrush was due simply to unseaworthiness. The unseaworthiness was the proximate cause of the loss. Exactly the same reasoning applies to the case of scuttling; the hole is there made in order to let in the water. The water comes in and the vessel sinks. The proximate cause of the loss is the scuttling, as in the other case the unseaworthiness. The entrance of the water cannot be divorced from the act which occasioned it.

The view of the law on this point put forward by the appellant is also inconsistent with the decision of the Judicial Committee of the Privy Council in *E. D. Sassoon & Co.* v. *Western Assurance Co.* (8). In that case opium stored in a wooden hulk moored in a river was damaged by water percolating through a leak caused by the rotten condition of the hulk. There was a time policy on the opium insuring against the perils of the sea, but it was held that the plaintiff could not recover for the loss. The case was tried in His Majesty's Supreme Court in Shanghai and it was there decided that the damage was not due to sea peril at all, but was due simply to the weakness of the hulk. The Judicial Committee affirmed this ruling. LORD MERSEY said in delivering the judgment of the Privy Council:

> "There was no weather, nor any other fortuitous circumstances, contributing to the incursion of the water; the water merely gravitated by its own weight through the opening in the decayed wood and so damaged the opium. It would be an abuse of language to describe this as a loss due to perils of the sea. Although sea water damaged the goods, no peril of the sea contributed either proximately or remotely to the loss."

LORD MERSEY then quoted what was said by LORD HERSCHELL in *Wilson, Sons & Co.* v. *Xantho* (*Cargo Owners*) (5), and concluded by saying that the damage by sea water was not in any sense due to sea peril, and, therefore, did not fall within the policy. This decision was approved and followed in *Grant Smith & Co. and McDonnell, Ltd.* v. *Seattle Construction and Dry Dock Co.* (34). LORD BUCKMASTER, in delivering the judgment of the Judicial Committee, said ([1920] A.C. at p. 171), after citing the *Xantho* (5) and the *Sassoon* (8) cases:

> "It is just as though a vessel, unfit to carry the cargo with which she was loaded through her own inherent weakness and without accident or peril of

A any kind, sank in still water. In such a case recovering under the ordinary policy of insurance would be impossible."

LORD COLLINS in *Trinder Anderson & Co.* v. *Thames and Mersey Marine Insurance Co.* (7) expressed himself as follows:

"The wilful default of the owner inducing the loss will debar him from suing on the policy in respect of it on two grounds. . . . First, because no one can B take advantage of his own wrong, using the word in its true sense which does not embrace mere negligence. . . . Secondly, because the wilful act takes from the catastrophe the accidental character which is essential to constitute a peril of the sea; 'I think,' said LORD HALSBURY in *Hamilton, Fraser & Co.* v. *Pandorf & Co.* (6), 'the idea of something fortuitous and unexpected is involved in both words "peril" or "accident." ' "

C As regards the first of the two grounds referred to in this passage, it is to be observed that the mortgagee was in no way party to the fraud of the owner in the present case. The first ground would, therefore, be applicable to him only if in the circumstances of this case the mortgagee is to be considered as so identified with the owner whose wilful misconduct brought about the loss as to be incapable of taking advantage of it. It is not necessary to decide whether he was so identified D in the present case, and I reserve my opinion upon it. LORD COLLINS' second ground is in terms applicable to the present case. The loss was directly due to the wilful and deliberate act of the owner, and there was nothing of the accidental element which is essential to constitute a peril of the sea.

In *Cullen* v. *Butler* (23) the court doubted whether the loss of a vessel which sank from the fire of a man-of-war which mistook her for an enemy was a loss by E perils of the seas, but held the loss recoverable on a special count stating the facts. This case formed the subject of some very illuminating comments by LORD HERSCHELL in the *Xantho Case* (5). One passage is so apposite to the present case that I venture to cite it (12 App. Cas. at p. 509):

"I think it clear that the term 'perils of the sea' does not cover every accident F or casualty which may happen to the subject-matter of the insurance on the sea. It must be a peril 'of' the sea. Again, it is well settled that it is not every loss or damage of which the sea is the immediate cause that is covered by these words. They do not protect, for example, against that natural and inevitable action of the winds and waves, which results in what may be described as wear and tear. There must be some casualty, something which G could not be foreseen as one of the necessary incidents of the adventure. The purpose of the policy is to secure an indemnity against accidents which may happen, not against events which must happen. It was contended that those losses only were losses by perils of the sea, which were occasioned by extraordinary violence of the winds or waves. I think this is too narrow a construction of the words, and it is certainly not supported by the authorities or H by common understanding. It is beyond question, that if a vessel strikes upon a sunken rock in fair weather and sinks, this is a loss by perils of the sea. And a loss by foundering, owing to a vessel coming into collision with another vessel, even when the collision results from the negligence of that other vessel, falls within the same category. Indeed, I am aware of only one case which throws a doubt upon the proposition that every loss by incursion of the sea, due to a vessel coming accidentally (using that word in its popular sense) into I contact with a foreign body which penetrates it and causes a leak, is a loss by a peril of the sea. I refer to *Cullen* v. *Butler* (23), where a ship having been sunk by another ship firing upon her in mistake for an enemy, the court inclined to the opinion that this was not a loss by perils of the sea. I think, however, this expression of opinion stands alone, and has not been sanctioned by subsequent cases."

It will be observed that LORD HERSCHELL emphasises the point that it is necessary to constitute a peril of the seas that there should be something in the nature of a

casualty or accident. He gives as instances extraordinary violence of the winds and waves, striking upon a sunken rock, foundering as the result of a collision with another vessel even when the collision resulted from the negligence of that vessel, and he summarises by saying that he is aware only of one case which throws doubt upon the proposition that

> "every loss by incursion of the sea due to a vessel coming accidentally (using that word in its popular sense) into contact with a foreign body, which penetrates it and causes a leak, is a loss by peril of the sea."

He adds that the expression of opinion in *Cullen* v. *Butler* (23), the case he referred to, stood alone and had not been sanctioned by subsequent cases. LORD HERSCHELL treats the firing upon the vessel in *Cullen* v. *Butler* (23), owing to her being mistaken for an enemy, as an accident which supplied the fortuitous circumstance necessary to constitute a peril of the sea. The possibility of scuttling is not a peril of the sea, it is a peril of the wickedness of man and would have to be mentioned expressly in the policy, like barratry or pirates, in order that the assured should recover from the underwriter in respect of it. If the scuttling is carried out by the captain and crew in fraud of the owner it is an act of barratry and the owner may recover under the policy, which ordinarily enumerates barratry as one of the perils insured against.

Counsel for the appellant cited a remark made in the judgment of LORD CAMPBELL in *Thompson* v. *Hopper* (30). In commenting upon a plea alleging personal misconduct of the plaintiffs which produced the loss, LORD CAMPBELL said:

> "The plaintiffs' counsel said truly that the perils of the sea must still be considered the proximate cause of the loss; but so it would have been if the ship had been scuttled or sunk by being wilfully run upon a rock."

It is true that the sea in all these cases would be the actual agent of destruction, but this does not make the loss a loss by perils of the seas. As pointed out by SCRUTTON, L.J., in his judgment, the question as to proximate cause is really as to what is the dominant or effective cause. In the present case it was, of course, the scuttling, and that is not a "peril of the sea." A dictum of LORD ELLENBOROUGH in *Heyman* v. *Parish* (24) was also cited. That dictum was a criticism of a ruling of BULLER, J., in the question whether, if a plaintiff declared for a loss by perils of the seas and it turned out that it was the result of barratrous misconduct in the navigation of the vessel, the plaintiff could recover. Reference was also made to *Dudgeon* v. *Pembroke* (33). In that case a vessel encountered very bad weather and was lost. It was alleged that she was unseaworthy, but it was decided that a loss caused immediately by the perils of the seas is within the policy, though it might not have occurred but for the concurrent action of some other cause which is not within the policy. Neither of these cases appears to me to have any material bearing upon the present. Upon the whole I arrive at the conclusion that there was no loss in this case by a peril insured against, and that the appeal must fail upon that ground.

LORD SUMNER.—Your Lordships have held that the mortgagees in this case were independently insured by the respondent and are not entitled simply through the mortgagor and by derivation from him, and further that they had a separate insurable interest in virtue of their agreement with the mortgagor, which gave them the right to call for a regular and legal mortgage, a right enforceable by legal process. I concur in both points, though, as to the first, had I tried the action, I think I should have decided otherwise, for the written agreement provides for a derivative insurance only, the mortgagor insuring himself and giving the mortgagees the benefit of his insurance, and the evidence does not prove a clear departure from this arrangement. The conversations proved are ambiguous, for Mr. Samuel, the mortgagee, whose intention, and not that of his broker, was the intention that really mattered, only said in substance that proper policies were to be effected, and the point that this policy was treated exactly as policies were

A treated in which the mortgagees had no insurable interest, namely, those on freight and disbursements, and were held by the mortgagees along with them, apparently as collateral security, has received less attention than I think it deserves. The question is, however, one of fact, and I should not presume to differ from your Lordships' view upon it.

To the independent claim of the mortgagees thus established the defendant raises B two defences, the first that the loss was not proximately caused by any perils insured against, and the second that, even if it was, the insurer's liability is not enforceable by reason of the fact that a condition incorporated in the policy—viz., No. 22 of the Institute Time Clauses—was not fulfilled. Both questions are of importance, the former because it involves a radical re-consideration of a part of the law of marine insurance which has long been thought to be settled, the latter C because, in consequence of a reply of waiver of the condition, the practical business of underwriting is seriously affected.

That this loss was not a loss by perils insured against, that is to say of the sea, is argued for the respondents under two heads, (i) that the peril was not fortuitous and accidental, but that the loss was deliberately designed, and (ii) that the loss was not proximately caused by foundering at sea, but was proximately and solely D caused by the act of scuttling the ship. The argument was approved both by BAILHACHE, J. (so far as his own opinion went), and by SCRUTTON, L.J. The former, however, says in his judgment in the present case that the incursion of sea water would in the circumstances be a peril of the sea, but, being due to the action of the owner or his agents in scuttling her, it would be a risk not covered by the policy. This is consistent with saying that the guilty owner fails to recover E on the policy because he is guilty and not because the loss is not otherwise a loss by perils insured against. SCRUTTON, L.J., says, first:

> "there must be a peril, an unforeseen and inevitable accident, not a contemplated and inevitable result,"

though in fact, whether the matter was one of accident or design, the result was F not in either event inevitable; and secondly:

> "when a stranger and still more an owner directly and intentionally lets sea water into a ship, the dominant, effective or proximate cause of the loss is the deliberate action of the owner and not any peril of the sea."

This proposition is framed to cover the intentional act alike of the owner or of a stranger which, I think, is strictly logical. The reasoning seems to be this. A G loss arising out of such action is a loss outside the words of an ordinary Lloyd's policy, because the action is intentional, the outcome of human volition, and apart from the relations between the actor and the underwriter. The reason why the sinking of a ship so brought about is not a loss by perils of the sea must be that man, not inanimate nature, is the cause of it; that it issues from the conscious working of the human will and not from the haphazard operation of natural forces. H What then, one asks, has wilful misconduct to do with it? Yet it is specially enacted that an assured cannot recover for a loss attributable to his own wilful misconduct. What is the use of such a rule? It is only a particular instance of a wider general proposition. He cannot recover for a loss attributable (proximately) to the wilful conduct of anybody, saint or sinner, because it is not fortuitous but is caused by human volition and is substantially what was willed. To these I weighty opinions may, I think, be added two observations by the respondents' junior counsel which are well worthy of attention, for they put these points freshly. The one is that a wicked scheme carried out with mens rea is not really a chance at all; it is a certainty. Of course it may fail and be defeated, but, if it succeeds, it succeeds through human machination. The other is that if, say, the sinking or burning of a ship was a loss by perils of the sea or by fire, even though the master or crew swamped or kindled her, barratry in a large number of cases of loss is an otiose addition to the perils insured against.

I cannot understand how these propositions are to be reconciled with the

well-established law applicable to collision cases. Neither the deliberation nor the wickedness of the action which produces the collision appears to affect the right of owners, who are insured, to recover as for a loss by perils of the sea. Two ships on crossing courses collide and sink. Either navigating officer may have kept his course and been right, or, kept his course when he should have given way or kept his course when, being in liquor, he was oblivious of the other ship's existence. In each case his action is the same; he steers the ship exactly where he meant to steer her and by being where he elected to place her she is cut down and founders. The result is the same whatever his state of mind, and neither his negligent navigation nor his liability to be indicted for manslaughter affects the right of owners of ship and cargo to recover. If the matter goes a little further and the navigator of the give-way ship, being inflamed by his liquor, stands on and vows he will sink the other rather than give way, he may, I suppose, be hanged for murder but his owners will be indemnified just the same; at least, I know no authority which decides the contrary. In each case the officer has done what he designed to do; in one intending to sink the other ship and take his chance of sinking his own. In all of them he has thus far intended the consequences of his action—that he has proposed to take the consequences, whatever they may be. To take one case more, there are situations in which it becomes the duty of a navigator to steer into and collide with a floating object to avoid collision with a third. For insurance purposes the result is the same. It is not true to say that he has no choice; the truth is that he has his choice and makes the right one, with consequences as before. In all these cases the action taken by the navigator is the same, and is persisted in up to and into the actual collision; the difference is purely in his state of mind and ranges from conscious rectitude through panic and intoxication to crime. How can the law applicable to such cases consist with the proposition contended for? An act has been intentionally done which let in the water as it might be expected to do, and yet loss resulting from that act is a loss by perils of the sea. If the navigator in each of the above cases be the sole owner of the ship he, of course, is defeated on proof that he shaped his course with a view to getting judgment in his favour on the policy, and it may be he would fail (I express no opinion) in some other cases, but as everything else is the same, except that in the case supposed the ship is his property and he has insured her, I cannot see how the cause of the loss is not the same throughout. Surely the difference does not rest on the fact that instead of an indictment for manslaughter the indictment of the owner is one based upon fraud.

I could put other cases, but do not think anything would be gained by them, nor does it appear to me to help the argument to say that in some of these cases there might be a loss by barratry. There is a good deal of overlap in the wording of a Lloyd's policy, and the same event may give cargo-owners indemnity under perils of the sea and shipowners an alternative indemnity under barratry. Thus there is very old authority for saying that cargo-owners cannot recover as for barratry when the barratrous act leading to the loss was assented to by the shipowner, for it is of the essence of barratry that the shipowner is wronged, and he is not wronged when he consents: *Stamma* v. *Brown* (13); *Nutt* v. *Bourdieu* (11). In such a case I think the cargo-owners recover for a loss by perils of the seas, but on the respondent's argument they had no remedy except against the shipowner and the captain. Contracts of indemnity are intended to make good losses where they happen in certain events, and except where, as with barratry, culpability is a quality of the cause of loss itself, they are not concerned with the guilt or innocence of the action. The case of loss attributable to the wilful misconduct of the assured is not an actual term of the contract. It is a restriction placed by law on the right to enforce it in order that a contract of indemnity may not serve as an instrument of fraud.

It is then said that the very definition of a peril of the sea excludes from the term the operations of wilful misconduct, whether of the assured or of anybody else; that the expression is perils of the sea, not perils on the sea; and, on the

A other side, that the wilful murder of a workman may, as an accident, be a ground for compensation to his widow, which is not unlike an accidental loss under a policy. My Lords, I have failed to find these arguments helpful. Nor do I think much is to be gained by reference to the decisions themselves in the *Xantho Case* (5) and *Hamilton, Fraser & Co.* v. *Pandorf & Co.* (6). SIR ROBERT PHILLIMORE points out in *The Chasca* (38) that the analogy between bill of lading cases, as B those cases were, and insurance cases is fallacious. The words "perils of the seas" have the same meaning in both instruments, but on the question of the cause of loss different rules and reasoning apply. Of course, perils of the sea are not the same as perils on the sea, but in law epigrams only dazzle, and as for decisions on the Workmen's Compensation Act, they shed even on that Act an illumination which is sometimes dim. In marine insurance we shall do better with the light C of reason.

The interpretation of the term "perils of the seas" is now statutory and is subject to the provisions of the Marine Insurance Act, 1906, including s. 55. Perils of the seas refer to accidents or casualties of the seas, so, evidently, accident or casualty is the point of definition. Fortuitous, probably, adds nothing to either substantive. A fortuitous casualty is a matter of chance, a mischance; but in D causation there is no chance. The effect is caused, it does not happen. Along this line the interpretation seems to carry us no further. If the chance refers to something not to be expected and not to be precisely foreseen something may be made of the term. If a ship has a hole in her below the water-line and nothing is done to close it, probably she will eventually sink and the point at which she sinks is the point at which the entrance of water passes from what she can carry to what E she cannot. That is what makes her sink. That point is capable of determination if sufficient data are known. Her ultimate fate is a matter of the intervention of something to stop the inflow before that point is reached. What difference does it make how the hole was made—by negligence or by crime, by impact of heavy cargo slipping from the slings, or contact with floating submerged wreckage? Given the hole and the water, Nature does the rest. I am speaking of such a case F as the present; if all the time the water was rushing in, the fraudulent owner was busily enlarging the hole with an axe, possibly this simultaneous joint causation might affect the matter, especially in view of the special language of some policies. Here, however, I do not see how it can be affirmed that the ship did not go to the bottom by getting too full of water, whether the owner let the water in at the beginning or not.

G In the present case the owner's part was played and played out before the ship left Philippeville. We do not know exactly what the plotters on board did. The learned judge says that an entrance for the water might have been arranged before the cargo was loaded. It might have been done by opening sea-cocks or tampering with valves immediately before the alarm was given. Many hours elapsed from the time of sailing to the time of the fictitious explosion; thirteen more passed from H that time before she sank, and during those thirteen hours she was slowly filling. For a long time she was in no danger. Even if the entry of water could not have been cut off the pumps would have overcome it. The attempt to tow would probably have succeeded if it had been made earlier. One need not know much about the sea and about ships to realise that the sinking was by no means an inevitable result of opening the aperture. Floating chips constantly get into and I choke inlet valves. Again, the ship might with the movement of the sea take a list that would lift this unknown aperture above the water-line. It is true that in the interval very little actually happened, though the chapter of accidents might have been a long one, but the interval is significant. To say that the proximate cause of the sinking was the instructions given by Anghelatos, and was not the entrance of water seems to me to give a new meaning to proximate cause, and if, for this purpose, the acts of his agents on board are regarded as his acts I think the result is still the same. A ship is none the less burnt and destroyed by fire because the striking of the match was an act of arson. There is authority for

saying that fire voluntarily caused to avoid capture is recoverable as a loss by fire: *Gordon* v. *Rimmington* (14), and I think it is plain that LORD HERSCHELL would have held in *Cullen* v. *Butler* (23) that a ship sunk by gunfire is lost by perils of the sea, for she is lost by incursion of sea water due to her coming accidentally (in the popular sense of the word) into contact with a cannon ball. To my mind, the real significance of the statutory interpretation is shown by the second sentence in r. 7, which is in antithesis to and is complementary of the first. Accidents are not what is ordinary; what will happen more or less in any case is not fortuitous. To say that if you make a hole under water, water will ordinarily come in, is only a gibe. That is an extraordinary manner for water to enter a hold at sea. To say that scuttling is not a peril of the seas because it has nothing to do with the seas except that they are the scene on which the drama of crime is played out appears to me also to be chopping logic. Negligence in navigation is not in this sense "of the seas," though it is pretty common at sea. It is more uncommon still to find an owner who is an Anghelatos; yet foundering is a peril of the seas in the case of a ship negligently navigated, and it must be so equally if she is deliberately holed.

SCRUTTON, L.J., uses language which seems to suggest that recent decisions have altered the rule as to causa proxima and have even, to some extent, substituted the rule of causa remota. I hardly think that this is so. The rule is statutory and courts have to apply, not to change it. If recent applications have not been altogether consistent with older ones, I do not think that was intended, though, no doubt, it is in the unintended and unforeseen effects of reported decisions that judge-made law finds its most interesting development. Where a loss is caused by two perils operating simultaneously at the time of loss and one is wholly excluded because the policy is warranted free of it, the question is whether it can be denied that the loss was so caused, for if not the warranty operates. It is then convenient and even necessary to test the application of the term proximate otherwise than by sequence in time, and attempts, more or less successful, have been made to explain it by using other adjectives, but the rule remains. I doubt if the present question would ever have been disposed of in favour of the respondent simply by saying that the hole had to be made first and then the water came in afterwards. Accordingly, the explanation of the two cases cited in this connection, *Leyland Shipping Co.* v. *Norwich Union Fire Insurance Society, Ltd.* (3) and *Reischer* v. *Borwick* (2), I think, is this. In the former where the question was really one of fact, the pressure of the water overcame the resistance of the bulkhead and the ship filled and sank, but it was the explosion of the torpedo which admitted that pressure to the bulkhead. Thus there were two concurrent causes proximately operating, namely, the opening of the ship's side and the pressure of the sea, and the policy, being free of the consequences of the former, it was free of this loss, though, if the insurance had been against perils of the sea and no more, the loss would have fallen within it. So in the other case. The policy was against collision and damage received in collision only, and it could not be denied that the vessel was damaged in collision. It took two things to sink her: the hole made in collision and water flowing into it. They were both immediate and concurrent causes, and if either was within the policy the assured recovered. If either of these cases goes beyond this, it does not merely re-name causa proxima and try to put it into English, but substitutes for it causa causans, whether proxima or not, which is in the teeth of the Act.

Before passing to s. 55 of the Marine Insurance Act may I say a few words about the decided cases? So far as I know there is no case which actually decides either of the propositions upon which the respondents rely. *Sassoon's Case* (8), approved in *Grant, Smith & Co. and McDonnell, Ltd.* v. *Seattle Construction and Dry Dock Co.* (34), is not really in point. The hulk was not navigated but was used as a floating store, and was so old and rotten that she could no longer withstand the pressure of the water in which she floated. The allusion to the absence of fortuitous circumstances made by LORD MERSEY does not mean that nothing can

A be a peril of the sea that does not happen by chance (whatever that may be), but meant that nothing except the rottenness of the hulk let in the water. So it is in cases on time policies where the loss is directly caused by unseaworthiness, for then it is plain that the loss was a certainty, whatever the state of the weather or the sea, and, as has been often said, perils of the sea refer to things that may happen, not to things which must happen in the ordinary course of navigation. B There is also the well-known passage in the opinion of COLLINS, L.J., in *Trinder's Case* (7), which was much relied upon. In spite of my respect for the lightest dictum of that great judge, the words themselves seem to me to be self-contradictory. The assured must prove a loss by perils insured against or fail. If it be true that his "wilful act takes away the accidental character which is essential to constitute a peril of the seas," then on proof of this wilful act he fails, C because the words of the contract do not cover the loss. Forbidding him to take advantage of his own wrong means that something, which in itself would be his of right under the contract, is denied to him because the law is more moral than the contract. Of course it is true that he cannot take advantage of his own wrong, or as it is sometimes put dolus circuitu non purgatur. This, however, seems to me to be obviously a case of personal disability, which cannot affect persons who D are neither parties to the dolus nor only standing in the guilty person's shoes. Fraud is not something absolute, existing in vacuo; it is a fraud upon someone. A man who tries to cheat his underwriters fails if they find him out, but how does his wrong against them invest them with new rights against innocent strangers to it? It seems to me impossible to study the judgments of A. L. SMITH, L.J., in the same case, and of KENNEDY, J., in the court below, without seeing how care-E fully both avoid saying that the exclusion of the assured from recovering on a policy for a loss attributable to his wilful misconduct has anything to do with the fortuitous character of perils of the sea. KENNEDY, J., says:

> "In regard to the conduct of the assured exonerating the underwriters, the line, in my judgment, is to be drawn at acts done knowingly or wilfully, or, at the least, with a reckless disregard of possible risk to the safety of the F subject of the insurance."

A. L. SMITH, L.J., says that when the loss is occasioned by the wilful act of the assured causa proxima non remota spectatur does not apply at all. I think "exoneration" is not the word to use for not being liable because the loss is not by any peril insured against, and, if proximate cause does not apply, the policy is G subjected to an exceptional rule of law to prevent the assured from profiting by his own misconduct, but no further.

If there are not decisions there certainly are dicta to the contrary, for example, LORD ELLENBOROUGH'S opinion in *Heyman* v. *Parish* (24) and LORD CAMPBELL'S opinion quoted from *Thompson* v. *Hopper* (30) (6 E. & B. at pp. 191, 192). In *Thompson* v. *Hopper* (30), LORD CAMPBELL, with the concurrence of COLERIDGE and H WIGHTMAN, JJ., said in terms that "if the ship had been scuttled or sunk by being wilfully run upon a rock," the loss would have been a loss by perils of the seas, a proposition not contested for over sixty years. That case is so largely quoted and adopted in *Dudgeon* v. *Pembroke* (33) that the absence of any criticism on LORD CAMPBELL'S observation is strong ground for believing that it was taken to be the law, and in the Court of Queen's Bench (L.R. 9 Q.B. at pp. 593, 594) BLACKBURN, J., quotes these very words with approval. When the judgment of that court was I restored in your Lordships' House, LORD PENZANCE, with the concurrence of LORD CARNS, L.C., and LORD BLACKBURN, says:

> "any loss caused immediately by perils of the sea is within the policy, though it would not have occurred but for the concurrent action of some other cause which is not within it."

Passing to *Thompson* v. *Hopper* (30), the learned judge adds that it is the only case which establishes an exception to this liability—the liability, that is, for losses immediately caused by perils of the seas—and that in this exception the knowledge

and wilful misconduct of the assured himself was an essential element in the decision. This appears to me to be fatal to the contention that scuttling by a stranger to the insurance sued on prevents the sinking from being a loss by perils of the seas at all, for why otherwise speak of "the assured himself"? In fact, loss by perils insured against, though brought about by the felonious act of a third party, has been held to be a loss within a fire policy: *Midland Insurance Co.* v. *Smith* (29). Is it to be taken that this case is to be overruled?

I think, however, there is a direct authority, namely, *Small* v. *United Kingdom Marine Mutual Insurance Association* (1). The contention that a loss by the wilful misconduct of Wilkes, which was by order assumed to be the fact, could not be a loss by perils of the sea was expressly raised in argument before MATHEW, J. (see 76 L.T. at p. 326), and must, I think, have been before the minds of the Court of Appeal, not merely as an incident in the proceedings below, but as a question lying at the bottom of the entire case. I am not aware that *Small's Case* (1) has been questioned till the present litigation, and certainly it is very well known, and the Act contains nothing expressly to the contrary of it. Neither is there, as far as I know, any case in which innocent cargo-owners have failed to recover for cargo lost at sea with the ship, on the ground that the water was let into her with the owner's privity. Whether what is said in *Small's Case* (1) is a decision or a dictum, it is in itself so important that the legislature could hardly have failed to put it right if it were wrong. The subject is dealt with in s. 55. The proposition is that a loss caused by wilful misconduct involving the sinking or burning of the ship is a loss for which, under the ordinary wording, the insurer is not liable. Why, if so, does not s. 55 (2) (b) add wilful misconduct to delay as a proximate cause of loss, for which it expressly states that the insurer is not liable? Had it done so it would at once have corrected *Small's Case* (1) and have affirmed a general and important rule. Again, if this proposition is true, why does s. 55 (2) (a) say that the insurer is not liable for wilful misconduct of the assured? The insurer can only be liable for losses covered by perils insured against, and, if he is never liable for losses caused by wilful misconduct, why specify the particular case and omit to state the general rule? Why is the language varied and the words "attributable to" used instead of "proximately caused by"? If the code meant to affirm the disputed passage in *Small's Case* (1), the words in s. 55 (1)—"is liable for any loss proximately caused by a peril insured against"—are adequate for the purpose. If the legislature intended to correct it, that intention failed. Again, if non-liability for losses attributable to wilful misconduct is a personal disqualification preventing the recovery of something otherwise recoverable, the addition of the words "of the assured" is apt; otherwise it is otiose. On the other hand, as sub-s. (1) states the general rule of liability, first affirmatively, and then negatively, and sub-s. (2) begins "In particular . . ." the subsection is the expression of particular cases of non-liability. What is there to show that this expression is not meant to be exhaustive? Why is loss attributable to someone's wilful misconduct omitted from the code and left to be implied at common law? As a matter of construction s. 55 seems to me to prescribe that the assured's wilful misconduct is a ground for refusing to him, but to him only, the indemnity which the proximate origin of the loss would otherwise have brought about. It is to be observed that the whole section is framed to state for what an insurer is liable, that is, upon a policy to a person assured by that policy, and is not framed as a definition of proximate or of remote causes. In fact, perils insured against are causes, and losses are effects. If the proximate cause of the effect, be it what it may, is not within the perils named in the policy, there is no liability and no more need be said about it. I cannot see any need for introducing this question of misconduct, unless it is first assumed that the loss has been brought within the policy by being proximately caused by perils mentioned therein. If so, wilful misconduct constitutes a case of exception, but of exception out of the insurer's liability to the assured who has misconducted himself, and not out of the perils covered by the policy, and the statement then becomes relevant to the section

because the object of the section is to declare for what the insurer is liable and for what he is not.

That the law, common or statute, should declare exceptions from liability which are not provided for by the words of the policy itself is nothing new. For example, apart from the custom of particular carrying trades, cargo stowed on deck is excepted out of the protection of a policy on cargo. So in a policy against capture in time of war British capture is excepted when the underwriter is a British subject. It seems to me, though, as it is a somewhat thorny subject, it may be better not to express any decisive opinion now, the indubitable freedom of the policy from liability for inherent vice and wear and tear really rests on the principle of special exceptions out of general categories of liability, though I recognise that they may be regarded as being merely instances of a limited interpretation placed upon the named perils. The Act, however, appears to regard them as exceptions from liability as it does the wilful misconduct of the assured.

I find it impossible not to be influenced by the consideration that if a scuttled ship is not proximately lost by perils of the sea then every cargo-owner who loses his goods with her is as uninsured as the scuttling shipowner. Curious results may follow. An owner-skipper of a craft of small value laden with, say, bullion, finds his anchor dragging as he lies in shelter and in shallow water, and to save his cargo from total loss if his vessel faces the gale outside and sinks in deep water, blows a hole in her stern and drops her on the mud in four fathoms, where the bullion is easily raised. I take it this, if reasonably done, is a general average sacrifice of the vessel and, subject to the ship's contribution, is directly recoverable from cargo-owners and freighters. Can the captain not recover anything on his hull policy, nor the cargo-owners anything on theirs, a loss by general average sacrifice being a loss by perils of the seas? That result follows from the respondent's argument, but I think it is not a result which underwriters desire or intend. It is true that, as Scrutton, L.J., says, to hold the contrary means that underwriters insure cargo-owners against fraudulent casting away of their goods by shipowners. It is true that, as has been argued, a cargo-owner is defeated in some other cases by the default of the shipowners, e.g., the unseaworthiness or the deviation of the ship, though he be ignorant of it in fact and powerless to prevent it. Then why not in the case of scuttling also? To the first observation I think the answer is that it is the business of an underwriter to take risks, and the risk, an inconsiderable one, of the shipowner's wilful misconduct, can be considered in the premium as well as the risk of negligent navigation. Though it is the underwriter's business to take risks, however, he refuses to be swindled. I would add that historically I do not think it is known whether this exclusion from liability for the assured's wilful misconduct really originates in the layman's construction of his contract or in the lawyer's ethical objection to allowing a man to profit by his own wrong. Quite possibly the case was always so exceptional that, left to himself, the underwriter would have made the best of it. As to the other point, I do not think the cases are parallel. Unless the contract of indemnity is to be absolute, at all events, some normal conditions must be assumed, and in voyage policies these include a definite voyage, definitely pursued, and a carrying vehicle reasonably fit for that voyage. These are not really cases of making an innocent assured bear the consequences of the default of a stranger.

In your Lordship's conclusion that the condition as to the permissible limit of p.p.i. cover on freight has been broken, I entirely concur. I have no doubt that it is intended to exercise and does exercise some useful restraint on persons who are tempted by the prospects of success in the same walk as that of Mr. Anghelatos, but the question is not what is intended or is effected, but what is said. Clause 22 is one of a code of clauses incorporated bodily into the policy, and that code contains disconnected and self-contained provisions which the parties think fit to adopt. It is true that the whole policy, the clauses included, must be read together; but the way in which policies are built up by the addition of isolated clauses or groups of clauses is quite familiar, and the mode of construction is different from that

which applies to a continuous instrument designed as a whole and drawn systematically with all a conveyancer's art. Clause 22 is a warranty, quite different from, say, the f.p.a. warranty. It is a condition; it must be enforced as a condition and exactly complied with, whether material to the risk or not (s. 33 (3)). Being a condition it can be answered only by performance or by waiver. In my opinion, on the facts it clearly was not performed and the appellants in fact relied on waiver, no reliance being placed on the proviso at the end of the clause.

It was pleaded in the reply that "the insurance against war risks only on freight for six months was effected (inter alia) by the [respondent] Dumas, who was also" an insurer (inter alios) in respect of the marine risks on hull and machinery, and in respect of war risks on hull and machinery and freight, and in respect of both on premiums and demurrage. "The said Dumas thereby waived the said warranty and is estopped from relying upon the same." How much was made of this plea at the trial we do not know. No evidence was given upon it except that all the slips were put in. The war risks policies do not appear in the record, but an original example of each of the groups of policies was produced during the argument for your Lordships' inspection. If BAILHACHE, J., appreciated that this point was relied on he did not think it merited any reference to it in his judgment. All that can be gleaned of its fortunes in the Court of Appeal is that SCRUTTON, L.J., having stated the appellants' contention, dryly adds, "I could not understand how this result followed." Before your Lordships this point was elaborately made and, probably for the first time, was one of the main props of the appellants' case. I think your Lordships might well have declined to entertain it. We have not the benefit of the opinions of either court below, manifestly because the appellants did not think fit to develop this point sufficiently to attract the court's attention or to make their reasoning intelligible. They called no evidence of actual intention or of knowledge of material circumstances on the part of the defendant. I do not think that your Lordships are bound to decide a point on which the party on whom the burden of proof lies has not elicited the proper evidence, or, by explaining the point, obtained clear judicial opinion upon it. I could have wished that your Lordships had refused to consider it in such circumstances.

Estoppel, though pleaded, may be dismissed at once. The respondent entered into a new contract of insurance; he did not agree upon valuable consideration to modify the old one. He made no representation that he would not rely on the conditions in the first policy, and, if he had done so, it would have been only a promise de futuro and not a representation of an existing fact. The appellants did not change their position on the faith of any representation, but no doubt continued to act, after the second slip was initialled on the respondent's behalf, exactly as they had intended to act before. There was nothing done to encourage the broker to go on completing the freight cover which he had opened, and he simply pursued his own course about it. This is not a case in which the law imputes or presumes any particular intention, and as to any intention in fact, I have no doubt that the person who initialled the second slip had at the time no thought, and probably no knowledge, of the first. It must, in my opinion, be clear that the broker acted by inadvertence when he opened a cover on freight f.i.a. for more than cl. 22 permitted. Why is not the underwriter to be supposed to have been inadvertent too? Unless he is treated on the same footing as the broker in this respect, the effect is that one party is bound to a consequence which he did not intend, while the other is relieved from all consequences on the ground that he did not intend them. An anticipatory election to waive a breach in case the amount covered should reach a sum which would involve a breach will not do, while of any actual election there is no evidence at all. No permission was given to the broker to cover as much on freight as he chose, nor was the condition abrogated by consent or by conduct. The matter is all the more serious for the underwriter since cl. 12 is a condition or nothing; if waived, it goes entirely. It cannot simply be reduced to a promise, of which the breach will sound in damages. The contention makes an underwriter's position difficult indeed, if without proof of knowledge or intention,

he is held to waive something in a prior contract, for when a risk is offered to him his mind is, and must be, bent on the risk so put before him and on the premium appropriate to it, and it is not reasonable in fact to expect him to have his mind on the terms of other insurances to which he is party, except to see whether he has exhausted the limits which restrict him in taking a further risk. Of course, for the purpose of disclosure, an underwriter is deemed to know whatever it is part of the current knowledge of an underwriter to know in the course of his business, but the question here is not a question of disclosure. Of course, too, the respondent is bound by the acts of his agents and the terms of his contracts, and he abides by both the insurances which he subscribed, and accepts liability for his agents' acts. The question is what is the effect of what he or his agents did? Is it only that he made two distinct contracts, or does it go further and alter one, when all that was in fact intended was to make another, and then observe both? No case was cited which would justify the inference of a waiver from such materials. In the most familiar of examples—waiver of a forfeiture by acceptance of fresh rent with knowledge of the existence of a cause of forfeiture—the mere doing of an act is taken as a conclusive waiver without inquiry into the lessor's actual state of mind, but this is an act, in itself unequivocal, done under the very contract under which the cause of forfeiture arises, and it is itself an act inconsistent with the prior determination of the contract for that cause: see the observations of PARKER, J., in *Mattheus* v. *Smallwood* (16). No case was produced in which a like result was held to follow, irrespective of actual intention, where no act is done under the contract to be affected, but another and independent contract is entered into, which, according to its terms, leaves the old contract untouched.

It is said, as I apprehend, first of all, that as the breach of the condition consisted and could only consist in contracting subsequently for an excessive amount of insurance of a particular kind, and as such contracting postulates an underwriter as well as an assured, the respondent, by taking a line on that subsequent insurance, was art and part in the breach himself, and could not thereafter rely on the condition which he himself had had a hand in breaking. This involves some examination of the war risks slip and policy so far as they include freight. It is further said that, by executing the marine risks policy, which was done after the war risks cover had been completed for an excessive amount, the respondent affirmed that the marine risks insurance was still in effect, the excess freight insurance notwithstanding, and thus, by an act inconsistent with an intention to rely on the breach of the condition, in law disentitled himself from doing so thereafter.

I will take first the war risks cover on freight f.i.a. itself, which was initialled on behalf of the respondent. As a matter of business it is the initialling of the slip which makes the contract and binds the underwriter to execute a policy, and, as a matter of law, rectification of a policy is granted to make it conform to the slip, and the obligation of disclosure has reference to the date of the slip. Except for the purposes of statutory stamp requirements, there need not be a policy at all. A policy was, however, in fact, duly issued as the law required (I treat the p.p.i. question as one not before your Lordships) and the legal effect of issuing the policy has to be examined. I would add that no attention was drawn to the payment of the premium on either policy nor is there any evidence about it, and it may well be that, having regard to the substitution of the broker for the assured as the person who alone is debtor for the premium, any evidence about it would, for present purposes, have been irrelevant. The question is, therefore, whether the subscription of either document makes the respondent a party to the breach of warranty. It appears from the copy of the slip which is in the record that the respondent is the first underwriter who happens to be on both risks. There may be another before him, but, at any rate, he is not by any means the only one on both. He, however, is the one selected to be sued, and, under the usual agreement to be bound, the fortunes of the others must stand or fall with his. It appears also

that, as the slip stood when it had been initialled on his behalf, the limit permissible under the condition—cl. 22—had not been exceeded or reached. As to these questions, I have had to use my own experience, since no evidence was given beyond the slip itself, but I think I am right. On the face of the slip it appears that a total "war risks only" cover is contemplated of £110,000 on hull and machinery, £27,500 f.i.a. on freight and £16,500 f.i.a. on disbursements. To anyone who had seen and remembered the marine slip initialled, in the case of the respondent, three days earlier, it could be made to appear from these materials that the total insurance of the hull and machinery against marine risks with institute time clauses having been £110,000 for twelve months and the war risks slip being for six months only, the permissible limit of an f.i.a. insurance on freight would be £13,750. I do not believe that any underwriter, with his mind on the question whether he should take a line on the war risk slip or not, would or could make the calculation in fact, and no one gave evidence that he could. After the event it undeniably appears possible, but why it is to be assumed in law that the underwriter knew this I do not know.

As far as the slip is concerned, I think the respondent is entitled to have it judged as at the moment when it was presented. Within the limit of £13,750 there can be no question of breach of the condition, and, if the respondent's subscription does not pass the limit, there can be no right to impute to him that it made him party to a breach by picking it out afterwards when other subscribers had raised the total subscribed beyond the limit. At any rate if he had been the leading underwriter on the slip he would still have waived the condition. How then is his action to be tested? In *Lord Darnley* v. *London, Chatham and Dover Rail. Co.* (36) Lord Chelmsford said: "A waiver must be an intentional act with knowledge." It is a question for a jury unless the facts are undisputed: *Davenport* v. *R.* (35). The name of the ship was on both slips; the name of Anghelatos was only on the marine risks slip; the other slip named no assured. At the most he had means of inferring that the assured was probably the same person, since the same broker was employed and who could wish to pay premiums on £110,000 on hull and machinery against war risks only except the person who had covered the same sum on the same subject-matter against marine risks f.c. and s.? He might then recall the terms of cl. 22 which are intricate, note that the time for the second cover is half that of the first, and, having done the arithmetic in his head, say "my proportion will not make this insurance on freight up to and inclusive of my line, as much as £13,750" (this, as I read the slip, being the fact). "The broker, it is true, has opened his slip for £27,500 on freight, which is £13,750 too much, but it is his business. He knows certainly as much and probably more about it than I do, and no harm is done so far. He will find out his mistake presently and either ask to have the amount reduced, which, of course, I shall agree to do, or will have to make his client his own underwriter for the excess of £13,750, and so keep on the safe side." I do not know what course an underwriter would feel bound to take if he said all this to himself, nor does it matter, for in fact I am sure this never would occur to him, but at any rate there would be no waiver for I do not think a man can be a party to a breach, which is not yet and quite possibly never may become a breach at all, at the time when this action begins and ends. Whether or not it would be inequitable for the respondent to be allowed to enforce the condition in these circumstances, I am sure I do not know. Counsel cited no authority to show that equity has ever restrained an underwriter from relying on a condition in such a case, but, if it would do so, it must be on some ground, and the statute specifies that ground and the only ground, namely, waiver. For my part I can see none.

Now as to the two policies produced. Both are signed by Lloyd's Underwriters' Signing Bureau, though in the case of the war risks policy one underwriter signs for himself, the subscription being £1,000 only, after the signing by the bureau is complete and in the case of the marine risks policy there are three such personal subscriptions, all subsequent to the work of the bureau. In the war risks policy

A the subscriptions by the bureau follow the order of the initials on the slip; in the other case they do not, and for some reason the subscription of the respondent is last but two, the three last being those of the groups of names who sign per E. R. Pulbrook, the respondent being a member of the first of the three. It is to be noted that there are other policies, presumably similar, neither policy produced exhausting the respective total amounts insured. It would appear from the B documents themselves that the official in the bureau had before him a battery of stamps, each with the list of "names" and of the proportions that they take in printed characters and the signature of the writing member in facsimile, and, having checked the policy with the slip, stamped the subscriptions with the stamps selected from his battery, sometimes following the order in the slip and sometimes for reasons unknown adopting another order. Of Lloyd's Underwriters' Signing C Bureau we only know what is to be found in the note to s. 102 of ARNOULD'S MARINE INSURANCE (10th Edn.). Each subscription is a separate insurance and there is no joint contract by all the underwriters. I am afraid the appellants' argument somewhat overlooked this. The practice is to take many subscriptions, often all, on one slip and, in the case of Lloyd's underwriters, one policy. Even if the total insurance effected on freight f.i.a. eventually was excessive, joining D many subscriptions in one policy cannot by itself make any individual underwriter a party to an excessive insurance. It is, therefore, in the addition of the figures £27,500 to the words "Freight f.i.a." that the whole burden rests. Now this does not make it a part of the assured's contract with the individual underwriters that insurance to the extent of £27,500 shall be effected. The contract does not make the underwriter join in or make him a party to a collective insurance. The under- E writer takes a part of that total, but whether the assured actually insures that total or not the result is the same; for any sum which he does not insure he will be his own underwriter. That is not enough. It surely cannot be said that if £13,750 only was effected with underwriters and the assured was his own underwriter for the balance there could be an "amount insured for account of the assured," within the meaning of cl. 22, in excess of £13,750. The figure put into the slip F becomes the basis of a calculation. It may be expected and intended to be carried through. That is a question of fact not proved in this case, but what of that? A man does not disentitle himself to rely on a condition when, knowing that the other party intends to do something which will be a breach, he simply stands by and leaves him to take his course: *Sheppard* v. *Allen* (12). As to the policy I suppose it is plain that the signing clerk at the bureau has no authority from the G respondent to do anything but to see that the policy correctly carries out the slip and then to sign for him by using the stamp provided. He has no authority to waive anything, or to receive notice of any other subscription so as to bind the respondent thereby, or to do anything except to execute the policy. If so it seems to me to follow that in the case of the war risks policy the subscription of the policy carries the case no further than the slip did, for it does not affect the respon- H dent with notice that the £13,750 on freight f.i.a. has now been exceeded, and that such excess amount was contemplated appeared on the slip itself when opened. It is as though a separate policy in terms of the slip had been brought by the broker to the respondent and signed by him as a matter of course.

As to the marine risks policy, the execution at the Signing Bureau involves nothing in the way of notice, knowledge, or election except that the policy is I executed. For an underwriter to refuse to issue a signed policy in terms of his slip is a grave matter, all the graver because he is not legally compellable to do so. In business it means no more than giving the assured the means to enforce at law rights already acquired in substance on the initialling of the slip. In truth, the respondent, or his underwriting agent, knew nothing more in October than was known on Sept. 25, and the clerk in the Signing Bureau knew nothing at all except that the two documents corresponded.

I would draw attention to one further point. By the policies the risk begins at noon on Sept. 25, and if the slip was initialled by the respondent at the end of

the day on Sept. 25 he was at risk forthwith, even though no other line was initialled afterwards, and thereupon he was entitled to his premium. Apparently the permissible amount of cover on freight was not exceeded on Sept. 25 at all. If my inference is right as the ship was at risk for two days before there was any breach of condition completed, and, as signing the policy could not at any rate affect the underwriters' liability for loss, if any, during that period and the right to the premium also, signing the policy cannot in itself show an intention to affirm that the insurance is valid at all events, no matter what has happened to the condition, but only that, for whatever the respondent may be liable on the slip, he is content to be legally bound and no more. I am, therefore, of opinion that no waiver is proved and that the condition has been broken and that on this ground the appellants fail.

VISCOUNT CAVE.—My noble and learned friend **LORD PARMOOR** informs me that he agrees on all points with the opinion I have expressed to your Lordships. My noble and learned friend **LORD HALDANE** desires me to say that he concurs in the conclusion at which your Lordships have arrived that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *W. & W. Stocken*; *William A. Crump & Son.*

[*Reported by* E. J. M. Chaplin, Esq., *Barrister-at-Law.*]

GAYLER AND POPE, LTD. *v.* B. DAVIES & SON, LTD.

[King's Bench Division (McCardie, J.), March 21, April 11, 1924]

[Reported [1924] 2 K.B. 75; 93 L.J.K.B. 702; 131 L.T. 507; 40 T.L.R. 591; 68 Sol. Jo. 685]

Negligence—Trespass—Pony and van left unattended in street—Pony bolting into plaintiffs' shop through window—Damage to premises and contents—Liability of owner of pony.

A pony belonging to the defendants, attached to the defendants' milk van then being used to distribute milk to the defendants' customers, was left unattended, bolted, and dashed through the plaintiffs' shop window, doing damage.

Held: (i) where damage was done by a horse straying off a highway on which it lawfully was the owner was liable only on proof that he had been guilty of negligence and not for the trespass simpliciter; when a horse and van, wholly unattended, dashed into a shop window adjoining a highway there was a primâ facie case of negligence against the owner; in the present case the defendants had failed to rebut that primâ facie case; and, therefore, the plaintiff was entitled to recover damages from them on the ground of negligence.

Notes. Referred to: *Deen* v. *Davies*, [1935] All E.R.Rep. 9; *Searle* v. *Wallbank*, [1947] 1 All E.R. 12; *Wright* v. *Callwood* (1950), 66 (pt. 2) T.L.R. 72.

As to negligence in the use of vehicles on highways, see 23 Halsbury's Laws (2nd Edn.) 637–644, 671–675. For cases see 2 Digest (Repl.) 309 et seq., 36 Digest (Repl.) 109.

Cases referred to:

(1) *Ruoff* v. *Long & Co.*, [1916] 1 K.B. 148; 85 L.J.K.B. 364; 114 L.T. 186; 80 J.P. 158; 32 T.L.R. 82; 60 Sol. Jo. 323, D.C.; 36 Digest (Repl.) 43, *222*.

(2) *Holmes* v. *Mather* (1875), L.R. 10 Exch. 261; 44 L.J.Ex. 176; 33 L.T. 361; 39 J.P. 567; 23 W.R. 869; 2 Digest (Repl.) 378, *539.*

(3) *Ellis* v. *Loftus Iron Co.* (1874), L.R. 10 C.P. 10; 44 L.J.P.C. 24; 31 L.T. 483; 39 J.P. 88; 23 W.R. 246; 2 Digest (Repl.) 312, *158.*

(4) *Fletcher* v. *Rylands* (1866), L.R. 1 Exch. 265; 4 H. & C. 263; 35 L.J.Ex. 154; 14 L.T. 523; 30 J.P. 436; 12 Jur.N.S. 603; 14 W.R. 799, Ex. Ch.; affirmed *Rylands* v. *Fletcher* (1868), L.R. 3 H.L. 330; 37 L.J.Ex. 161; 19 L.T. 220; 33 J.P. 70 H.L.; 2 Digest (Repl.) 328, *215.*

(5) *Cox* v. *Burbidge* (1863), 13 C.B.N.S. 430; 1 New Rep. 238; 32 L.J.C.P. 89; 9 Jur.N.S. 970; 11 W.R. 435; 143 E.R. 171; 2 Digest (Repl.) 319, *187.*

(6) *Manton* v. *Brocklebank*, [1923] 2 K.B. 212; 92 L.J.K.B. 624; 129 L.T. 135; 39 T.L.R. 344; 67 Sol. Jo. 455, C.A.; 2 Digest (Repl.) 331, *229.*

(7) *Goodwyn* v. *Cheveley* (1859), 4 H. & N. 631; 28 L.J.Ex. 298; 33 L.T.O.S. 284; 23 J.P. 487; 7 W.R. 631; 157 E.R. 989; 2 Digest (Repl.) 312, *157.*

(8) *Tillett* v. *Ward* (1882), 10 Q.B.D. 17; 52 L.J.Q.B. 61; 47 L.T. 546; 47 J.P. 438; 31 W.R. 197; 2 Digest (Repl.) 310, *139.*

(9) *Read* v. *Edwards* (1864), 17 C.B.N.S. 245; 5 New Rep. 48; 34 L.J.C.P. 31; 11 L.T. 311; 144 E.R. 99; 2 Digest (Repl.) 377, *532.*

(10) *River Wear Comrs.* v. *Adamson* (1877), 2 App. Cas. 743; 47 L.J.Q.B. 193; 37 L.T. 543; 42 J.P. 244; 26 W.R. 217; 3 Asp.M.L.C. 521, H.L.; 36 Digest (Repl.) 166, *890.*

(11) *Phillips* v. *Britannia Hygienic Laundry Co.*, [1923] 1 K.B. 539; 92 L.J.K.B. 389; 128 L.T. 690; 39 T.L.R. 207; 67 Sol. Jo. 365; 21 L.G.R. 168, D.C.; affirmed, [1923] 2 K.B. 832; 93 L.J.K.B. 5; 129 L.T. 777; 39 T.L.R. 530; 68 Sol. Jo. 102; 21 L.G.R. 709, C.A.; 36 Digest (Repl.) 92, *497.*

(12) *Hammack* v. *White* (1862), 11 C.B.N.S. 588; 31 L.J.C.P. 129; 5 L.T. 676; 8 Jur.N.S. 796; 10 W.R. 230; 142 E.R. 926; 2 Digest (Repl.) 317, *171.*

(13) *Manzoni* v. *Douglas* (1880), 6 Q.B.D. 145; 50 L.J.Q.B. 289; 45 J.P. 391; 29 W.R. 425; 2 Digest (Repl.) 317, *172.*

(14) *Byrne* v. *Boadle* (1863), 2 H. & C. 722; 3 New Rep. 162; 33 L.J.Ex. 13; 9 L.T. 450; 10 Jur.N.S. 1107; 12 W.R. 279; 159 E.R. 299; 36 Digest (Repl.) 73, *387.*

(15) *Crawford* v. *Upper* (1889), 16 A.R. 440; 36 Digest (Repl.) 142, **1217.*

(16) *Tolhausen* v. *Davies* (1888), 57 L.J.Q.B. 392; 59 L.T. 436; 4 T.L.R. 328; 52 J.P. 804; affirmed 58 L.J.Q.B. 98; 5 T.L.R. 18, C.A.; 2 Digest (Repl.) 327, *209.*

(17) *Watson* v. *Weekes* (1887), cited 57 L.J.Q.B. 394; 52 J.P. 804; 2 Digest (Repl.) 317, *173.*

(18) *Simson* (*Simpson*) v. *London General Omnibus Co.* (1873), L.R. 8 C.P. 390; 42 L.J.C.P. 112; 21 W.R. 595; sub nom. *Smith* v. *London General Omnibus Co.*, 28 L.T. 560; 2 Digest (Repl.) 320, *190.*

(19) *Snee* v. *Durkie* (1903), 6 F. 42; 41 Sc.L.R. 39; 11 S.L.T. 397; 2 Digest (Repl.) 324, **213.*

(20) *Illidge* v. *Goodwin* (1831), 5 C. & P. 190; 2 Digest (Repl.) 318, *178.*

(21) *Martin* v. *Stanborough* (1924), 40 T.L.R. 557; 68 Sol. Jo. 739; affirmed 41 T.L.R. 1; 69 Sol. Jo. 104, C.A.; 36 Digest (Repl.) 44, *242.*

(22) *Macfarlane* v. *Colam*, [1908] S.C. 56; 45 Sc.L.R. 47; 15 S.L.T. 451; 36 Digest (Repl.) 39, **214.*

(23) *Hendry* v. *M'Dougall*, [1923] S.C. 378; 36 Digest (Repl.) 109, **820.*

Action tried by McCardie, J., without a jury.

The plaintiffs claimed damages from the defendants in respect of damage to their business premises which, they alleged, was due to the negligence or trespass of the defendants' servants. The plaintiffs were drapers and carried on their business at premises occupied by them at Marylebone. At about 6 a.m. on Jan. 14, 1923, the defendants' pony, attached to a van which was then being used to supply milk to the defendants' customers, dashed through the window of the plaintiffs' shop

and damaged a large quantity of goods in the shop, besides doing damage to the fittings and woodwork. No driver or other servant of the defendants was in sight at the time. The plaintiffs brought this action, alleging that the pony was negligently left unattended by the defendants' servants in the street and allowed to bolt into the plaintiffs' shop window, doing damage to the extent of £145. Alternatively, the plaintiffs said that they had suffered the damage through the trespass of the defendants by their pony and cart. The defendants denied both trespass and the negligence.

Clement Davies for the plaintiffs.
Montague Berryman for the defendants.

Cur. adv. vult.

April 11. **McCARDIE, J.,** read the following judgment.—This case raises points of practical importance in the everyday litigation of the courts. The facts which gave rise to the main point can be briefly stated. The plaintiffs carry on business as drapers. They occupy premises at the corner of High Street and Blandford Street, Marylebone, which have a large glass shop window. About 6 o'clock on the morning of Jan. 14, 1923, a pony and milk van belonging to the defendants (who are milk vendors) dashed right through the shop window, overthrew and damaged a large quantity of goods in the shop, broke fittings and woodwork, and finally came to a standstill in a lobby within the plaintiffs' premises. There, a few minutes later, the pony was found lying on the ground, still attached to the van and with the wreckage around it. No driver or other servant of the defendants was in sight. The total damage sustained by the plaintiffs was £145. The pony and van were being used that morning by the defendants' servants to supply milk to the defendants' customers in Marylebone. The plaintiffs brought this action to recover from the defendants damages for negligence, or, alternatively, for trespass. They alleged that the defendants' pony and van was negligently left unattended by the defendants' servants in the street and that the pony with the van was negligently allowed to bolt into the plaintiffs' shop window. Alternatively, the plaintiffs said that they had suffered the damage through the trespass of the defendants by their pony and cart. The defendants denied both the negligence and the trespass.

Counsel submitted that, on the facts mentioned, the plaintiffs were entitled to recover damages on the ground that the defendants had, by their horse and van, actually trespassed in and upon the plaintiffs' premises, and that, therefore, quite apart from any question of negligence, the defendants were liable in trespass. It would be assumed at first sight that this contention of the plaintiffs could be met at once by direct decisions citable in the defendants' favour. But on the arguments for the plaintiffs and for the defendants it seems that no direct decision exists upon facts like those in this case, nor have I, upon research, been able to find any actual and definite decision on the point at issue. I have, however, a recollection, both forensic and judicial, of various cases in the courts in which it has been undoubtedly assumed that on facts substantially similar to the present ones it is essential for a plaintiff to prove negligence. In the case of a motor car which ran into a plaintiff's shop and did damage, the court assumed that evidence of negligence by the defendant was required: see *Ruoff* v. *Long & Co.* (1). Counsel submits in substance that the hitherto existent practice of the courts is erroneous, and that trespass lies in such a case as the present irrespective of negligence. If he be right in his contention, then a new and striking aspect of the law arises. If the injury to the plaintiffs' property had taken place on the highway itself then, plainly, the plaintiffs would have to prove either wilful conduct or negligence by the defendants: see *Holmes* v. *Mather* (2). Broadly put, the plaintiffs say, first, that a man is liable for the trespasses of his horses and cattle, and, secondly, that no sufficiently wide exception to that general rule exists here to save the defendants from liability.

I will examine those contentions. There can be no doubt regarding the general rule that a man is liable for the trespasses of his cattle. The word "cattle" in this connection, of course, includes horses. Sir Frederick Pollock says in his work

on Torts (12th Edn.), p. 502: "Cattle trespass is an old and well-settled head (i.e., of liability), perhaps the oldest." The decisions on the point are many. A striking example is *Ellis* v. *Loftus Iron Co.* (3), where the defendants' horse injured the plaintiff's mare by biting and kicking her through the fence separating the plaintiff's land from the defendants'. It was held by Lord Coleridge, C.J., and Keating, Brett and Denman, JJ., that there was a trespass by the defendants' horse for which the defendants were liable apart from any question of negligence on the part of the defendants. Brett, J., put the matter strongly and perhaps too widely when he said:

> "Having looked into the authorities, it appears to me that the result of them is that in the case of animals trespassing on land the mere act of the animal belonging to a man, which he could not foresee, or which he took all reasonable means of preventing, may be a trespass, inasmuch as the same act, if done by himself, would have been a trespass."

This passage must, of course, be read subject to exceptions based on certain special sets of facts; for example, where the trespass has taken place by reason of a plaintiff's failure to fulfil his own obligation by prescription or agreement to keep up his fences, not only to restrain his own cattle within bounds, but also to keep out those of neighbours: see Hunt's Boundaries and Fences (6th Edn.), chap. IV; and Gale on Easements (9th Edn.), p. 409; and Pollock's Law of Torts (12th Edn.), p. 504. The normal obligation to keep one's cattle and horses from trespassing was emphasised by Blackburn, J., in his well-known judgment in *Fletcher* v. *Rylands* (4) (L.R. 1 Exch. at p. 280). It was clearly put by Williams, J., in *Cox* v. *Burbidge* (5), when he said (13 C.B.N.S. at p. 438):

> "If I am the owner of an animal in which by law the right of property can exist, I am bound to take care that it does not stray into the land of my neighbour; and I am liable for any trespass it may commit, and for the ordinary consequences of that trespass. Whether or not the escape of the animal is due to my negligence is altogether immaterial":

see, too, Salmond's Law of Torts (6th Edn.), pp. 259, 474. The recent well-known case of *Manton* v. *Brocklebank* (6) contains many observations on the point. Thus the general rule that a man is liable for the trespasses of his cattle, horses and the like is well settled. The roots of the rule, though buried in the past, still produce a living branch of tortious liability.

Apart from the special exceptions which I have named and which do not bear on the present case, the question is whether further limitations to the rule exist which here can relieve the defendant from liability. Sir Frederick Pollock, in his already cited work on Torts (12th Edn.), p. 504, puts the limitations as follows:

> "The rule does not apply to damage done by cattle straying off a highway on which they are being lawfully driven: in such case the owner is liable only on proof of negligence, and the law is the same for a town street as for a country road."

For this statement the distinguished author cites two decisions: *Goodwyn* v. *Cheveley* (7) and *Tillett* v. *Ward* (8). He adds in a note a reference to the opposite view by Littleton in the Year Book, 20 Edw. 4, Michaelmas Term, fol. 10 (B), cited in *Read* v. *Edwards* (9) (17 C.B.N.S. at p. 251). The words of Littleton are:

> "If a common road lies over the land of divers men, and if a drover come with his beasts, and some of them go out of the way, he shall be punished in an action of trespass."

Counsel for the plaintiffs here repeatedly submitted that the exception was stated too broadly by Sir Frederick Pollock and that the two decisions mentioned do not support the exception in its full breadth. He submitted that the limitation on the general rule of liability for cattle trespass only applied where the cattle, being lawfully driven along the highway without negligence, trespassed on a plaintiff's

land through some open gateway or open doorway or path, or through some fence-gap, or the like, and that the limitation had no application to a case where, as here, a pony dashed through a window enclosing the plaintiffs' premises. This argument calls for attention. The point is curious and interesting. The decisions are equally curious and interesting.

Let me take *Goodwyn* v. *Cheveley* (7). There the plaintiff's cattle, while being driven along the highway, strayed into the defendant's field through a gap in the fence. The defendant impounded them on the ground of damage feasant in his close. The plaintiff replied that the cattle escaped into the close in consequence of the fence being out of repair. The defendant rejoined that after the plaintiff had notice that the cattle were in the close a reasonable time elapsed during which they might and ought to have been driven out and were not. Upon that the plaintiff took issue. The case really turned on the question whether in the circumstances the defendant was entitled to impound the cattle. BRAMWELL, B., said: "Yes, he was so entitled." POLLOCK, C.B., MARTIN and CHANNELL, BB., said, "No." The dicta, however, are of interest. All the judges apparently laid stress on the point that the fence was out of repair, and, therefore, opened a gap to straying cattle. BRAMWELL, B., said (4 H. & N. at p. 638):

> "The plaintiff was not justified in allowing his cattle to trespass on the defendant's land. He had a right to take his cattle along the highway; and, when cattle are driven along a highway, if there are no fences to the adjoining land, it is certain that the cattle will stray. That is an unavoidable injury which persons whose lands border on a highway must sustain."

MARTIN, B., said (4 H. & N. at p. 640): "If a person will neglect to fence he must put up with the inconveniences consequent upon it." POLLOCK, C.B., said much the same thing. It is obvious, therefore, that the facts in *Goodwyn* v. *Cheveley* (7) were quite different from the facts here, and that the judges rested their views largely on the circumstance that the state of the fence presented an opening to the cattle.

I take next the case of *Tillett* v. *Ward* (8). The headnote correctly states the facts in, and the result of, that decision. It is this (10 Q.B.D. 17):

> "An ox belonging to the defendant and while being driven by his servants through the streets of a country town entered the plaintiff's shop, which adjoined the street, through the open doorway and damaged his goods. No negligence on the part of the persons in charge of the ox was proved: Held, that the defendant was not liable."

Counsel for the present plaintiffs points out that the ox in *Tillett* v. *Ward* (8) entered the plaintiff's premises through an open place, and he submits that the decision was, in substance, based on that point. It is now, perhaps, forgotten that the decision in *Tillett* v. *Ward* (8) roused much discussion and doubt in the legal world. It was, for example, vigorously criticised in vol. 27 of the JOURNAL OF JURISPRUDENCE (SCOTTISH) at p. 347, and was defended, for example, in 27 SOLICITORS JOURNAL 595 (July 7, 1883). It must be taken, I think, as a decision marked by novelty. LORD COLERIDGE, C.J., who gave the first judgment, pointed out that for trespass by a defendant's animal while on a highway a plaintiff could not recover unless he proved negligence. I need not pause to criticise the word "trespass" as so used by the learned Lord Chief Justice. He then says (10 Q.B.D. at p. 20):

> "We find it established as an exception upon the general law of trespass, that where cattle trespass upon unfenced land immediately adjoining a highway the owner of the land must bear the loss."

I presume that the Lord Chief Justice meant to add the words "without negligence." Thus, says plaintiff's counsel, the substantial ratio of the judgment I have cited was that the plaintiff's shop door was open. But I must point out that the Lord Chief Justice proceeded as follows:

A "There is also the statement of Blackburn, J., in *Fletcher* v. *Rylands* (4) (L.R. 1 Exch. at p. 286), that persons who have property adjacent to a highway may be taken to hold it subject to the risk of injury from inevitable risk."

Again, I do not pause to analyse the words "inevitable risk." The Lord Chief Justice then added that he saw no distinction for the purposes of the case between a field in the country and a street in a market town, and that the

B "accident to the plaintiff was one of the necessary and inevitable risks which arise from driving cattle in the streets in or out of town."

The judgment of Stephen, J., is short. He refers to the general rule regarding a man's liability for trespass by his cattle, and then adds:

C "But while he is driving them upon a highway he is not responsible, without proof of negligence on his part, for any injury they may do upon the highway, for they cannot then be said to be trespassing. . . . The case of *Goodwyn* v. *Cheveley* (7) seems to me to establish a further exception, that the owner of the cattle is not responsible without negligence when the injury is done to property adjoining the highway, an exception which is absolutely necessary for the conduct of the common affairs of life."

D With all respect to Stephen, J., I doubt greatly whether *Goodwyn* v. *Cheveley* (7) in any way established any such wide exception. Finally, Stephen, J., says:

"I can see no solid distinction between the case of an animal straying into a field which is unfenced or into an open shop in a town."

E Counsel for the plaintiff again submits that the ratio of Stephen, J., was based really on the fact that the plaintiff's shop in *Tillett* v. *Ward* (8) was "open." I confess that I appreciate fully his criticisms on *Tillett* v. *Ward* (8). It is difficult to determine the actual grounds of the decision and the emphatic use of the word "open" in both judgments tends to confusion. But, curiously enough, *Tillett* v. *Ward* (8) seems to have been regarded by both the courts and the profession as if

F it were a clear crystallisation of a broad principle as settled by earlier authority. It is obvious, however, that the learned authors of Clerk and Lindsell on Torts regard the decision as one for comment: see (7th Edn.), pp. 443–4. Yet in Salmond's Law of Torts (6th Edn.), p. 277, the broad principle regarding property adjoining the highway seems to be recognised, although I confess that the actual illustration given by the learned author is open to comment.

G What is the basis of the practice which has, I think, been applied by the courts for the last thirty years—namely, that where a horse and cart, or motor car, or bicycle comes upon a plaintiff's premises adjoining a highway in consequence of a street accident, the defendant is not held liable in the absence of negligence or wilful intention? Is the practice sound? On what principle does it rest? In my view, that principle is to be found not in *Goodwyn* v. *Cheveley* (7), nor, perhaps,

H in the actual ratio of *Tillet* v. *Ward* (8), but rather in the recognition (sometimes, perhaps, unconscious) by the courts and the profession of the good sense and weight of a passage in a judgment of Lord Blackburn in *River Wear Comrs.* v. *Adamson* (10) (2 App. Cas. at p. 767). Strangely enough, that important passage is not cited in the majority of textbooks dealing with torts. But it is referred to in Addison on Torts (8th Edn.), p. 704, and is cited in Beven on Negligence (3rd

I Edn.), vol. 1, p. 441. To my mind it is the key to the modern practice. It is desirable to set out the passage here so that it may be remembered to-day when there is an ever-growing recognition by some of the importance of principle and of the need for a greater co-ordination of case law. The noble Lord said:

"My Lords, the common law is, I think, as follows: Property adjoining a spot on which the public have a right to carry on traffic is liable to be injured by that traffic. In this respect there is no difference between a shop, the railings or windows of which may be broken by a carriage on the road, and a pier adjoining a harbour, or a navigable river, or the sea, which is liable to be

injured by a ship. In either case the owner of the injured property must bear his own loss, unless he can establish that some other person is in fault, and liable to make it good. And he does not establish this against a person merely by showing that he is owner of the carriage or ship which did the mischief, for the owner incurs no liability merely because he is owner."

The noble Lord then proceeds to show the need of proof of negligence in such a case.

I am unable to understand why this passage was not cited to the learned judges in *Tillett* v. *Ward* (8), for I confess that I can see no distinction between alleged trespass by a horse and carriage and alleged trespass by an ox. It is, however, right to say that the judges in *Tillett* v. *Ward* (8) had before them an earlier dictum by the same great lawyer (then BLACKBURN, J.) to somewhat the same effect: see *Fletcher* v. *Rylands* (4) (L.R. 1 Exch. at p. 286). Whether the common law rule was in earlier days as LORD BLACKBURN stated it in *River Wear Comrs.* v. *Adamson* (10) in 1877 I do not inquire. It is, I think, the rule which has come into existence and which has for the past generation been followed by the courts. It must be taken, I think, that *Tillett* v. *Ward* (8) did not turn on the fact that the trespass was there committed through an open doorway. The ratio must be taken to have been a broader one. I shall apply here the rule stated by LORD BLACKBURN. I venture to think that it is just and convenient and agreeable to modern notions and everyday life. In substance, LORD BLACKBURN applied to injury to persons or property adjoining the highway, a rule like that established in *Holmes* v. *Mather* (2) with respect to injury to persons or property on the highway itself. It is a rule, moreover, which is in substantial harmony with *Phillips* v. *Britannia Hygienic Laundry Co.* (11) and with such cases as *Manton* v. *Brocklebank* (6). I respectfully agree, therefore, with the statement of SIR FREDERICK POLLOCK in his work on TORTS already cited (12th Edn.), p. 504. I hold that the plaintiffs cannot recover here on the ground of trespass.

There is, I need scarcely add, no suggestion that the injury was intentional. It follows, therefore, that the plaintiffs must prove negligence. Counsel for the defendants submitted at the close of the plaintiffs' case that there was no evidence of negligence. His argument was that, inasmuch as the plaintiffs proved no more than that the pony with the van had dashed through the plaintiffs' window into the shop, this fact, in view of the nature of horses, was not inconsistent with care by the defendants' servants, and hence afforded no primâ facie evidence in favour of the plaintiffs. This is a practical point which often arises, and it is well to briefly consider it. Several decisions are concisely referred to in SIR FREDERICK POLLOCK's work on TORTS (12th Edn.), p. 448. The defendants here placed their main reliance on *Hammack* v. *White* (12) and *Manzoni* v. *Douglas* (13), two cases generally cited to show that the unexplained bolting of a horse is of itself no primâ facie evidence of negligence. I confess that an examination of the actual decisions in those two cases leads me to the conclusion that they did not go to the extent generally assumed. In *Hammack* v. *White* (12) the defendant was trying a newly purchased horse in Finsbury Circus which was, and is, a much frequented thoroughfare. The horse for some unexplained reason became restive, ran upon the pavement and there killed a man. His widow brought an action under Lord Campbell's Act [Fatal Accidents Act, 1846], but failed. The court held that there was no evidence to go to a jury. It is plain, however, that when the evidence for the plaintiff was viewed as a whole it appeared upon that very evidence that the defendant had taken well-directed efforts to control the horse and that the horse got on the pavement in spite of, and not because of the absence of, those efforts. So, too, in *Manzoni* v. *Douglas* (13) the plaintiff failed because the evidence called on his behalf itself disclosed that the defendant's driver had made the utmost efforts to control the horse and brougham which caused the injury to the plaintiff. As decisions on the actual facts, *Hammack* v. *White* (12) and *Manzoni* v. *Douglas* (13) may be perfectly correct. But the dicta appear to go beyond the decisions, and it is the dicta rather than the decisions which are usually cited in the courts.

I observe, however, that in Beven on Negligence (3rd Edn.), vol. 1, p. 115 et seq., the author very properly looks at the actual decisions rather than the passing observations. I need not refer to the dicta in *Hammack* v. *White* (12). They are ambiguous. But I must mention the often cited words of Lindley, J., in *Manzoni* v. *Douglas* (13), where he said (6 Q.B.D. at p. 153):

> "To hold that the mere fact of a horse bolting is per se evidence of negligence would be mere reckless guesswork. To entitle him to recover in an action of this kind, the plaintiff must make out a clear primâ facie case by evidence which will warrant an inference of negligence."

If the learned judge be correctly reported then I can only say, with great respect, that he goes, I think, too far. Indeed, the words which I have quoted are inconsistent with his own prior words when he said:

> "The plaintiff was lawfully walking on the foot pavement of a public thoroughfare, and was knocked down by a horse drawing the defendant's brougham. If the case had been left there, it might be that the defendant was liable for the negligent driving of her servant."

I respectfully agree with the passage last cited. I fully appreciate, of course, the distinction between animate things, such as horses, and inanimate things, such as bales of goods. The distinction was rightly pointed out in *Manzoni* v. *Douglas* (13) where many cases were cited, including *Byrne* v. *Boadle* (14): see also the useful observations of Avory, J., in *Ruoff* v. *Long & Co.* (1) ([1916] 1 K.B. at p. 152). I myself, however, assent to the view expressed by an eminent Canadian judge who said:

> "I think the reasonable view of the law, and of the ordinary transactions of human life is, that if a man's horses galloping through a street run on and injure a passenger on the sidewalk, a case of primâ facie wrong is shown. It may be fully explicable, but I think it calls for explanation":

see per Hagarty, C.J., in *Crawford* v. *Upper* (15) (16 A.R. at p. 444, cited in Beven (3rd Edn.), vol. 1, p. 116). If, for example, a man, just as he has passed the Law Courts and while walking on the pavement, is suddenly knocked down and injured by an unattended horse and cart which has dashed out of Chancery Lane, I should myself hold that there was a primâ facie case of negligence. To rule otherwise would, in my view, be against legal principle and against the good sense of those who are familiar with equine peculiarities. If Lindley, J., meant to rule to the contrary I respectfully differ.

The view I now take is strongly supported by the judgment of Mathew and Smith, JJ., in *Tolhausen* v. *Davies* (16). In giving the judgment of the court Smith, J., said (59 L.T. at p. 437):

> "I held in the case of *Watson* v. *Weekes* (17) on Mar. 19, 1887, and in which I was affirmed by the Court of Appeal on April 1, 1887, that upon proof given by a plaintiff that the defendant's horse, harnessed to a cart, was running away unattended along a highway, whereby the plaintiff, being lawfully thereon, was injured, a judge could not rightly nonsuit, for that such facts were more consistent with the absence of ordinary care in the superintending the horse than with such care having been used."

It is curious that this passage is not referred to in the majority of the able textbooks on torts, although it is of great importance on the question of primâ facie evidence. In my humble view, the dicta in *Hammack* v. *White* (12) and *Manzoni* v. *Douglas* (13) must be deemed unsound if and in so far as they conflict with the view of the Court of Appeal as stated by the Divisional Court in *Tolhausen* v. *Davies* (16). I observe that in Clerk and Lindsell's work on Torts (7th Edn.), p. 458, the learned authors cite *Hammack* v. *White* (12) and *Manzoni* v. *Douglas* (13) for the proposition that the mere unexplained bolting of a horse does not constitute conclusive evidence of negligence on the part of the person in charge of it. With this proposition I fully agree, but I point out that it is not the proposition with

which the two cases were dealing. They were dealing with primâ facie, and not conclusive, evidence. In SALMOND'S LAW OF TORTS (6th Edn.) at p. 82, the author refers to *Manzoni* v. *Douglas* (13) as a decision of the Court of Appeal. I point out that the case was heard by a Divisional Court, consisting of DENMAN and LINDLEY, JJ., and not by the Court of Appeal. The view which I have ventured to express is not inconsistent with *Holmes* v. *Mather* (2). It is agreeable to *Simson* v. *London General Omnibus Co.* (18), and it is strongly supported further by the view expressed in the Scottish case of *Snee* v. *Durkie* (19), where a powerful court ruled that where a runaway horse and carriage runs down a person in broad daylight in a public street the presumption is that the owner of the horse and carriage is in fault. So here I hold that when a pony and van, wholly unattended, dashes into a shop window adjoining a highway there is a primâ facie case of negligence. The fact calls for explanation. This, I think, follows the view of the Court of Appeal as stated by SMITH, J., in *Tolhausen* v. *Davies* (16).

At one time I thought it might be necessary in this case to examine closely the decisions on negligence by leaving unattended a horse or a horse and cart. *Illidge* v. *Goodwin* (20) and other cases were cited. I need only refer to CLERK AND LINDSELL ON TORTS (7th Edn.), pp. 152, 457, and 465; to ADDISON ON TORTS (8th Edn.), pp. 57 and 712; and particularly to BEVEN ON NEGLIGENCE (3rd Edn.), vol. 1, pp. 545–6. I also refer to *Ruoff* v. *Long & Co.* (1). Nor need I do more than mention *Martin* v. *Stanborough* (21), just decided by a Divisional Court on the question of leaving a motor car unattended. *Ruoff* v. *Long & Co.* (1) was considered by the court. A motor car is, I presume, to be viewed as an inanimate thing, and special considerations may apply thereto. In the view, however, which I take of the present facts I do not think that such analysis is here necessary, though doubtless the point will call for consideration in some future case. In that event I hope that the English decisions and textbooks will be remembered in conjunction with the Scottish cases of *Macfarlane* v. *Colam* (22) and *Hendry* v. *M'Dougall* (23).

I mentioned the main facts at the commencement of this judgment. Shortly after the window had been smashed a police officer was on the scene. One of the defendants' servants, Mayes, came up in a few minutes. He (Mayes) said to the police constable: "I was standing by her head when she bolted. I got hold of her head, but was unable to stop her." Another servant of the defendants, Fitzjohn, then came up and said: "I was down the mews when she bolted." Some time afterwards the defendants' manager came up and said to the plaintiffs' manager: "We sent two men with the pony to prevent such an accident as this, and this comes of leaving the pony unattended." Later on he said: "Let me know the extent of the damage as soon as possible." This evidence, I think, is quite significant. I may say that the pony was quite small. She was only twelve hands high. The defendants had had her only about five or six weeks. Her age was five. The defendants gave £20 for her. At the trial Mayes was called. He said that on the morning of the accident he was in charge of the pony, and that he and Fitzjohn happened to be together on the round because of some new arrangement as to customers. It was, he said, the first time he had been on the round. He stated that while Fitzjohn was serving a customer who lived down a mews he (Mayes) was standing on the kerb by the pony's head, so close that he could touch the pony's head, that suddenly the pony flung up her head and cantered off, that he made a grab for the bridle, but before he could get a proper grip the pony wrenched herself free and went off, that he (Mayes) sprained his wrist in his efforts, and that he chased the pony, but failed to catch her. This was the substance of the defendants' case apart from the usual evidence that the pony was quiet and could stand unattended. I need not give the details on the point. After the accident the pony was sold for £4. I saw a photograph of the van to which the pony was harnessed. It is a singularly large vehicle for so small a pony. I have to weigh the evidence as a whole and to draw just inferences of fact. Not only have the defendants failed to dissipate the primâ facie case of negligence arising

from the accident, but they have also failed to dissipate the conclusions to be drawn from what was said by the defendants' servants immediately after the accident. I watched with care the witnesses called for the defendants, and I feel quite unable to accept their evidence. They were most unsatisfactory witnesses. The story, for example, told by Mayes is, I think, quite untrue. He was a strongly built man, and it is obvious that, if he was standing in attendance on the pony, as he stated that he was, he could quite easily have prevented it from bolting, in view of its small size, and of its being attached to so heavy a vehicle. The reality of the matter is that the pony was not quiet. The defendants' manager revealed the truth when he said on the morning of the accident that two men were sent out with the pony "to prevent such an accident as this." He realised that Mayes or Fitzjohn had been negligent, and hence his admission (for such I think it was) of liability by asking that the details of damage should be sent to him. I hold that the accident occurred because of the negligence of the defendants' servants in leaving unattended a pony which to their knowledge was of such a character as to require careful watching and attendance lest it should bolt. Accepting as I do the evidence for the plaintiffs, and rejecting the evidence for the defendants, so far as it conflicts with that for the plaintiffs, I find that negligence has been established, and that the defendants are liable for the damage suffered by the plaintiffs. I therefore give judgment for the plaintiffs for £145 with costs.

Judgment for the plaintiffs.

Solicitors: *Harvey Clifton*; *F. J. Berryman.*

[*Reported by* T. W. Morgan, Esq., *Barrister-at-Law.*]

BENAIM & CO. *v.* DEBONO

[Privy Council (Lord Atkinson, Lord Wrenbury and Lord Darling), January 28, 29, February 14, 1924]

[Reported [1924] A.C. 514; 93 L.J.P.C. 133; 131 L.T. 1]

Conflict of Laws—Sale of goods—Place of performance of contract—Purchase by trader in Malta of goods f.o.b. Gibraltar—Cessation of sellers' control over goods on delivery on board.

Sale of Goods—Acceptance—Conduct of buyer inconsistent with ownership of sellers—No suggestion of rejection for three months—Claim against sellers for short delivery—Sale of Goods Act, 1893 (56 *&* 57 *Vict.*, *c.* 71), *s.* 35.

Where a contract is made in one country and is to be performed either wholly or partly in another, the proper law of the contract, especially as to the mode of performance, is presumed to be the law of the country where the performance is to take place.

By the Gibraltar Ordinance (No. 20 of 1895) which reproduced s. 35 of the Sale of Goods Act, 1893: "The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller. . . ."

A contract was made for the sale by the appellants, who carried on business in Gibraltar, to the respondent, who carried on business in Malta, of a quantity of anchovies f.o.b. Gibraltar. The goods were delivered to the ship and were conveyed to Malta. The respondent paid the invoice price, and, on examining the goods, complained to the appellants about the packing and quality, but made no suggestion that he rejected or intended to reject the goods. On the

contrary he made a claim against the appellants in respect of an alleged short delivery. Three months later he began an action for the rescission of the contract.

Held: (i) the contract was to be performed by the delivery of the goods on board a ship at Gibraltar; from the moment of such delivery the appellants had no further control over the goods; and, therefore, the contract was to be performed in Gibraltar; (ii) the manner in which the respondent dealt with the goods after their arrival at Malta was entirely inconsistent with the ownership of the appellants.

Notes. Referred to: *Broken Hill Proprietary Co.* v. *Latham*, [1933] Ch. 373; *British and French Trust Corpn.* v. *New Brunswick Rail. Co.*, [1937] 4 All E.R. 516.

As to the law governing contracts on a conflict, see 7 HALSBURY'S LAWS (3rd Edn.) 72–83; and as to acceptance under a contract for the sale of goods, see ibid., 2nd Edn., vol. 29, pp. 28–30. For cases see 11 DIGEST (Repl.) 420 et seq., and 39 DIGEST 369–377, 583 et seq. For Sale of Goods Act, 1893, see 22 HALSBURY'S STATUTES (2nd Edn.) 988.

Case referred to:

(1) *Jacobs* v. *Crédit Lyonnais* (1884), 12 Q.B.D. 589; 53 L.J.Q.B. 156; 50 L.T. 194; 32 W.R. 761, C.A.; 11 Digest (Repl.) 432, 774.

Appeal by the defendants from an order of the Court of Appeal, Malta (SIR M. A. REFALO, His Honour DR. AGIUS and His Honour DR. CAMILLERI), affirming the judgment of His Honour DR. PARNIS, sitting in the Commercial Court, in favour of the plaintiff.

The facts appear from their Lordships' judgment.

D. B. Somervell for the appellants.

R. A. Wright, K.C., and *C. J. Colombos* for the respondent.

LORD DARLING.—This is an appeal from a judgment dated April 5, 1922, of the Court of Appeal, Malta. By such judgment the court upheld the judgment dated Sept. 28, 1921, of the Commercial Court, Malta (His Honour DR. A. PARNIS), against the appellants. The appellants were the defendants in the original action. That action was brought by the present respondent against the appellants on a contract for the sale by the appellants to the respondent of anchovies f.o.b., Gibraltar. The goods were delivered and shipped to Malta and paid for, and the respondent subsequently claimed rescission of the contract and repayment of the price. The questions for decision are (i) whether on the facts the respondent was entitled to rescind, and (ii) whether, if he had such right, he has not lost it by his own acts and conduct in accepting and dealing with and retaining the goods. These were the issues raised on the pleadings and considered in the judgments.

This case involves, in the first place, the question whether the contract of sale is governed by the law of Gibraltar or of Malta. The contract under which the present dispute has arisen is contained in telegrams which passed between the appellants and the respondent on Dec. 4 and 5, 1917, and confirmed by letters between the said parties dated Dec. 5, 1917. These are hereafter set out. By the contract the appellants agreed to sell to the respondent 9/10,000 kilos. anchovies in brine at a price of 1s. 5d. per kilo., f.o.b. Gibraltar. Payment was to be made against shipping documents through a bank at Gibraltar. It was subsequently agreed that the quantity of the anchovies should be reduced to 7,320 kilos. and finally to 6,657 kilos. The goods were shipped on Dec. 28, 1917, and invoiced to the respondent on Dec. 31, 1917, at a price of £509 0s. 9d., which included a sum of £37 10s. in respect of freight from Gibraltar to Malta. The respondent paid the invoice price to the appellants early in January, 1918. The goods arrived at Malta on Jan. 10, 1918. By a letter dated Jan. 22, 1918, the respondent made certain complaints to the appellants as to the packing of the goods and as to their quality. There was no suggestion in such letter that the respondent had rejected or intended

A to reject the goods. On the contrary the respondent made a claim against the appellants for a sum of £44 12s. 6d. in respect of an alleged short delivery of 630 kilos. Previous to their arrival in Malta the respondent had re-sold all the goods to other purchasers. From the respondent's evidence in a case of *Borg* v. *Spiteri Debono* it appears that the respondent tendered the goods to his sub-purchasers all of whom, excepting Borg, refused to accept the goods on the ground B that the tins in which they were packed were not like those agreed upon in the sub-contract. Borg subsequently started proceedings against the respondent claiming to rescind his contract. On Mar. 7 a referee appointed by the Commercial Court, Malta, in the case of *Borg* v. *Spiteri Debono* reported that the anchovies sold by the respondent to Borg, which were part of the consignment bought by the respondent from the appellants, were (i) not unfit for human food, and were (ii) C merchantable but of inferior quality, being of smaller dimensions than ordinary anchovies and owing to their recent preparation had an odour and taste somewhat less pronounced.

A writ was issued by the respondent against the appellants on April 2, 1918, claiming: (i) That the sale of the said anchovies be declared rescinded and that the appellants be condemned to refund the price of the said goods already paid D amounting to £509 sterling, the freight paid being included in such sum with commercial interest from Jan. 15, 1918, and £30 0s. 9d. paid for insurance of the goods with commercial interest from Dec. 12, 1917; (ii) that the appellants be condemned to make good to the respondent the damage sustained by him, consisting in loss of profit and expenses amounting to the sum of £212 13s. 9d., with commercial interest from Jan. 20, 1918; (iii) that the appellants be condemned to E refund to the respondent the costs sustained by the respondent in an action brought against him by Guiseppe Borg with commercial interest. By their defence the appellants contended: (i) That the anchovies were according to order and of good consistency and in every respect fit for human food and merchantable; (ii) that it was not the fault of the appellants if the anchovies could not be sold on the Malta F market, and that the respondent should have verified this circumstance before ordering goods determined as to kind without indication of quality, size, or other specifications; (iii) that the respondent had accepted the goods having, after examining the quality of the fish, asked only to be credited with an alleged shortage of £44 12s. 6d. sterling and having offered the goods by auction on his own account. By an interlocutory order of the Commercial Court, dated April 16, 1918, Salvatore G L. Calleja was appointed referee and required, inter alia, to report upon the condition of the anchovies without prejudice to the interests of the contending parties. On April 25, 1918, Calleja reported that the anchovies were bitter and unsaleable upon the Malta market. By sworn evidence given on May 27, 1918, Calleja explained and qualified the report as follows:

H "By having stated in my report that the goods are not saleable in Malta I do not intend to say that they are saleable or unsaleable abroad as I have no knowledge of other than the local market. When I saw the goods they were good as to consistency, but their defect consisted in their being bitter."

The action was heard by the Commercial Court, and judgment delivered by His Honour DR. A. PARNIS on Sept. 28, 1921. By such judgment His Honour DR. A. I PARNIS allowed the first claim of the respondent, limited to the rescission of the sale with costs. He held that the anchovies were of a quality inferior to the medium, and that upon this ground the respondent was entitled to claim rescission of the sale. He further held that the respondent had not so accepted the goods as to deprive him of the said right. The appellants appealed to the Court of Appeal which court affirmed the decision of the Commercial Court and dismissed the appeal with costs.

For the purpose of this appeal it is necessary first to determine whether the contract between the parties, and the performance of it, is subject to the law of

Gibraltar or to that of Malta. Several communications having passed, an agreement was come to in the following terms: A

"Eastern Telegraph Co., Ltd.—Gibraltar. Dec. 5, 1917, at 11.55 a.m.—From Malta to Benaim—Gibraltar.—Accept ten thousand kilos. anchovies, brine, 1917. Fishing seventeen pence nett, f.o.b. Gibraltar. Packing included 4 barrels, about 240 kilos. Altogether excluded, we require tins weighing not over twenty-five kilos. f.o.b. Gibraltar. Wire acceptance. Will open credit. —Spiteri Debono." B

"Gibraltar, Dec. 5, 1917.—Messrs. L. Spiteri Debono & Co., Malta.—Dear Sirs,—We thank you for your favours of the 9th and 14th ultimo, and confirm ours of the 15th. 'Anchovies.—We are glad to confirm the sale we have effected to your goodselves of 9/10,000 kilos. anchovies in brine, packed in ordinary tins weighing 22/25 kilos. each, at the price of 1s. 5d. (one shilling and five pence) per kilo., f.o.b. Gibraltar, payment against shipping documents through a bank at Gibraltar.' We hope you will open the credit in due course as we are trying to ship by first opportunity. For your guidance we may inform you that anchovies are very scarce at present, due to lack of fishing and tins. The above is a job lot we have purchased in this neighbourhood lately as they were in tins of 22/25 kilos., which, as you know are not current, and a quantity in barrels. But, as you know very well, the main thing now is to get supplies, no matter how the goods are packed; as there are all reasons to believe that no further lots of these goods are to be obtained for some time to come.—Yours faithfully (Signed) D. Benaim & Co." C D

"Malta, Dec. 5, 1917.—Messrs. Benaim & Co., Gibraltar.—Dear Sirs,—We confirm our letter of the 3rd instant in its full contents, and have to acknowledge the receipt your valued cable of yesterday's date (received this morning) reading as follows:—Accept 9/10,000 kilos. anchovies seventeen pence f.o.b. Gibraltar, open credit, all weighing 22/25 kilos., approximately, except 140 tins, ten kilos. four barrels, altogether 240, to which we have promptly replied by cabling you thus: 'Accept ten thousand kilos. anchovies in brine, 1917. Fishing, seventeen pence kilo. nett, f.o.b. Gibraltar. Packing included four barrels, about 240 kilos. Altogether excluded, we require tins weighing not over twenty-five kilos.,' which we confirm. The above cable is self explanatory and therefore it is useless to transcribe it plainly. We now await your cable reply to open you the required credit as follows: '10,000 kilos. anchovies in brine, at 1s. 5d. per kilo. nett, f.o.b. Gibraltar. £708 6s. 8d., plus freight.'—Yours faithfully (Signed) L. Spiteri Debono & Co. (Signed) J. Spiteri." E F G

In the judgment of the Court of Appeal in Malta it was held that this contract, and all that followed from it, was governed by the law of Malta—which is in effect the civil law. In fact, no one then contended that the law of Gibraltar applied. No doubt this contract should be regarded as made in Malta—for thence came the final acceptance by the respondent of the offer made by the appellants. But it appears to their Lordships to be plain upon the face of the three documents already set out that the contract was to be performed by the delivery of the goods on board a ship at Gibraltar selected by the respondent; from the moment of such delivery the appellants had no further control over the goods, and had parted with their possession and property in them. H

The principle of law here applicable is thus stated by Mr. Dicey in his book on the Conflict of Laws (3rd Edn.), p. 609: I

"When the contract is made in one country, and is to be performed either wholly or partly in another, then the proper law of the contract, especially as to the mode of performance, may be presumed to be the law of the country where the performance is to take place (lex loci solutionis)."

This statement of the law is in full accordance with the judgment of the court in *Jacobs* v. *Crédit Lyonnais* (1) and the authorities there cited. Now, the law of

Gibraltar relating to the sale of goods is to be found in Ordinance No. 20 of 1895, which codified the law—s. 35 of that ordinance provides:

"The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when after the lapse of a reasonable time he retains the goods without intimating to the seller that he has rejected them."

In this case it is beyond dispute that the manner in which the respondent dealt with the goods in question after their arrival at Malta was entirely inconsistent with the ownership of the appellants according to this law of Gibraltar, which is merely the law of England. It is, therefore, unnecessary to decide whether the acts of the respondent by way of rescission are justifiable under the law of Malta, for that is beside the point. In the opinion of their Lordships, the respondent had parted with his right to reject the goods, and to rescind the contract, which is the question here to be decided. But he may still, possibly, have rights entitling him to recover damages for breach of contract in regard to the condition or quality of the goods delivered and accepted. No such claim, however, has come before this Board; and it is suggested that, should it be made, it must fail as being out of time. The point of view from which their Lordships regard this case was never brought to the notice of the learned judges who gave judgment in Malta; and there is no reason to discuss whether their decision was correct supposing the law of Malta to have applied to the making and performance of the contract.

In their Lordships' opinion the appellants are entitled to judgment in this appeal. But they consider that they are not entitled to any costs in the courts of Malta, seeing that they never there took the point upon which their Lordships consider they should here succeed. Their Lordships will humbly advise His Majesty that the appeal should be allowed with costs and the action dismissed. The order as to costs in the court below should stand.

Appeal allowed.

Solicitors: *Coward & Hawksley, Sons, & Chance*; *Thomas Cooper & Co.*

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

GUNTER *v.* DAVIS

[KING'S BENCH DIVISION (McCardie, J.), October 31, November 7, 1924]

[Reported [1925] 1 K.B. 124; 94 L.J.K.B. 352; 132 L.T. 538; 69 Sol. Jo. 841]

Rent Restriction—Costs—Action in High Court—Claim for possession—Tenant a trespasser—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5, c. 17), s. 17 (2).

By s. 17 (2) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920: "A county court shall have jurisdiction to deal with any claim or other proceedings arising out of this Act or any of the provisions thereof, notwithstanding that by reason of the amount of claim or otherwise the case would not but for this provision be within the jurisdiction of a county court, and, if a person takes proceedings under this Act in the High Court which he could have taken in the county court, he shall not be entitled to recover any costs." The plaintiff was the owner of a dwelling-house within the Act, and he brought an action to recover possession from the defendant, who was in

possession of the premises. McCardie, J., held that the defendant was a trespasser, and gave judgment for the landlord. On a question as to costs,

Held: the landlord's action was an ordinary action for ejectment and the fact that the house fell within the limits of the Rent Restriction Acts was immaterial; accordingly, the action was not a proceeding in the High Court within s. 17 (2) of the Act of 1920, and the landlord was entitled to his costs.

Notes. Considered: *Joslowitz* v. *Burstein*, [1948] 1 K.B. 408. Referred to: *Russoff* v. *Lipovitch*, [1925] All E.R.Rep. 100; *Lee* v. *K. Carter, Ltd.*, [1948] 2 All E.R. 690; *Drive Yourself Hire Co. (London), Ltd.* v. *Strutt*, [1953] 1 All E.R. 1036.

As to costs in cases under the Rent Restriction Acts, see 23 Halsbury's Laws (3rd Edn.) 833; and for cases see 31 Digest (Repl.) 723, 724.

Cases referred to:

(1) *Wolff* v. *Smith*, [1923] 2 Ch. 393; 92 L.J.Ch. 635; 130 L.T. 154; 67 Sol. Jo. 766; 31 Digest (Repl.) 720, *8035*.

(2) *Gill* v. *Luck* (1923), 93 L.J.K.B. 60; 130 L.T. 331; 40 T.L.R. 38; 68 Sol. Jo. 100; 22 L.G.R. 292, C.A.; 31 Digest (Repl.) 720, *8037*.

(3) *Bensusan* v. *Bustard*, [1920] 3 K.B. 654; 89 L.J.K.B. 1117; 124 L.T. 278; 85 J.P. 15; 36 T.L.R. 811; 64 Sol. Jo. 669, D.C.; 31 Digest (Repl.) 723, *8067*.

Action tried by McCardie, J., without a jury.

The plaintiff, Robert Geoffrey Gunter, the owner of a dwelling-house, No. 4, Edith Villas, Fulham, in the county of London, claimed possession of the premises and mesne profits from the defendant, Richard John Davis. By an indenture dated April 22, 1845, the predecessor in title of the plaintiff leased the premises to one, James Wood, for the term of eighty years from June 24, 1843. The lease, which was vested in a Mrs. Woolley, as tenant, expired on June 24, 1923, on which date the defendant was in occupation of the premises. The rent of the premises was £75 per annum. They were, therefore, premises to which the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, applied. The defendant denied that the plaintiff was entitled to possession, and alleged that he occupied the house as a sub-tenant of Miss Woolley and that, on the expiration of the lease of April, 1845, he became the tenant of the plaintiff by virtue of s. 15 (3) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. McCardie, J., having held that the defendant was a trespasser and had no right or title to remain in possession, it was contended on behalf of the defendant that the plaintiff was not entitled to any costs on the ground that he could have taken proceedings in the county court within s. 17 (2) of the Act of 1920.

Wilfrid Price for the plaintiff.
Salter Nichols for the defendant.

McCARDIE, J.—The plaintiff is the owner of a villa in Fulham, a lease of which, as from June 24, 1843, was granted by his predecessor in title, and he has brought this action against the defendant to recover possession, on the ground that he, the defendant, has wrongly had possession thereof since June 24, 1923, when the lease expired. The plaintiff also claimed mesne profits. One of the intermediate assignees, a Mrs. Woolley, died in August, 1922, leaving no will nor administrator. The defendant, who was a connection of Mrs. Woolley's, remained on the premises and was there on June 24, 1923. On Nov. 5, 1923, the writ was issued by the plaintiff, and on March 28, 1924, the defendant gave up possession, but refused to pay anything in respect of his occupation after June, 1923. I was satisfied at the trial that the defendant had no right or title to remain in possession, and he had paid no rent. He was, in fact, a trespasser, and I gave the plaintiff judgment for mesne profits at the rate of £75 per annum. Thereupon it was contended, on behalf of the defendant, that the plaintiff was not entitled to costs, on the ground that this was a claim or proceeding arising "out of this Act" within the meaning of s. 17 (2) of the Increase of Rent and Mortgage Interest (Restric-

tions) Act, 1920. Is that contention right? It is a serious point, because, if it is right, it will cut down in a very drastic fashion the ejectment jurisdiction of the High Court, since, by s. 12 (2) (a) of the Act, it applies to all houses in London where the rent does not exceed £105 [now the rateable value: see Rent Act, 1957, Sched. 8, Part I].

At the trial the defendant raised the contention, which it was not easy to understand, that in some way he had obtained a title to the possession of these premises, and that consequently he was entitled to rely on the Rent Restrictions Acts. I think that s. 17 (2) of the Act of 1920 must be read as a whole, and, so reading it, I have no doubt that it was intended to deal with claims or proceedings concerning the particular matters referred to in the Act—e.g., recovery of overpaid rent under s. 14. If s. 17 (2) is limited in that way, then it does not cover this case. But I am bound to give a more extended application to the subsection if I follow the judgment of EVE, J., in *Wolff* v. *Smith* (1), and to hold that, if a plaintiff can only maintain an action for recovery of possession by invoking the Act of 1920, the action must be deemed to fall under the provisions of s. 17 (2) thereof, as one arising "under this Act." I accept that view, though, perhaps, a different view might be taken. Does s. 17 (2) go further? Primâ facie, in my opinion, it does not, and the only support for the view that it does are the dicta of BANKES and ATKIN, L.JJ., in *Gill* v. *Luck* (2). The question in that case arose in this way. The plaintiff had brought the action to recover possession of a dwelling-house, which by virtue of its rental clearly fell under the provisions of the Rent, &c. (Restrictions) Act, 1920. He had obtained judgment under Ord. 14 from the master, which was confirmed by the judge in chambers, and the point at issue for the Court of Appeal was whether Ord. 14 applied at all, having regard to the provisions of the Rent, &c. (Restrictions) Act, 1920, particularly of s. 5. The substance of the decision was that it did not, and it was only by accident that the present point arose on the question of costs. It having arisen accidentally and not being argued at length—s. 17 only being referred to and no cases cited—certain obiter dicta were pronounced. That of BANKES, L.J., is ambiguous, and may or may not cover this case. But with the greatest respect I cannot follow the dictum of ATKIN, L.J., where he says:

> "When it is shown that the house is within the Act proceedings to recover it must arise out of the Act, because they cannot be enforced unless the conditions imposed by the Act are fulfilled."

In my view, the action of ejectment in the present case was not brought by virtue of the provisions of the Act of 1920. It does happen accidentally that the premises fall within the rental limit fixed by s. 12 (2) (a) of the Act, but apart from that circumstance the Act has nothing to do with the case. Broadly speaking, my view is that, save as cut down by the Act, all the common law rights of a landlord remain. Here the landlord brought his action against a trespasser, and his action was an ordinary action of ejectment, and the writ was endorsed in the ordinary way. That being so the defendant is unable to destroy the plaintiff's primâ facie right to costs by an ingenious, but unsustainable contention. The result is that I hold that the plaintiff is entitled to costs.

I think it my duty to say, although after full argument I am unable to agree with the dictum of ATKIN, L.J., in *Gill* v. *Luck* (2), that if it were necessary a clear distinction can be drawn between that case, where the relation of landlord and tenant had once subsisted between the parties, and the present case, where there never was that relation. My judgment is not inconsistent with the decision in *Bensusan* v. *Bustard* (3).

Judgment for plaintiff with costs.

Solicitors: *Tomlin & Dinwiddy*; *Richard John Davis.*

[*Reported by* T. W. MORGAN, ESQ., *Barrister-at-Law.*]

A

HAMBROOK *v.* STOKES BROS.

[Court of Appeal (Bankes, Atkin and Sargant, L.JJ.), October 18, November 12, 1924]

[Reported [1925] 1 K.B. 141; 94 L.J.K.B. 435; 132 L.T. 707; 41 T.L.R. 125]

B

Negligence—Damages—Mental shock—Mother's fear for safety of children when out of her sight.

The defendants' servant negligently left a motor lorry on an incline in a street with the engine running. The lorry got into motion, and it ran down a narrow street in which were the plaintiff's three children. The plaintiff's wife, who knew that the children were in that street, was nearby and heard the lorry coming down the street, ricocheting from one side to the other. Her apprehension for the safety of her children caused her to suffer from shock with the result that, she being then pregnant, she had a severe hæmorrhage and died. In an action by her husband under Lord Campbell's Act,

C

Held (Sargant, L.J., dissenting): on proof that the shock suffered by the plaintiff's wife was due to a reasonable fear of injury to her children the plaintiff was entitled to recover, it being unnecessary to prove that she was in fear of injury to herself.

D

Dictum of Kennedy, J., in *Dulieu* v. *White & Sons* (1), [1901] 2 K.B. 669 at p. 675, not approved.

E

Notes. Considered: *Owens* v. *Liverpool Corpn.*, [1938] 4 All E.R. 727. Criticised: *Hay* (*or Bourhill*) v. *Young*, [1942] 2 All E.R. 396. Distinguished: *King* v. *Phillips*, [1953] 1 All E.R. 617.

As to damages in respect of nervous shock resulting in physical injury, see 11 Halsbury's Laws (3rd Edn.) 255; and for cases see 36 Digest (Repl.) 196, 197.

F

Cases referred to:

(1) *Dulieu* v. *White & Sons*, [1901] 2 K.B. 669; 70 L.J.K.B. 837; 85 L.T. 126; 50 W.R. 76; 17 T.L.R. 555; 45 Sol. Jo. 578; 36 Digest (Repl.) 197, *1038*.

(2) *Lynch* v. *Knight* (1861), 9 H.L.Cas. 577; 5 L.T. 291; 8 Jur.N.S. 724; 11 E.R. 854, H.L.; 32 Digest 171, *2093*.

(3) *Victorian Railway Comrs.* v. *Coultas* (1888), 13 App. Cas. 222; 57 L.J.P.C. 69; 58 L.T. 390; 52 J.P. 500; 37 W.R. 129; 4 T.L.R. 286, P.C.; 36 Digest (Repl.) 196, *1034*.

G

(4) *Bell* v. *Great Northern Rail. Co. of Ireland* (1890), 26 L.R.Ir. 428; 36 Digest (Repl.) 197, **1852*.

(5) *Byrne* v. *Great Southern and Western Rail. Co. of Ireland* (1884), cited in 26 L.R.Ir. 428; 36 Digest (Repl.) 197, **1851*.

H

(6) *Wilkinson* v. *Downton*, [1897] 2 Q.B. 57; 66 L.J.Q.B. 493; 76 L.T. 493; 45 W.R. 525; 13 T.L.R. 388; 41 Sol. Jo. 493; 17 Digest (Repl.) 122, *334*.

(7) *Smith* v. *Johnson & Co.* (1897), cited in, [1897] 2 Q.B., p. 61; 66 L.J.Q.B., p. 496; 7 L.T., p. 494; 45 W.R., p. 526; 13 T.L.R., p. 390; 41 Sol. Jo. 493, D.C.; 36 Digest (Repl.) 197, *1036*.

(8) *Coyle* (*or Brown*) v. *John Watson, Ltd.*, [1915] A.C. 1; 83 L.J.P.C. 307; 111 L.T. 347; 30 T.L.R. 501; 58 Sol. Jo. 533; 7 B.W.C.C. 259, H.L.; 34 Digest 268, *2284*.

I

(9) *Re Polemis and Furness, Withy & Co., Ltd.*, [1921] 3 K.B. 560; sub nom. *Polemis* v. *Furness, Withy & Co., Ltd.*, 90 L.J.K.B. 1353; 126 L.T. 154; 37 T.L.R. 940; 15 Asp.M.L.C. 398; 27 Com. Cas. 25, C.A.; 36 Digest (Repl.) 38, *185*.

(10) *Weld-Blundell* v. *Stephens*, [1920] A.C. 956; 89 L.J.K.B. 705; 123 L.T. 593; 36 T.L.R. 640; 64 Sol. Jo. 529, H.L.; 36 Digest (Repl.) 201, *1064*.

(11) *Pugh* v. *London, Brighton and South Coast Rail. Co.*, [1896] 2 Q.B. 248; 65 L.J.Q.B. 521; 74 L.T. 724; 44 W.R. 627; 12 T.L.R. 448; 40 Sol. Jo. 565, C.A.; 29 Digest 401, *3178*.

(12) *Janvier* v. *Sweeney*, [1919] 2 K.B. 316; 88 L.J.K.B. 1231; 121 L.T. 179; 35 T.L.R. 360; 63 Sol. Jo. 430, C.A.; 17 Digest (Repl.) 123, *336*.

Appeal by the plaintiff from an order of BRANSON, J., in an action tried by him with a jury.

The action was brought by the plaintiff claiming damages under the Fatal Accidents Act, 1846, for the loss of his wife which, he alleged, had been caused by the negligence of the defendants, their servants or agents. The facts appear from the judgments.

Serjeant Sullivan, K.C., and *Martin O'Connor* for the plaintiff.

H. D. Samuels for the defendants.

Cur. adv. vult.

Nov. 12. The following judgments were read.

BANKES, L.J.—This appeal raises an important and interesting point of law. The appellant, who was plaintiff in the court below, claimed compensation under Lord Campbell's Act for the loss of his wife. His case was that his wife died as the result of nervous shock caused by the negligence of the defendants' servant. The material facts proved or admitted at the trial were that the defendants were the owners of a motor lorry, which was left by their servant unattended and with the engine running, and which ran away down a street in Folkestone, so narrow that in places the road was only just 6 ft. wide. It was admitted that the defendants' servant was negligent in allowing this to happen. The lorry was finally pulled up by running into a house close to where the plaintiff's wife happened to be standing. The plaintiff's case was that his children, at the time the lorry came down the street, were on their way to school, and having regard to the time at which they started, would presumably be where the lorry might strike them, the street being so narrow and the lorry swaying from side to side of the street. He further contended that the shock to his wife was due either to a reasonable fear of immediate personal injury to herself, or, alternatively, of injury to her children, and that her death was the result of the shock. The case for the defendants was that the shock was due to a fear of injury to her children, which did not give rise to any cause of action, and, further, that the wife's death was due to quite independent causes. Upon both points issues of fact were raised which were entirely for the jury, and upon which no question arises in this appeal.

The matter comes before this court upon a complaint of misdirection by the learned judge upon two matters. The first has reference to the way in which the learned judge put the case to the jury upon the question whether the wife's death was the result of the shock or of some independent cause. I should not be prepared to direct a new trial upon this part of the case as, although the learned judge did, in summing up to the jury on this part of the case, put the matter in a way of which complaint can be made, he had previously put the matter so very clearly and carefully to the jury that I do not think they could have been in any way misled. The important part of the plaintiff's complaint is with regard to the statement of the law by the learned judge to the jury in reference to the defendants' liability for any nervous shock caused to the wife. What the learned judge told the jury in substance was that, if they found that the shock to the wife resulted in her death, and arose from reasonable fear of immediate injury to herself, they might award the husband compensation, but that, if they found that the fear was fear, not of injury to herself, but of injury to her children, they must find for the defendants. In thus directing the jury the learned judge was following the latest decision upon the point, and the object of this appeal is to get that decision, if decision it be, as opposed to a mere dictum, set aside or corrected, and the law laid down in terms wide enough to embrace either view of the cause of the shock to the wife.

The branch of the law relating to the responsibility for causing nervous shock has developed considerably in comparatively recent years. In *Lynch* v. *Knight* (2) (9 H.L.Cas. at p. 590), decided in 1861, LORD WENSLEYDALE speaks of mental pain or anxiety as something which the law cannot value and does not pretend to redress. In 1888, in the case in the Privy Council of the *Victorian Rail. Comrs.* v. *Coultas* (3), the question was directly raised whether damages were recoverable for a nervous shock or mental injury caused by fright of an impending collision. The decision was that they were not, and the ground of the decision was that such damages would be too remote. SIR R. COUCH, in delivering judgment, says this (13 App. Cas. at p. 775):

> "According to the evidence of the female plaintiff her fright was caused by seeing the train approaching and thinking they were going to be killed. Damages arising from mere sudden terror unaccompanied by any actual physical injury, but occasioning a nervous or mental shock, cannot, in such circumstances, their Lordships think, be considered a consequence which, in the ordinary course of things, would flow from the negligence of the gate-keeper. If it were held that they can, it appears to their Lordships that it would be extending the liability for negligence much beyond what that liability has hitherto been held to be. Not only in such a case as the present, but in every case where an accident caused by negligence had given a person a serious nervous shock, there might be a claim for damages on account of mental injury. The difficulty which now often exists in case of alleged physical injuries of determining whether they were caused by the negligent act would be greatly increased, and a wide field opened for imaginary claims."

The law thus laid down was not followed in Ireland. In 1890, in *Bell* v. *Great Northern Rail. Co. of Ireland* (4), a court consisting of PALLES, C.B., ANDREWS and MURPHY, JJ., refused to follow the decision, and accepted an earlier decision of the Court of Appeal in Ireland in *Byrne* v. *Great Southern and Western Rail. Co.* (5), in which the exact opposite was held to be the law.

The question does not appear to have been directly raised in England until 1901, when *Dulieu* v. *White & Sons* (1) came before a Divisional Court consisting of KENNEDY and PHILLIMORE, JJ. The facts in that case were that the plaintiff was claiming damages for illness caused by the shock resulting from the negligence of the defendants' servant in driving a pair-horse van into the house in which she was. The defendants contended that the statement of claim disclosed no cause of action. The court refused to follow the Privy Council decision, and in elaborate and closely reasoned judgments both learned judges held that the plaintiff had disclosed a cause of action. In giving judgment, KENNEDY, J., says this ([1901] 2 K.B. at p. 675):

> "It is not, however, to be taken that in my view every nervous shock occasioned by negligence and producing physical injury to the sufferer gives a cause of action. There is, I am inclined to think, at least one limitation. The shock, where it operates through the mind, must be shock which arises from a reasonable fear of immediate injury to oneself. A. has, I conceive, no legal duty not to shock B.'s nerves by the exhibition of negligence towards C., or towards the property of B. or C."

In introducing this limitation the learned judge relies upon a reference by WRIGHT, J., in *Wilkinson* v. *Downton* (6), to a previous decision in *Smith* v. *Johnson & Co.* (7), in which a Divisional Court had held that, where a man was killed in the sight of the plaintiff by the defendant's negligence, and the plaintiff became ill, not from the shock for fear of harm to himself, but from the shock of seeing another person killed, this harm was too remote a consequence of the negligence. It must be noticed that the facts in this last-mentioned case, and in the general illustration given by KENNEDY, J., in support of his dictum, are very different from the facts of the present case. It may well be that the duty of a person to take care does not extend to a person in the position of the plaintiff in *Smith* v. *Johnson & Co.* (7),

A or to the person indicated as B. in KENNEDY, J.'s illustration, and yet may extend to a person in the position of the plaintiff's wife. I think that the decision in *Dulieu* v. *White & Sons* (1), apart from the exception introduced by KENNEDY, J., is now accepted as good law. It is certainly so treated by LORD SHAW in *Coyle* (*or Brown*) v. *John Watson, Ltd.* (8). The surest way, as it seems to me, of testing the question whether the limitation introduced by KENNEDY, J., upon the B general rule is good law, is by considering the principle upon which the rule itself is based. PHILLIMORE, J., in his judgment in *Dulieu* v. *White & Sons* (1), approaches the question from that point of view. He commences his judgment with these words ([1901] 2 K.B. at p. 682):

> "I think there may be cases in which A. owes a duty to B. not to inflict a mental shock on him or her, and that in such a case, if A. does inflict such a C shock upon B.—as by terrifying B.—and physical damage thereby ensues, B. may have an action for the physical damage, though the medium through which it has been inflicted is the mind."

I had occasion, in *Re Polemis and Furness, Withy & Co., Ltd.* (9), to refer to the authorities and to the speech of LORD SUMNER in *Weld-Blundell* v. *Stephens* (10) upon the question of the materiality of what a reasonable man ought to have D anticipated when that man's negligence was in question. LORD WENSLEYDALE, in *Lynch* v. *Knight* (2), approved of the reasoning of CHRISTIAN, J., in considering whether the plaintiff in that case had established a cause of action. He says (9 H.L.Cas. at p. 600):

> "I strongly incline to agree with him, that to make the words actionable, by E reason of special damage, the consequence must be such as, taking human nature as it is, with its infirmities, and having regard to the relationship of the parties concerned, might fairly and reasonably have been anticipated and feared would follow from the speaking the words, not what would reasonably follow, or we might think ought to follow."

Accepting the line of reasoning illustrated by these authorities, it follows that F what a man ought to have anticipated is material when considering the extent of his duty. Upon the authorities as they stand, the defendant ought to have anticipated that, if his lorry ran away down this narrow street, it might terrify some woman to such an extent, through fear of some immediate bodily injury to herself, that she would receive such a mental shock as would injure her health. Can any real distinction be drawn from the point of view of what the defendant G ought to have anticipated, and what, therefore, his duty was, between that case and the case of a woman whose fear is for her child, and not for herself? Take a case in point as a test. Assume two mothers crossing this street at the same time when this lorry comes thundering down, each holding a small child by the hand. One mother is courageous and devoted to her child. She is terrified, but thinks only of the damage to the child, and not at all about herself. The other H woman is timid and lacking in the motherly instinct. She also is terrified, but thinks only of the damage to herself and not at all about her child. The health of both mothers is seriously affected by the mental shock occasioned by the fright. Can any real distinction be drawn between the two cases? Will the law recognise a cause of action in the case of the less deserving mother, and none in the case of the more deserving one? Does the law say that the defendant ought reasonably to I have anticipated the non-natural feeling of the timid mother, and not the natural feeling of the courageous mother? I think not. In my opinion, the step which the court is asked to take, in the circumstances of the present case, necessarily follows from an acceptance of the decision in *Dulieu* v. *White & Sons* (1), and I think that the dictum of KENNEDY, J., laid down in quite general terms in that case, cannot be accepted as good law applicable in every case.

While coming to this conclusion, for the reasons I have given, I wish to confine my decision to cases where the facts are indistinguishable in principle from the facts of the present case, and in the present case I am merely deciding that, in

my opinion, the plaintiff would establish a cause of action if he proved to the satisfaction of the jury all the material facts on which he relies—namely, that the death of his wife resulted from the shock occasioned by the running away of the lorry; that the shock resulted from what the plaintiff's wife either saw or realised by her own unaided senses, and not from something which someone told her; and that the shock was due to a reasonable fear of immediate personal injury either to herself or to her children. The judgment for the defendants must be set aside and a new trial ordered, the costs of the appeal to be paid by the respondent and the costs of the first trial to abide the event of the new trial.

ATKIN, L.J.—This action, so far as is relevant to our present decision, was brought under the Fatal Accidents Act, 1846, as amended by the Act of 1864, by a husband to recover damages for the death of his wife, alleged to be caused by the negligence of the defendants. The plaintiff, therefore, had to show that the death of his wife was caused by the wrongful act, neglect, or default of the defendants, and that the act, neglect, or default is such as would, if death had not ensued, have entitled the wife to maintain an action and recover damages in respect thereof. The negligence alleged by the statement of claim is that the defendants, by their servant, brought the defendants' motor lorry to rest at the top of a steep street in Folkestone, with the engine running, and omitted to take proper precautions to prevent its moving, whereby the plaintiff's wife, Mrs. Hambrook, was injured. It is very material to notice that by the defence the negligence is admitted, and the only material traverse raised is that the injury to the wife was caused by the negligence.

The injury alleged arose in unusual circumstances. The evidence on behalf of the plaintiff was to the effect that on the morning in question, May 1, 1923, Mrs. Hambrook had escorted her children, two boys and a girl Mabel, aged ten, to the pavement in Dover Street, where they joined other children on their way to school. The group of children proceeded on their way, turning a corner of Dover Street within a few yards of leaving Mrs. Hambrook, and so passing out of her sight. They had hardly turned the corner when the derelict motor lorry coming down the street, ricocheting from one side of the road to the other, dashed into the children, inflicting serious injuries to the child Mabel. The progress of the lorry would be heard by those round the corner, including Mrs. Hambrook. After injuring the child it shot round the corner, and finally came to a stop within 15 or 20 feet of Mrs. Hambrook. She immediately evinced signs of great mental disturbance, caused, as the jury have found, by apprehension, not of injury to herself, but of injury to the child. She was pregnant at the time; as to the stage of the pregnancy there is some discrepancy between the evidence of the husband, who says three months, and the doctor who attended her at her death on July 16, 1923, who says that on May 1 she had been pregnant two to six weeks. She had a severe hæmorrhage on May 3, which she thought was a miscarriage. She partially recovered, but about June 28 became worse, and died on July 16, 1923. On July 11 she was operated on and a fœtus removed, which the doctor said had been dead, "say a month, and about two to three months' development." An issue was raised by the defendants whether the death of the fœtus and the death of the mother were not entirely due to one or other of two lorry drives in a motor charabanc which the wife had taken to the Derby on June 6 and to Ascot on June 21. It is sufficient to say that there was ample evidence upon which the jury might have found that death was not solely so caused. The learned judge directed the jury that, unless the death of the wife was the result of shock produced by fear of harm to herself, as contrasted with shock produced by fear of harm to her child, the plaintiff could not recover. The question for us is whether that is a misdirection. In my opinion, it was, and in consequence there must be a new trial.

The legal effects of injury by shock have undoubtedly developed in the last thirty or forty years. At one time the theory was held that damage at law could not be proved in respect of personal injuries, unless there was some injury which was

A variously called "bodily" or "physical," but which necessarily excluded an injury which was only "mental." There can be no doubt at the present day that this theory is wrong. It is, perhaps, irrelevant to discuss at length how it arose. It may be due partly to a false analogy between the action of negligence and the action of trespass to the person involving some sort of impact with the person, and in part to the law following a belated psychology which falsely removed mental B phenomena from the world of physical phenomena. The final expression of the theory in question is to be found in *Victorian Railways Comrs.* v. *Coultas* (3). That case has been criticised in the courts of England, Scotland and Ireland, and pronounced by LORD SHAW to be no longer a decision of binding authority. On the other hand, there is a series of cases in which, in varying forms of action, injury from shock has been held to entitle the person so injured to recover damages. C I will confine myself to the English cases.

In *Pugh* v. *London, Brighton, and South Coast Rail. Co.* (11), in 1896, a signalman was held to have been incapacitated from employment by reason of accident, where the incapacity was due to shock caused by the excitement and alarm of successfully averting an accident to a train. There was no apprehension of danger to the signalman, and the members of the court seem to have considered that the D fright was the accident, and the shock and consequent incapacity the result of the accident. In *Smith* v. *Johnson & Co.* (7), referred to by WRIGHT, J., in his judgment in *Wilkinson* v. *Downton* (6), a Divisional Court, consisting of BRUCE and WRIGHT, JJ., decided that where a man was killed in the sight of the plaintiff by the defendant's negligence, and the plaintiff became ill from the shock of seeing the man killed, the damage was too remote a consequence of negligence. No E further particulars are available; the case was presumably a county court case, and it does not appear what facts had been found. The decision of the court, according to WRIGHT, J., was based on the remoteness of damage. In *Wilkinson* v. *Downton* (6) the defendant in joke had falsely represented to a married woman that her husband had met with a serious accident whereby both his legs were broken. The plaintiff suffered a serious shock. WRIGHT, J., held that she was entitled to recover F damages. Here the apprehension was of injury to the husband; there was no intent to injure, but there was an intent that the wife should believe the representation, and the representation was found either by the judge or the jury to be calculated to cause physical harm. In *Dulieu* v. *White & Sons* (1) damages for shock caused by apprehension of injury to the plaintiff by negligent driving were held to be recoverable. The case was decided by KENNEDY and PHILLIMORE, JJ., G on a point of law raised in the pleadings. The decision is plainly right. The case is important for the dictum of KENNEDY, J., which BRANSON, J., followed in the present case, to the effect that the shock, where it operates through the mind, must be a shock which arises from reasonable fear of immediate personal injury to oneself. I will discuss the correctness of this dictum later. I do not see that PHILLIMORE, J., expressed any definite opinion upon this point. Finally, in *Janvier* H v. *Sweeney* (12) a private detective made false representations in the nature of threats to a female servant, in order to obtain information from her. The representation found by the jury was: "You are the woman we want, as you have been corresponding with a German spy." The alleged German spy was a man named Neumann, who was then interned, to whom the plaintiff had been engaged for five years. The Court of Appeal held that the plaintiff was entitled to recover damages I for injury caused by shock, the result of the representations. The jury had found that the statements were calculated to cause physical injury, and were made by the defendant with the knowledge that they were likely to cause injury. It does not clearly appear whether the fright of the plaintiff was of evil consequences to herself, or to Neumann, but it may be that the Court of Appeal accepted the former view.

In this state of the authorities, was the direction of the learned judge right? It appears to me that, if the plaintiff can prove that her injury was the direct result of a wrongful act or omission by the defendant, she can recover, whether the wrong is a malicious and wilful act, is a negligent act, or is merely a failure to

keep a dangerous thing in control, as, for instance, a failure to keep a wild beast in control. Once a breach of duty to the plaintiff is established, one has no longer to consider whether the consequences could reasonably be anticipated by the wrongdoer. The question is whether the consequences causing damage are the direct result of the wrongful act or omission. The full effect of the decision in *Re Polemis and Furness, Withy & Co., Ltd.* (9) has not yet, I think, been fully realised, even though that case laid down no new law. I agree that in the present case the plaintiff must show a breach of duty to her, but this she shows by the negligence of the defendants in the care of their lorry. I am clearly of opinion that the breach of duty to her is admitted in the pleadings. I do not appreciate the nature of the admission, unless it is an admission of negligence which, if supported by damage, would give the plaintiff a cause of action. This seems made plain by the fact that the only traverse in the defence is that the negligence caused damage, and by the, to me, conclusive fact that the same admission of negligence covers the cause of action of the infant plaintiff to whom the duty is not in dispute.

But, apart from the admission in the pleadings, I think that the cause of action is complete. The duty of the owner of a motor car in a highway is not a duty to refrain from inflicting a particular kind of injury upon those who are in the highway. If so, he would be an insurer. It is a duty to use reasonable care to avoid injuring those using the highway. It is thus a duty owed to all wayfarers, whether they are injured or not; though damage by reason of the breach of duty is essential before any wayfarer can sue. Further, the breach of duty does not take place necessarily when the vehicle strikes or injures the wayfarer. The negligent act or omission may precede the act of injury. In this case it was completed at the top of Dover Street when the car was left unattended in such a condition that it would run violently down the steep place. Here, then, was a breach of a duty owed to Mrs. Hambrook. No doubt, the particular injury was not contemplated by the defendants, but it is plain from *Re Polemis and Furness, Withy & Co., Ltd.* (9) that this is immaterial. If the act would or might probably cause damage, the fact that the damage it in fact causes is not the exact kind of damage one would expect is immaterial, so long as the damage is in fact directly traceable to the negligent act and not due to the operation of independent causes having no connection with the negligent act: see per SCRUTTON, L.J. ([1921] 3 K.B. at p. 577). I can find no principle to support the self-imposed restriction stated in the judgment of KENNEDY, J., in *Dulieu* v. *White & Sons* (1), that the shock must be a shock which arises from a reasonable fear of immediate personal injury to oneself. It appears to me inconsistent with the decision in *Pugh* v. *London, Brighton, and South Coast Rail. Co.* (11) and with the decision in *Wilkinson* v. *Downton* (6), in neither of which cases was the shock the result of the apprehension of the injury to the plaintiff. It would result in a state of the law in which a mother, shocked by fright for herself, would recover, while a mother, shocked by her child being killed before her eyes, could not, and in which a mother traversing the highway with a child in her arms could recover, if shocked by fright for herself, while if she could be cross-examined into an admission that the fright was really for her child, she could not. In my opinion, such distinctions would be discreditable to any system of jurisprudence in which they formed part. Personally, I see no reason for excluding the bystander in the highway who receives injury in the same way from apprehension of, or the actual sight of, injury to a third party. There may well be cases where the sight of suffering will directly and immediately physically shock the most indurate heart; and, if the suffering of another be the result of an act wrongful to the spectator, I do not see why the wrongdoer should escape. The reason why a threatened battery upon the plaintiff is actionable, if it causes damage, is that it is an assault, a crime committed against the plaintiff, and, therefore, a wrong to him. The reason why a threatened or an actual battery against a third person is not actionable by a spectator is that it is not a wrong to him. It may be that to negative KENNEDY, J.'s restriction is to increase possible actions. I think this may be exaggerated. I find only about half a dozen cases

of direct shock reported in about thirty years, and I do not expect that shocks to bystanders will outnumber them. But if they do, in the words of KENNEDY, J. ([1901] 2 K.B. at p. 681):

> "I should be sorry to adopt a rule [in this case the restriction] which would bar all such claims on grounds of policy alone, and in order to prevent the possible success of unrighteous or groundless actions. Such a course involves the denial of redress in meritorious cases, and it necessarily implies a certain degree of distrust, which I do not share, in the capacity of legal tribunals to get at the truth in this class of claim."

In my opinion, it is not necessary to treat this cause of action as based upon a duty to take reasonable care to avoid administering a shock to wayfarers. The cause of action, as I have said, appears to be created by breach of the ordinary duty to take reasonable care to avoid inflicting personal injuries, followed by damage, even though the type of damage may be unexpected—namely, shock. The question appears to be as to the extent of the duty, and not as to remoteness of damage. If it were necessary, however, I should accept the view that the duty extended to the duty to take care to avoid threatening personal injury to a child in such circumstances as to cause damage by shock to a parent or guardian then present, and that the duty was owed to the parent or guardian; but I confess that, upon this view of the case, I should find it difficult to explain why the duty was confined to the case of parent or guardian and child, and did not extend to other relations of life also involving intimate associations; and why it did not eventually extend to bystanders. It may be, however, that there is not any practical difference between the two ways of putting it; for the degree of care to be exercised by the owner of the vehicle would still in practice be measured by the standard of care necessary to avoid the ordinary form of personal injuries. One may, therefore, conclude by saying that this decision in no way increases the burden of care to be taken by the drivers of vehicles, and that the risk, foreshadowed in one of the cases, of an otherwise careful driver being made responsible for frightening an old lady at Charing Cross, is non-existent. The case must go for a new trial. I need, therefore, not pronounce finally upon the complaint of misdirection as to the cause of the injury, though I incline to think that it might have misled the jury, and be in itself a sufficient ground for the order we now make. No doubt, at the trial all the facts will be carefully investigated, including the possibility that the shock received by the mother was in no way caused by the sight or sound of the accident, and apprehension of danger to the child or children, but solely to the report of the injury to the daughter made to her by the third person. I content myself with saying that there is evidence that the latter is not the true view.

SARGANT, L.J.—This appeal arises in regard to a claim by the plaintiff under Lord Campbell's Act for the death of his wife in consequence of a motor lorry of the defendants escaping from control and charging down Dover Street, Folkestone. The plaintiff, to establish his claim, has to show that his wife, had she not died, would have been entitled to recover from the defendants for injury inflicted on her. Mrs. Hambrook having died, it is not possible to ascertain the precise circumstances of the accident. But it is clear that just previously she had, in accordance with her usual custom, taken her children—two boys and a girl—across Dover Street on their way to school, and that they had gone some few yards up the street and out of her sight past a bend. The lorry had then charged down this higher part of the street, bumped into the shop of a dealer, Brown, on the opposite side of the street to that on which the children had been walking—apparently in company with, or near to, other children—and then crossed the street, passed the bend above Mrs. Hambrook, and finally brought up against a baker's shop on her side of the street not far from her. She was then found in a frantic condition, in violent hysterics, tearing her hair and inquiring wildly as to the safety of her little girl. Her state was no doubt due to shock arising from one or other aspect of the accident; but the evidence given did not indicate with absolute certainty whether

the shock was due (i) to apprehension of immediate injury to herself from the lorry, A
though her exclamations seem to negative this view, or (ii) from apprehension of
injury having been caused by the lorry to one or other of her children. On the
latter hypothesis, it is not quite clear whether the apprehension of this danger was
solely due to the realisation that the lorry had been charging down the street in
which her children were, or was due to, or aggravated by, statements made to her
that a little girl wearing spectacles (as her girl did) had been injured. There seems B
to be strong ground for the latter view, inasmuch as she appears to have expressed
apprehension for the girl only, though the two boys had been in equal peril, and
one of them was the youngest of the three and, therefore, the least capable of
taking care of himself. In fact, the little girl had been seriously, though not
dangerously, injured; and after Mrs. Hambrook had somewhat recovered from her
hysterics, she was taken by her husband to the school, and from there to the C
hospital, whither the little girl had been conveyed. But counsel for the plaintiff
expressly disclaimed any suggestion that the shock to Mrs. Hambrook, which is
said to have been the cause of her subsequent death, was due to, or aggravated by,
her finding that the little girl was missing from the school, or by her afterwards
tracing her to and seeing her in hospital. He relied upon the shock occasioned to
Mrs. Hambrook by the original apprehension of the imminent danger to her little D
girl, or rather perhaps of the imminent danger to her three children; for, apart
from the information said to have been given by a bystander, there was no more
reason for apprehending danger to the girl than to either of the boys.

On these facts BRANSON, J., directed the jury, as a matter of law, that the
plaintiff had to show, as a first step, that the shock causing Mrs. Hambrook's
illness arose from a reasonable fear of immediate personal injury to herself. The E
plaintiff says that this is a misdirection, and that it would be sufficient for his case
on this point if the shock arose from fear or apprehension of personal injury to her
children. It is admitted that the learned judge's direction followed precisely the
view expressed by KENNEDY, J., in *Dulieu* v. *White & Sons* (1), but it is said that
the view so expressed was not necessary to the decision of that case, and was
wrong, and should be overruled. *Dulieu* v. *White & Sons* (1) seems to have been F
the first case in the High Court of accident on or near the highway in which the
defendant was rendered liable for negligence without there having been direct
physical injury to the plaintiff, either by actual impact of the vehicle or in the course
of the accident. It is a notable case, as having adopted the reasoning of the
Court of Appeal in Ireland in *Bell* v. *Great Northern Rail. Co. of Ireland* (4) and
rejected the express decision of the Privy Council in *Victorian Railways Comrs.* v. G
Coultas (3). But, apart from the importance due to the necessity of having to
decide between two directly conflicting decisions, I do not think that *Dulieu* v.
White & Sons (1) marked any great advance in the development of our law, or any
considerable extension in the liabilities of users of the highway for negligence.

It is, no doubt, more difficult to prove that physical injury results from nervous
shock than from direct impact. But when once this difficulty of proof is overcome, H
I cannot see why a negligence which so nearly causes direct impact as to cause
physical injury by nervous shock is a more remote or less natural cause of damage
than a negligence causing actual physical impact. Or, to put it more precisely,
as a matter of duty which is owed to the plaintiff, the neglect of which has caused
damage, the duty of the defendant so to control his vehicle as to avoid causing
physical injury to those on or near the highway, including the plaintiff, can hardly I
be limited to actual physical impact on the plaintiff (though this is in fact the
result of the American cases), but must logically include such an immediate threat
of impact on the plaintiff as to produce physical injury to him, or her, through the
nervous system. There seems to me to be no magic in actual personal contact.
A threatened contact producing physical results should be an equivalent. The
principle on which a threatened battery may justify damages for assault is, in my
view, strictly analogous. In the case of a threat of imminent danger to a plaintiff
resulting in illness through nervous shock, there is, in my view, as real and direct

an interference with the personality of the plaintiff as if the illness had been caused by actual physical contact with him. And the duty of a defendant to avoid acts or omissions which will result in the illness of the plaintiff seems to me as clear and definite in the one case as in the other, though, no doubt, the occasions on which illness will result are much less frequent in the first case than in the second. On the other hand, the matter is very different when the shock to the plaintiff is due, not to immediate fear of personal impact, but to the sight or apprehension of impact on a third person. Here *Smith* v. *Johnson & Co.* (7), referred to by WRIGHT, J., in the judgment in *Wilkinson* v. *Downton* (6) ([1897] 2 Q.B. at p. 61), is of the highest importance. There the plaintiff became ill, not from impact on himself, nor from fear of such impact, but from the shock of seeing another killed, the death being due to the negligence of the defendant. It was held that the plaintiff was not entitled to recover. That decision seems to me unquestionably right, though I should prefer, with KENNEDY, J., to put it, not on the ground that the harm was too remote a consequence of the negligence, but on (what is often practically equivalent) a consideration of the extent of the duty of the defendant towards the plaintiff and others on and near the highway. That is to say that, as the defendant did not do anything which could reasonably or naturally be expected to cause the harm in question to the plaintiff, there was no evidence of any breach of duty towards him for which the defendant could be rendered liable. In my judgment, it would be a considerable and unwarranted extension of the duty of owners of vehicles towards others in or near the highway, if it were held to include an obligation not to do anything to render them liable to harm through nervous shock caused by the sight or apprehension of damage to third persons.

No doubt in *Smith* v. *Johnson & Co.* (7) the person killed was a stranger to the plaintiff, while here the persons with regard to whom apprehension was entertained were the young children of Mrs. Hambrook herself. But I cannot think that this makes any real difference, if the question is regarded, as I think it ought to be regarded, from the point of view of the extent of the duty of the defendant towards the public in or near the highway. If he has no duty to avoid shocking them by killing or endangering strangers, can it be reasonably held that he has such a duty to avoid shocking them by killing or endangering their friends or relatives? And, if so, what degree of friendship or relationship is the defendant to expect as that which will reasonably or naturally result in harmful nervous shock? It seems to me that, when once the requirement is relaxed that the shock is to be one caused by the plaintiff's apprehension of damage to himself, the defendant is exposed to liability for a consequence which is only reached by a new and quite unusual link in the chain of causation, and which cannot therefore properly be held to have been within his ordinary and reasonable expectation. The extent of this extra liability is necessarily both wide and indefinite, inasmuch as it may vary with the precise degree of connection between the person injured and the plaintiff, and also, perhaps, with the circumstances attending the realisation by the plaintiff of actual or apprehended injury to the third person. For instance, should it extend to a shock occasioned to a daughter by apprehended danger to a mother, or to a sister by apprehended danger to a brother? And where, as in this case, the apprehended danger is out of the sight of the plaintiff, ought the plaintiff to be entitled to recover for the illness by shock if the facts were that the person whose safety was in question had turned off the dangerous highway, or had for some other reason never been in imminent danger at all?

Some stress was laid, in the argument for the plaintiff, on the anomalies that might arise if in such a case as this a mother had been hand in hand with her child, and was entitled or disentitled to recover according as her shock was due to her own personal danger or to the child's. In my judgment, no assistance is rendered by the consideration of possible cases which are rendered more complicated than the present by the concurrence or confusion of two possible causes of apprehension and shock. Here there is, as the evidence has been given, little risk of any such confusion, since there is no evidence that Mrs. Hambrook was, or

considered herself to be, in any personal danger, and the inference which counsel for the plaintiff asked the court to draw was that the shock was due to Mrs. Hambrook's acute apprehension of the danger to one or more of her children. A

Wilkinson v. *Downton* (6) and *Janvier* v. *Sweeney* (12) are not really in point, since they are founded on intentional and malicious wrongdoing. *Pugh* v. *London, Brighton, and South Coast Rail. Co.* (11) is merely a decision on what amounted to an accident within the meaning of a policy. *Re Polemis and Furness, Withy & Co., Ltd.* (9) dealt with a case in which there was a duty by contract between the plaintiff and the defendant, while here we have to determine, in the absence of contract, what is the extent of the duty of the defendant, and whether the plaintiff's wife fell within the area of the duty as so defined. I do not think that any of these cases assist the solution of the present problem. B

A second alleged misdirection by the learned judge may be much more briefly dealt with. It is said that, in charging the jury as to the sufficiency of the chain of causation connecting the original illness of Mrs. Hambrook with her ultimate death, the learned judge made an important mistake of fact and took a view of the law towards the end of his charge, which was too unfavourable to the plaintiff. If this alleged second misdirection stood alone, I should have felt some difficulty; but, as it is, this second point becomes unimportant on either alternative view of the first point, for, on the view of the majority of the court, a new trial has to be granted. And, on my view of the first point, the plaintiff could not succeed, unless there were apprehension by his wife of personal injury to herself, and there was no evidence before the jury on which they could properly find that any such apprehension of injury to herself was the cause of her illness by shock. Indeed, I read their verdict as negativing this view. C D E

In my opinion, the appeal should be dismissed, but, in view of the fact that the majority of the court are of opinion that it should be allowed, I would suggest the advisability of the judge directing the jury on the new trial to find whether the shock to Mrs. Hambrook was caused by her own unaided realisation of what had happened, or was due wholly or partly to what she heard from bystanders. For I gather that the view of the majority of the court is that it is only in the former event that the defendants would be liable; and as I have already said, the fact that Mrs. Hambrook appears to have expressed anxiety only as regards her daughter is an indication of some weight that she had heard from others of the injury to a little girl answering in one respect the description of her daughter. F

Appeal allowed.

Solicitors : *Edmund O'Connor & Co.*; *William Hurd & Son.* G

[*Reported by* W. C. Sandford, Esq., *Barrister-at-Law.*]

VERGE *v.* SOMERVILLE AND OTHERS

[Privy Council (Lord Atkinson, Lord Wrenbury and Lord Darling), December 20, 1923, January 25, 1924]

[Reported [1924] A.C. 496; 93 L.J.P.C. 173; 131 L.T. 107; 40 T.L.R. 279; 68 Sol. Jo. 419]

Charity—Benefit to community—Benefit of appreciably important class—Need to prove benefit to poor to exclusion of rich.

Charity—Soldiers—Repatriation of soldiers returning from war.

To ascertain whether a gift constitutes a valid charitable trust so as to escape being void on the ground of perpetuity a first inquiry must be whether it is public, whether it is for the benefit of the community or of an appreciably important class of the community. If it is, a valid charitable trust may exist notwithstanding the fact that in its administration the benefit is not confined by the donor to the poor to the exclusion of the rich.

Per Lord Wrenbury: In the investigation of the legal meaning of the word "charity" as distinguished from its popular meaning the statute 43 Eliz., c. 4, must always be the starting-point. The words in the preamble are not a definition of charitable uses, but are a detailed statement of certain uses which are to be charitable, and in dealing with the matter the course which the Court of Chancery has pursued has been to look at the enumeration of the charities in the statute, and to include under the word "charitable" any gift of funds for a public purpose which is analogous to those mentioned in the statute. In fact, the legal meaning and the popular meaning of the word "charitable" are so far apart that it is necessary almost to dismiss the popular meaning from the mind as misleading before setting out to determine whether a gift is charitable within the legal meaning. For instance, the statute includes gifts for the repair of bridges, ports, harbours, causeways, and highways—objects, obviously, of benefit, not to the poor only, but to the community as a whole, comprising rich as well as poor.

A gift to trustees "for the benefit of New South Wales returned soldiers, **held**, to create a good charitable trust.

Notes. Considered: *Williams' Trusts Trustee* v. *I.R.Comrs.*, [1947] 1 All E.R. 513; *Polish Combatants' Association, Ltd.* v. *I.R.Comrs.* (1949), 93 Sol. Jo. 513; *I.R.Comrs.* v. *Baddeley*, [1955] 1 All E.R. 525. Applied: *Davies* v. *Perpetual Trustee Co.*, [1959] 2 All E.R. 128. Referred to: *General Medical Council* v. *I.R.Comrs.*, *English Branch Council of General Medical Council* v. *Same* (1928), 97 L.J.K.B. 578; *Keren Kayemeth Le Jisroel, Ltd.* v. *I.R.Comrs.*, [1932] All E.R.Rep. 971; *Re Ward's Estate, Ward* v. *Ward* (1937), 81 Sol. Jo. 397; *Re Hillier, Dauncy* v. *Finch and A.-G.*, [1944] 1 All E.R. 480; *Re Compton, Powell* v. *Compton*, [1945] 1 All E.R. 198; *Re Tree, Idle* v. *Tree*, [1945] 2 All E.R. 65; *Re Strakosch, Temperley* v. *A.-G.*, [1949] 2 All E.R. 6; *Oppenheim* v. *Tobacco Securities Trust Co.*, [1951] 1 All E.R. 31; *Re Cox, Baker* v. *National Trust Co.*, *Public Trustee for Ontario Province* v. *National Trust Co.*, [1955] 2 All E.R. 550.

As to charities for purposes beneficial to the community, see 4 Halsbury's Laws (3rd Edn.) 226–232; and for cases see 8 Digest (Repl.) 342–352.

Cases referred to:

(1) *Goodman* v. *Saltash Corpn.* (1882), 7 App. Cas. 633; 52 L.J.Q.B. 193; 48 L.T. 239; 47 J.P. 276; 31 W.R. 293, H.L.; 8 Digest (Repl.) 440, *1306*.

(2) *Re Christchurch Inclosure Act* (1888), 38 Ch.D. 520; 57 L.J.Ch. 564; 58 L.T. 827; 4 T.L.R. 392, C.A.; 8 Digest (Repl.) 384, *776*.

(3) *Income Tax Special Purposes Comrs.* v. *Pemsel*, [1891] A.C. 531; 61 L.J.Q.B. 265; 65 L.T. 621; 55 J.P. 805; 7 T.L.R. 657; 3 Tax Cas. 53, H.L.; 8 Digest (Repl.) 312, *1*.

(4) *Morice* v. *Bishop of Durham* (1805), 10 Ves. 522; 32 E.R. 947, L.C.; 8 Digest (Repl.) 390, *836*.

(5) *Blair* v. *Duncan*, [1902] A.C. 37; 71 L.J.P.C. 22; 86 L.T. 157; 50 W.R. 369; 18 T.L.R. 194, H.L.; 8 Digest (Repl.) 394, *865*.

(6) *Grimond* v. *Grimond*, [1905] A.C. 124; 74 L.J.P.C. 35; 92 L.T. 477; 21 T.L.R. 323, H.L.; 8 Digest (Repl.) 396, *882*.

(7) *Re Sidney*, *Hingeston* v. *Sidney*, [1908] 1 Ch. 488; 77 L.J.Ch. 296; 98 L.T. 625; 52 Sol. Jo. 262, C.A.; 8 Digest (Repl.) 350, *304*.

(8) *A.-G.* v. *National Provincial and Union Bank of England*, [1924] A.C. 262; 40 T.L.R. 191; 68 Sol. Jo. 235; sub nom. *Re Tetley*, *A.-G.* v. *National Provincial and Union Bank of England*, 93 L.J.Ch. 231; 131 L.T. 34, H.L.; 8 Digest (Repl.) 397, *892*.

(9) *Re Macduff*, *Macduff* v. *Macduff*, [1896] 2 Ch. 451; 65 L.J.Ch. 700; 74 L.T. 706; 45 W.R. 154; 12 T.L.R. 452; 40 Sol. Jo. 651, C.A.; 8 Digest (Repl.) 395, *879*.

(10) *Re Gassiot*, *Fladgate* v. *Vintners' Co.* (1901), 70 L.J.Ch. 242; 17 T.L.R. 216; 8 Digest (Repl.) 357, *358*.

(11) *Re Elliott*, *Raven* v. *Nicholson* (1910), 102 L.T. 528; 54 Sol. Jo. 426; 8 Digest (Repl.) 317, *36*.

Appeal from an order of the Supreme Court of New South Wales made by STREET, C.J., in equity.

German Verge, of Gladstone Macleay River, in the State of New South Wales, who died in 1920, by his will, dated in 1919, devised and bequeathed all the residue of his estate unto the trustees for the time being of the "Repatriation Fund" or other similar fund for the benefit of New South Wales returned soldiers. A question arose whether the gift of the testator's residuary estate was valid, and the surviving executor of the will commenced proceedings in the Supreme Court of New South Wales in its equity jurisdiction by originating summons against the Attorney-General for the Commonwealth of Australia, the Attorney-General for the State of New South Wales, and the appellant Sydney Verge, who was the testator's brother, as defendants, asking (inter alia) for decisions (i) whether the said devise and bequest had lapsed by reason of the repeal of the Australian Soldiers Repatriation Fund Act, 1916, by the Australian Soldiers Repatriation Act, 1917, and (ii) if the said devise and bequest had not lapsed, to whom the said executor should transfer and pay the said residuary estate, or whether the said residuary estate ought to be applied cy près or how the same ought to be dealt with by the said executor. On behalf of the appellant Verge it was contended that the devise and bequest was void or had lapsed. On behalf of the Attorney-General for the Commonwealth of Australia it was contended that the gift was valid and had not lapsed and was payable to the Repatriation Commission of the Commonwealth of Australia. On behalf of the Attorney-General for New South Wales it was contended that the gift had not lapsed, but was not payable to the said Repatriation Commission, and that a scheme for its application ought to be directed by the judge. From the evidence it appeared that there was not in existence any actual fund known as the "Repatriation Fund" or other similar fund for the benefit of New South Wales returned soldiers to which recourse might be had only by men who enlisted in and had returned to the State of New South Wales. There was, however, in existence at the date of the will and of the testator's death, a repatriation fund for Australian soldiers generally established under statutes of the Commonwealth of Australia. STREET, J., held that the devise and bequest did not lapse by reason of the repeal of the Act of 1916 by the Act of 1917, and that the devise and bequest was a good charitable gift and ordered that, as there were no trustees designated by the will to administer the gift and no directions in the will as to the method of administration, it should be referred to the master in equity to settle a scheme for the regulation and administration of the said gift.

A residuary estate to the trustees for the time being of the Repatriation Fund or other similar fund for the benefit of New South Wales returned soldiers was not a valid charitable gift but was void; if the gift was for a valid purpose, it failed because there was at the testator's death no such fund as referred to in the gift; if the gift was valid it lapsed by reason of the repeal of the Act of 1916 by the Act of 1917, with the result that at the date of the will the body of trustees therein mentioned B had ceased to exist; it was of the essence of the gift that it should be vested in a body of trustees who could and would administer the same exclusively for the benefit of New South Wales returned soldiers, and not in a State department, subject to the complications, expense and delay incident to a scheme intended for the benefit of the soldiers of all the States of Australia and their children, widows, relations and other dependants; and that the testator did not intend that the fund C should be applied in relief of the taxation of the people of the Commonwealth of Australia; and it was contrary to the practice of the court so to apply a charitable gift. There was also an appeal by the Attorney-General for Australia on the grounds that by the words "trustees for the time being of the Repatriation Fund" the testator meant the trustees or persons in the position of trustees for the statutory repatriation fund. There could be and was no other repatriation fund D than the statutory repatriation fund referred to; the words "for the benefit of returned" New South Wales Soldiers were words of destination only and did not form part of the description of the repatriation fund mentioned in the said will; there existed at all material times a "repatriation fund" and trustees thereof; and that the learned judge should have directed the residue to be paid to the trustees of the statutory repatriation fund.

E

Clauson, *K.C.*, and *A. Adams* for the appellant Verge representing the next-of-kin.

Maugham, *K.C.*, and *Wilfred Barton* for the Attorney-General for Australia.

Luxmoore, *K.C.*, and *Geoffrey Lawrence*, for the Attorney-General for New South Wales, supported the order directing a scheme.

Jan. 25. **LORD WRENBURY.**—On Jan. 17, 1920, German Verge, of New F South Wales, grazier, died, having by his will, dated Oct. 1, 1919, bequeathed his residuary estate "unto the trustees for the time being of the 'Repatriation Fund' or other similar fund for the benefit of New South Wales returned soldiers." The questions for decision are whether this is a valid charitable trust, and, if it is, how it ought to be administered. The appellant (for the next-of-kin) contends that the gift is void—that it is not a valid charitable trust. The Attorney-General for the G Commonwealth of Australia contends that it is a valid trust, and that it ought to be administered by the trustees of a certain statutory Repatriation Fund for Australian soldiers. The Attorney-General for the State of New South Wales contends also that it is valid, but says that the judge in equity was right in ordering, as he did, that a scheme should be settled.

Before dealing with and deciding the proper construction of the words of gift, H their Lordships find it convenient to discuss some propositions of law in view of which the case falls to be decided. To ascertain whether a gift constitutes a valid charitable trust so as to escape being void on the ground of perpetuity, a first inquiry must be whether it is public—whether it is for the benefit of the community or of an appreciably important class of the community. The inhabitants of a parish or town, or any particular class of such inhabitants, may, for instance, be the I objects of such a gift, but private individuals, or a fluctuating body of private individuals, cannot. If this test is satisfied, is it necessary to find, further, that the class is confined to poor persons, to the exclusion of persons not poor? Is poverty a necessary element? In argument it was scarcely pressed that it is necessary, and after the decision in *Goodman* v. *Saltash Corpn.* (1) it was not possible to maintain the general proposition that it is. A trust or condition in favour of the free inhabitants of ancient tenements in the borough of Saltash, in accordance with a usage whereunder they had the privilege of dredging for oysters,

might not have been poor. The poor are not the only people who like oysters or the profits to be derived from their sale. In the course of the judgments reference was, in fact, made to the character of the "free inhabitants" in terms which show that the noble and learned Lords were, in fact, not regarding them as poor. Thus LORD CAIRNS says (7 App. Cas. at p. 650) that he must conclude that they were persons who originally had some share in the corporation of the borough of Saltash and were in some way connected with the corporation; and LORD FITZGERALD (7 App. Cas. at p. 668) states the same matter more at large, and indicates that they were probably the burgesses and were persons who contributed to the public charges and took their part in bearing the public duties. In the course of the judgments in that case, LORD SELBORNE says (7 App. Cas. at p. 642):

> "A gift subject to a condition or trust for the benefit of the inhabitants of a parish or town, or of any particular class of such inhabitants, is (as I understand the law) a charitable trust, and no charitable trust can be void on the ground of perpetuity."

LORD CAIRNS says (ibid. at p. 650):

> "A trust of that kind [i.e., a trust for the free inhabitants of ancient tenements in the borough] would not in any way infringe the law or rule against perpetuities because we know very well that where we have a trust which if it were for the benefit of private individuals, or a fluctuating body of private individuals, would be void on the ground of perpetuity, yet if it creates a charitable trust—that is to say, a public interest—it will be free from any obnoxiousness to the rule with regard to perpetuities."

Neither of the noble and learned Lords adds poverty as a relevant factor, and, obviously, a class of all the free inhabitants is not a class confined to its poorer members.

In *Re Christchurch Inclosure Act* (2) (38 Ch.D. at p. 530) LINDLEY, L.J., referring to the *Saltash Case* (1), said:

> "Had it not been for the decision of the House of Lords in *Goodman* v. *Saltash Corpn.* (1) we should have felt great difficulty in holding this trust to be a charitable trust; for, although the occupiers of these cottages may have been, and perhaps were, poor people, the trust is not for the poor occupiers, but for all the then and future occupiers, whether poor or not."

The decision in *Re Christchurch Inclosure Act* (2) followed and illustrated the *Saltash Case* (1), the class being the occupiers of certain cottages which had theretofore enjoyed rights of turbary over tracts of commonable and waste lands of a manor.

Finding themselves in this difficulty, counsel for the appellant advanced an ingenious argument, viz.: that in both these cases the person who claimed the benefit was entitled to it as matter of right, and that the case in which a member of the class is entitled to the benefit as matter of right, if he chooses to claim it, and the case in which he is eligible for the benefit, but would only enjoy it if in the administration of the trust the trustees think proper to give it him, are different, and that in the latter case poverty is a necessary element. The proposition is strange that a trust may be charitable if the rich are as matter of right objects of the trust, but cannot be charitable if they can share, if, and only if, the trustees administering the fund think proper to admit them to benefit. Their Lordships can find no principle on which this contention can be based. The difference, if any, would seem to be the other way. Counsel were unable to cite any authority for their proposition, and although, if it were sound, it would surely have received attention before this, yet their Lordships are not prepared to dismiss it without examination, and therefore proceed to examine it.

In the investigation of the legal meaning of the word "charity" as distinguished from its popular meaning the statute of Elizabeth (43 Eliz., c. 4) must always be the starting-point. That statute has long been obsolete, and was finally repealed

by the Mortmain and Charitable Uses Act, 1888, subject to saving words not material for the present purpose. The words in the preamble are not a definition of charitable uses, but are a detailed statement of certain uses which are to be charitable, and in dealing with the matter the course which the Court of Chancery has pursued has been to look at the enumeration of the charities in the statute, and to include under the word "charitable" any gift of funds for a public purpose which is analogous to those mentioned in the statute. In fact, the legal meaning and the popular meaning of the word "charitable" are so far apart that it is necessary almost to dismiss the popular meaning from the mind as misleading before setting out to determine whether a gift is charitable within the legal meaning. For instance, the statute includes gifts for the repair of bridges, ports, harbours, causeways, and highways—objects, obviously, of benefit not to the poor only, but to the community as a whole, comprising rich as well as poor. From this point their Lordships may well pass on to LORD MACNAGHTEN'S famous judgment in *Income Tax Special Purposes Comrs.* v. *Pemsel* (3), where, taking his start evidently from Sir Samuel Romilly's argument in *Morice* v. *Bishop of Durham* (4) (10 Ves. at p. 531), he says ([1891] A.C. at p. 583):

> "How far, then, it may be asked, does the popular meaning of the word 'charity' correspond with its legal meaning? 'Charity' in its legal sense comprises four principal divisions; trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community not falling under any of the preceding heads."

His fourth head does not contain the word "poor." He does not say "beneficial to the poorer members of the community"; he says, "beneficial to the community." Did he mean his words to be read as confined to the poor? Education and religion, two of the heads which he had just mentioned, do not require any qualification of poverty to be introduced to give them validity. If he was going by general words to add a fourth class in which poverty must be an ingredient, he would surely have said so. He goes on to say:

> "The trusts last referred to (i.e., the fourth class) are not the less charitable in the eye of the law because incidentally they benefit the rich as well as the poor."

Upon the word "incidentally" might, perhaps, have been founded an argument that the trust is invalid as a charitable trust if it benefits the rich in any way other than indirectly, but for the fact that *Goodman* v. *Mayor of Saltash* (1) had nine years before upheld as charitable a trust under which rich as well as poor could, not incidentally, but directly, claim to share the benefit. Their Lordships understand LORD MACNAGHTEN'S words as meaning "beneficial to the community," and not "beneficial to the poor members of the community."

A large number of cases were cited at the Bar—such, for instance, as *Blair* v. *Duncan* (5), *Grimond* v. *Grimond* (6), and *Re Sidney*, *Hingeston* v. *Sidney* (7), in which a gift not confined to charitable purposes, but given to "charitable or public purposes," or a gift to "such charitable or religious institution and societies as my trustees may select," or a gift "for such charitable uses or for such emigration uses, or partly for such charitable uses and partly for such emigration uses, as my trustees shall select," were held not to create valid charitable trusts because either they were not confined to charitable purposes or were so vague as to be void for uncertainty. The latest case of this kind is *A.-G.* v. *National Provincial and Union Bank of England* (8). These lend no assistance to the present inquiry. There is, however, one case of this kind—*Re Macduff* (9)—in which LINDLEY, L.J., does say something which is relevant but which is not in favour of the appellant. He says ([1896] 2 Ch. at p. 464):

> "I am quite aware that a trust may be charitable though not confined to the poor, but I doubt very much whether a trust would be declared to be charitable which excluded the poor."

With the case last supposed their Lordships are not here concerned. Upon a review of the authorities and after the decision in the *Saltash Case* (1), they agree with LINDLEY, L.J., in the case first supposed. They are of opinion that a valid charitable trust may exist notwithstanding the fact that in its administration the benefit is not confined by the donor to the poor to the exclusion of the rich.

It is, perhaps, well to mention two cases cited for the appellant, *Re Gassiot* (10) (decided by COZENS-HARDY, J.) and *Re Elliott* (11) (decided by PARKER, J.), in which are to be found expressions which the appellant sought to use as indicating poverty as a necessary qualification. Their Lordships content themselves with pointing out that in neither case was the *Saltash Case* (1) cited. Their Lordships pass on to consider the nature of the gift and the words of gift in the present case. The words are:

> "unto the trustees for the time being of the 'Repatriation Fund' or other similar fund for the benefit of New South Wales returned soldiers."

The facts are that when the testator made his will, and when he died, the following had been the history of a "Repatriation Fund," not for New South Wales returned soldiers in particular, but for Australian soldiers generally. Statute No. 7 of 1916 of the Commonwealth of Australia, intituled "The Australian Soldiers Repatriation Fund Act, 1916," established a statutory fund called "The Australian Soldiers' Repatriation Fund," and appointed trustees of the fund and defined their powers and duties. It provided for "State War Councils" for each State in the Commonwealth, gave the trustees power to allocate sums or property to each State War Council, and gave the council power to apply those funds for the assistance and benefit of Australian soldiers and of their dependants. The Governor-General was empowered to make regulations prescribing the conditions under which a State War Council might expend sums allocated to it. Under this Act regulations were made, including a regulation as follows:

> "Regulation 11 (4) The State War Council or the committee thereof, as the case may be, shall regard as ineligible any applicant who—(a) is deemed by it to have adequate means or to be adequately provided for under any scheme promoted by any governmental or private agency; . . . but may, if it thinks fit, recommend the application of any such applicant for the favourable consideration of the trustees."

By the Act No. 37 of 1917, "The Australian Soldiers Repatriation Act, 1917," the Act of 1916 was repealed, a Repatriation Commission was appointed, by s. 9 there was to be a State Repatriation Board for each State, and by s. 12 there might be local committees within a State, and they could raise and control funds for the district and disburse funds within the district. By s. 17 the control of local funds for the repatriation of Australian soldiers theretofore raised in a district were vested in the trustees of the fund, and by s. 16 all the trust properties were vested in the commission. A subsequent Act, No. 15 of 1918, contains a long section, the substance of which is that motherless children and widows and dependants and persons incapacitated, and so on, are in particular the objects of assistance. Under this Act of 1918 again, statutory regulations were made. They are very lengthy and detailed. On looking through them, their Lordships are satisfied that the giving assistance which the soldier or his dependants require is that which it is intended to give, and the weekly allowances which are to apply to different circumstances, ranging as they do from 42s. to 86s. 6d. a week, show that the class to be benefited is not the rich.

This was the state of the legislation when the testator died. There was not at his death any Repatriation Fund for the benefit of New South Wales soldiers, as distinguished from Australian soldiers. After his death Act No. 6 of 1920 was passed. This repealed the previous Acts, and appointed a Repatriation Commission, and s. 13 (1) appointed a Repatriation Board for each State. There can be no question but that the gift in the testator's will satisfies the first test required to support it as a good charitable trust. It is a public trust and is to benefit a

A class of the community, viz., men from New South Wales who served in the war and were returned or to be returned to their native land. Further, if it were necessary to consider at all the question of a trust for the poor, it is a gift which is to benefit that class in some sense expressed by the word "repatriation." This does not mean simply restoring them to New South Wales by paying their fare home. They may be "returned" already, not "returning" soldiers. It means B restoring them to their native land and there giving them a fresh start in life. Their Lordships have no doubt that this is a charitable purpose. If it were (which in their opinion it is not) necessary to find that need of assistance is to be a qualification for benefit—that the gift is charitable in the sense of assisting the needy—they find that the words "Repatriation Fund," in the facts as to the Australian Repatriation Fund of which no doubt the testator had knowledge, C indicate an intention to benefit the needy. If his words "Repatriation Fund or other similar fund" are referable at all to the statutory Australian Soldiers' Repatriation Fund, and if it were necessary to find a reference to poverty, their Lordships have no difficulty in finding it. The testator's words may be read in more than one way. First, the words "for the benefit," &c., may qualify both the words "Repatriation Fund" and the words "or other similar fund." If this D be the meaning, there is no gift to the trustees of the statutory Repatriation Fund, for there was no such fund for the benefit of New South Wales returned soldiers. Secondly, the language may be read as if the words "Repatriation Fund" were separated from that which follows and as if the next words stood apart, with the result that the words "for the benefit," &c., qualify the "other similar fund" and nothing else. It remains, however, that the latter fund is to be one "similar" to E the former, and the test of similarity must lie in benefit to New South Wales returned soldiers. The Repatriation Fund, therefore, must again be one for the benefit of New South Wales returned soldiers. Thirdly, the words may be read as a gift for the benefit of New South Wales returned soldiers, but made to the trustees of the Repatriation Fund (meaning the statutory "Australian Soldiers' Repatriation Fund") or other similar fund. If this were the meaning the Attorney-F General for the Commonwealth would succeed. But the language, in their Lordships' opinion, does not bear this meaning. The words "Repatriation Fund" are in the will in inverted commas, and purport to state the name of the fund to which the testator refers. To bear this meaning they would look to find the correct name, "Australian Soldiers' Repatriation Fund," set out at length. It is not the phrase used.

G From these considerations, in their Lordships' opinion, two results follow: First, as between the Commonwealth of Australia and the State of New South Wales the administration of the fund does not rest with the former; and secondly, inasmuch as there is no Repatriation Fund for New South Wales returned soldiers, there are no named trustees who are to govern the administration and no detailed directions given as to administration, with the result that it is necessary to settle H a scheme. It results that there was created here a valid charitable trust; that in the circumstances above stated the trustees of the statutory fund known as the "Australian Soldiers' Repatriation Fund" are not the trustees of the charity; that, for want of a trustee named with certainty and for want of clear directions as to the administration of the fund, it is necessary to settle a scheme. This was the opinion of the learned judge in equity. Their Lordships agree with him. The I appeal should be dismissed with costs, and the cross-appeal will also stand dismissed, but without costs. Their Lordships will humbly advise His Majesty accordingly.

Appeal dismissed.

Solicitors: *Bell, Brodrick & Gray*; *Coward & Hawksley, Sons & Chance*; *Light & Fulton.*

[*Reported by* W. C. SANDFORD, ESQ., *Barrister-at-Law.*]

A

ALLARD *v.* SELFRIDGE & CO., LTD.

[KING'S BENCH DIVISION (Lord Hewart, C.J., Shearman and Salter, JJ.), November 7, 10, 1924]

[Reported [1925] 1 K.B. 129; 94 L.J.K.B. 374; 132 L.T. 377; 88 J.P. 204; 41 T.L.R. 97; 22 L.G.R. 792; 27 Cox, C.C. 701] B

Merchandise Marks—False trade description—Defence—Innocence of intention to infringe Act—Merchandise Marks Act, 1887 (50 & 51 *Vict.*, *c.* 28), *s.* 2 (2).

By s. 2 (2) of the Merchandise Marks Act, 1887: "Every person who sells . . . or has in his possession for sale . . . any goods or things to which any . . . false trade description is applied . . . shall, unless he proves: (a) That having taken all reasonable precautions against committing an offence against this Act, he had at the time of the commission of the alleged offence no reason to suspect the genuineness of the trade mark, mark, or trade description; and (b) That on demand made by or on behalf of the prosecutor, he gave all the information in his power with respect to the persons from whom he obtained such goods or things; or (c) That otherwise he had acted innocently; be guilty of an offence against this Act." C D

A stipendiary magistrate dismissed a summons against the respondents for selling, contrary to s. 2 (2), stockings to which a false trade description had been applied, namely, that they were silk stockings whereas in fact they were not made of silk, on the ground that while their servant, who had bought the stockings for sale on their behalf, had not properly examined the stockings and so had not "taken all reasonable precautions against committing an offence against the Act" within para. (a) of the subsection, she had, within that paragraph, had "no reason to suspect the genuineness of the trade description," and so had "acted innocently" within para. (c). E

Held: the defence under paras. (a) and (b) and that under para. (c) were separate and distinct, and proof of part of para. (a) could not be accepted as proof of innocence under para. (c); innocence under para. (c) meant innocence of any intention to infringe the Act, as where the infringement was committed by inadvertence or mistake; the respondents had intended to sell the stockings under the description of "silk"; and, therefore, the decision of the magistrate was wrong. F

Notes. The Merchandise Marks Act, 1887, has been amended by the Merchandise Marks Act, 1953 [33 HALSBURY'S STATUTES (2nd Edn.) 915]. Section 2 (2) of the 1887 Act has been clarified by s. 4 of the 1953 Act so that s. 2 (2) is to be construed in the way in which it has been construed by the courts, i.e. that two quite distinct offences are open under the subsection. G

Followed and applied: *Mercer* v. *Pyramid Sand and Gravel Co.* (1944), 109 J.P. 54. Applied: *Kat* v. *Diment*, [1950] 2 All E.R. 657. Referred to: *Slatcher* v. *George Mence Smith, Ltd.*, [1951] 2 All E.R. 388. H

As to false trade description, see 32 HALSBURY'S LAWS (2nd Edn.) 673, 674; and for cases see 43 DIGEST 239–242. For Merchandise Marks Act, 1887, see 25 HALSBURY'S STATUTES (2nd Edn.) 1113.

Cases referred to: I

(1) *Christie, Manson and Woods* v. *Cooper*, [1900] 2 Q.B. 522; 69 L.J.Q.B. 708; 83 L.T. 54; 64 J.P. 692; 49 W.R. 46; 16 T.L.R. 442, D.C.; 43 Digest 240, *849*.

(2) *Stone* v. *Burn*, [1911] 1 K.B. 927; 80 L.J.K.B. 560; 103 L.T. 540; 74 J.P. 456; 27 T.L.R. 6, D.C.; 43 Digest 241, *858*.

(3) *Starey* v. *Chilworth Gunpowder Co.* (1889), 24 Q.B.D. 90; 59 L.J.M.C. 13; 62 L.T. 73; 54 J.P. 436; 38 W.R. 204; 6 T.L.R. 95; 17 Cox, C.C. 55, D.C.; 43 Digest 240, *847*.

Case Stated by a metropolitan magistrate on a prosecution under the Merchandise Marks Act, 1887.

The information was laid by the appellant Allard against the respondents, Selfridge & Co., Ltd., charging the respondents "with having unlawfully sold certain goods, namely, one pair of silk stockings, to which a false trade description was applied as follows, 'silk,' contrary to s. 2 (2)" of the statute. It was contended on behalf of the respondents that all reasonable precautions had been taken against committing an offence against the Act, the respondents' servant who had sold having no reason to suspect at the time of the sale the genuineness of the trade description, i.e., that the requirements of s. 2 (2) (a) and (b) of the Act had been fulfilled. The magistrate found that all reasonable precautions had not been taken by the respondents, so that the respondents were not entitled to the protection given by the two paragraphs mentioned. In the judgment which accompanied and was part of the Case he said:

"I have got to say whether, all reasonable precautions having been taken, the purchaser had no reason to suspect the genuineness of the trade mark or trade description. Miss Snow [the respondents' buyer] purchased these goods of a man named Weissberger; he represents himself to be a manufacturer and importer, but it is clear that he was not in a very large way of business. It is a name that is not known at all, and his business is so small that he himself goes round continually putting his samples before potential purchasers. He seems to have called at this place over and over again unsuccessfully, and then at last this lady is induced to make a purchase. It does not seem to me that she made any inquiries whether he was a person of reputation or not. I do not suppose he is at all of the class of manufacturers of whom this firm ordinarily buys; he came before her without anything to support his reputation or to show that he is a person to be trusted. Then she purchases these stockings; she applies a very superficial test, merely handling and looking at them, and upon that she pronounces them to be silk. At the time she knew of two very simple tests which she herself might have applied—the strength of fibre test and the burning test—and she also knew of the nitric acid test. The only reason she seems to give for not applying these tests is that it might have involved the destruction of one of the stockings."

The magistrate decided

"that in conducting the sale of the stockings the servant of the respondents had acted in perfect good faith and had not in any way been guilty of fraud."

He said that, taking all the circumstances into consideration, although he very much regretted it, he had to find that there was negligence on the part of the buyer. He proceeded:

"Then I come to the most difficult part of the case, whether the defendants in this case acted innocently. They are responsible for everything that Miss Snow did, and if she acted innocently they had the advantage of it. Did she act innocently? She did act innocently, unless negligence is not innocence. I do not think upon the judgment in *Christie, Manson and Woods* v. *Cooper* (1) that negligence cannot be considered innocence, because it speaks of the mens rea; that means intent to cheat or intent to defraud, not mere negligence, and the judges say that if the mens rea can be proved to be absent then no offence is committed."

Accordingly, he dismissed the summons but stated this Case.

Sir Duncan Kerly, K.C., and *H. D. Roome* for the appellant.

Hawke, K.C., and *Walter Frampton* for the respondents.

LORD HEWART, C.J.—The learned magistrate has decided this case upon the view that mens rea for the purposes of this statute, or at any rate this part of the statute, means intent to cheat or intent to defraud. The question is whether he was right in deciding that to constitute the offence proof of mens rea in that sense was necessary.

Much has been said upon the scheme of this legislation, and some questions have been raised which it is not necessary to determine for the purpose of deciding this case. The real contention which has been made, both before the learned magistrate and in this court, a contention said to be derived from the judgments in *Christie, Manson and Woods* v. *Cooper* (1), is that the words in s. 2 (2) (c), "that otherwise he had acted innocently," are sufficient to enable a person to make good a defence by proving a part and only a part of what is contained in paras. (a) and (b). The section is dealing with a considerable variety of matters as to which, in the course of trade, it is quite obvious that different considerations may apply. The section is dealing at one and the same time with selling, exposing for sale, and having in possession for sale or any purpose of trade or manufacture, any goods which in some one or other of a variety of ways offend. I leave out the words which for the purposes of the present case are not immediately necessary. The charge here was, selling a pair of stockings to which a false trade description was applied. The words of the subsection which relate to such a transaction as that are these: "Every person who sells . . . any goods or things to which . . . a false trade description is applied" shall be guilty of an offence against this Act unless he proves certain things—in other words, the scheme of the statute, which is undoubtedly a rigorous statute, intended to deal with offences of a notorious and at one time, at any rate, prevalent character, is that, when certain events are proved, the proof of the offence is complete unless the defendant is able to discharge the burden which the statute puts upon him by way of defence.

What are the defences which the statute contemplates? It is quite obvious when one looks at the framework of this section that there is a clear distinction of a twofold nature. The defendant may prove the matter which is contained in (a) and (b), (a) and (b) being united by the conjunction "and"; but apart altogether from (a) and (b), he may prove (c). The words of (c) are not "that he had acted innocently"; the words of (c) are "that otherwise he had acted innocently." In other words, there is the clearest possible dichotomy; if a person is going to prove that which is contained in (a) and (b), that is one line of defence; but if the circumstances are such that, while his defence is of that nature, it is built upon materials that are incomplete, so that he fails in proving (a) and (b), he cannot then have recourse to (c) for the purpose of establishing a portion only of that which is first alleged under the head of (a) and (b). To hold the contrary would be destructive of this part of the section, and it would involve what appear to me to be at least two absurdities. One is that it would involve the conclusion that paras. (a) and (b) contain a mere illustration exempli gratia of the kind of defence which may be put forward, and the other conclusion which is involved is that the word "otherwise" has to be omitted from the phrase "that otherwise he had acted innocently." As I understand this section, it means that if a defendant is going to seek to excuse himself upon the ground that he had no reason to suspect the genuineness of the trade mark or trade description, he must first lay the foundation for the defence by establishing that he had taken all reasonable precautions—in other words, the statute says: "We will not listen to an excuse to the effect that there was no reason to suspect until the person who says he has no reason to suspect shows that he had taken all reasonable precautions." In this case that foundation is expressly found to be absent; there had been a failure to take all reasonable precautions, and a defence therefore based upon the absence of reason to suspect the genuineness of the trade description was impracticable.

What, then, was the defence that was raised? The only defence that was open was that in some way other than that referred to in (a) the respondents had acted innocently. But what was done was to seek to show that, although reasonable precautions had not been taken, there nevertheless was no reason to suspect the genuineness of the trade description; in other words, the argument involves this proposition, that one is to read the first words of para. (a), not as they appear in the statute, that, having taken all reasonable precautions against committing an offence, the respondent's buyer had at the time of the sale no reason to suspect,

but that having taken or not taken, as the case may be, all reasonable precautions against committing an offence, he had at that time no reason to suspect, &c. That seems to me, with great respect, to be nonsense.

But an argument was made upon *Christie, Manson and Woods* v. *Cooper* (1). That case was decided twenty-four years ago. It may be that if one looks at particular passages in the judgments in that case they do appear to afford some slight assistance to the argument which in the present case is made on behalf of the respondents. In my opinion, the judgments in that case are to be read very strictly in relation to the particular and peculiar facts of that case and are not to be extended. In that case Messrs. Christie, Manson and Woods had described in their catalogue as Dresden china something which was not Dresden china, and there were upon that china certain marks resembling a good trade mark of Dresden china. Fortunately, however, before the sale took place the attention of the sellers was directed to the true facts, and, accordingly, when the auctioneer reached that particular lot he said to the assembled buyers: "Our attention has been directed to this lot, and we sell it for what it is. You see what there is. What shall we say for it?" In other words, the sellers were not putting forward the untrue mark as being a true mark; they were doing their best to erase it, they were doing their best to obliterate the false trade mark from the article sold; they did not do it physically nor did they attempt to do it physically, but by words employed to the bidders at the time they endeavoured to render the falsity of the mark of no effect, and that being so the judges came to the conclusion that the conviction must be quashed.

When one compares the decision in that unique case with the decision ten years later in *Stone* v. *Burn* (2), the limitations upon the earlier judgments seem to be reasonably clear. In *Stone* v. *Burn* (2) the appellant, who was a bottler of beer, had in the course of his business come into possession of certain bottles belonging to a brewery company called Felinfoel Brewery Co., which were embossed with the name of that company. He filled them with beer brewed by Bass & Co., applied that company's labels upon the bottles, and then sold the contents as being Bass & Co.'s beer. It was held, nevertheless, that he had applied a false trade description—that is to say, the name of the Felinfoel Brewery Co.—none the less because the presence of Bass's labels on the bottles would prevent a reasonable purchaser from supposing that he was buying anything but Bass's beer. Pickford, J., said ([1911] 1 K.B. at p. 933):

> "In *Christie, Manson and Wood* v. *Cooper* (1) the court did indeed quash a conviction on the ground that the appellant had acted innocently and that the magistrate was bound in law so to find. I confess I share the doubts expressed there by Channell, J., as to whether the question is one for the court, or whether the case ought not rather to be remitted to the magistrate for re-consideration. But that case was a very different one from the present."

Lord Coleridge, J., said:

> "The only defence could be that he was acting innocently. But, as was said by Channell, J., in *Christie's Case* (1), 'the innocence contemplated by the Act is innocence of any intention to infringe the Act of Parliament.' Such innocence can only exist where the infraction was committed by inadvertence or mistake of fact. And here the appellant knew all the facts—his only mistake was as to the effect of the statute."

In the present case the learned magistrate appears to have fallen into two errors. In the first place, he has paid insufficient attention to the structure of paras. (a), (b) and (c) in s. 2 (2) of the statute, with the result that the word "otherwise" has apparently been overlooked. He seems to have been of the opinion that under this section a defendant can establish innocence by proving a portion of what is contained in (a), and that if he proves a portion of what is contained in (a) he comes under (c). Secondly, the learned magistrate has clearly taken the view that mens rea for the purposes of this statute means intent to cheat or intent to defraud.

I think that is an erroneous view, and the true view of the meaning of the words "otherwise had acted innocently" is that which was expressed in the case already mentioned: "The innocence contemplated by the Act is innocence of any intention to infringe the Act of Parliament." It has been said, and I think quite truly, that the phrase "any intention to infringe the Act of Parliament" is capable, at any rate for purposes of controversy, of two interpretations. What is meant by these words is an intention to do the act which is in fact prohibited by the statute. It is not necessary to enter upon the inquiry how much is involved in the words in para. (c) of s. 2 (2), "that otherwise he had acted innocently." It is quite obvious, when one looks at the great variety of transactions or acts or states contemplated by the words of sub-s. (2), that in different circumstances different facts might afford a defence under that heading, but this at least is clear, that where the terms "he had acted innocently" are qualified and governed by the word "otherwise," the innocence which is spoken of cannot be a fragment of what is already referred to in (a) and (b). In my opinion, therefore, this appeal succeeds, and the case ought to go back to the learned magistrate with a direction to convict.

SHEARMAN, J.—I am of the same opinion. I agree with my Lord that this case might be decided on the bare words "or otherwise" in s. 2 (2) (c) of the Act, for a person charged with this offence cannot, if he establishes half of the requirements of para. (a), say that by so proving he comes within para. (c). But the case has been argued on far wider grounds, and, therefore, I desire to give my judgment upon wider grounds.

In my opinion, there were no facts on which the magistrate could have found, quite apart from the word "otherwise," that the respondents were innocent within the meaning of the Act. This is one of the many cases where confusion has arisen by the loose use of the words mens rea. The true translation, to my mind, of mens rea is "criminal intention," or, to put it at greater length, "the intention to do the act which is made penal by the statute, or by common law." It is true as to the mass of our old common law before it was put into statute that the laws of morality and crime were much the same. Mens rea in a mass of cases does involve moral blame, and the result is that people have got into the habit of translating these two Latin words mens rea as meaning a guilty mind, and there is a widespread notion that you cannot be guilty of any penal act unless you have an immoral or wicked mind in what you did. That, to my mind, is wrong, but that notion of mens rea will be found in a great many of the earlier cases. In view of that notion many learned judges did say that there were cases where a man might be a criminal although he had no mens rea or guilty mind. Of course, that is quite true if one accepts the old meaning of mens rea.

What one has to consider in this statute is what was the act struck at. I think this statute is fairly clear. It is a statute absolutely forbidding certain voluntary and intentional acts. Section 2 (1) commences by speaking of trade marks and falsely applying them, and then it goes on to throw the onus upon the defendant in those cases to prove that he acted without intent to defraud. A number of other acts are struck at and absolutely forbidden by s. 2 (2), and it is under that subsection that this prosecution comes. It is alleged that the respondents were selling an article to which a false trade description was applied—that is, intentionally selling it and intentionally applying to it that false description. The additional words are not exactly the same as under s. 2 (1), that the seller must prove that he acted without intent to defraud; there are a number of exceptions provided, which, if the seller proves them, he is deemed not to be guilty, but to be proved innocent. The onus is put upon the defendant to prove either sub-s. (2) (a) and (b) or (2) (c), and, if he does, then he is proved innocent, and that means that the case ought to be dismissed. The two subsections are in different words, and the absence of intent to defraud is in s. 2 (1), but the scheme is much the same.

A What the learned magistrate found in this case was that these stockings were sold deliberately and intentionally by salesmen in the shop and described as silk when as a matter of fact they were not silk at all. That is proof of intention unless the respondents can bring themselves under paras. (a) and (b) or (c). They gave evidence under (a); (b) did not apply because apparently no demand was made. The whole evidence of the respondents as set out in the case was designed to prove B their innocence under (a). The magistrate held that on the facts they failed. An argument was put up by counsel on the authority of *Christie, Manson and Woods* v. *Cooper* (1) that, notwithstanding the clear words in the statute, it was always incumbent on the prosecution to prove moral or intentional guilt. The magistrate adopted that view, and, as there was no moral guilt in the person who had failed to justify under paras. (a) and (b), he dismissed the summons. My Lord has C already pointed out that that was wrong in two ways; it cast the onus of proof on the wrong party, and he was employing the word "otherwise" as really dividing up what is the defence under s. 2 (2) (a) and (b).

In my judgment it was also wrong because *Christie, Manson and Woods* v. *Cooper* (1) was entirely misunderstood. I find myself quite unable to see how, upon the facts of that case, the acquittal was justified. It is clear that it was a D trumpery offence, because Messrs. Christie had sold some Dresden articles which had got forged marks upon them, but, being warned beforehand, they had told the purchasers not to rely upon the marks. The only justification for an acquittal in that case was that the court regarded the marks as having been blotted out, but the fact was that the articles had got these marks upon them when sold by Christie's. When these facts were proved GRANTHAM, J., gave his judgment on E these grounds:

> "On it being brought to their attention that there was a doubt as to the genuineness of the article, they communicate that doubt to the purchaser, and sell the article for 'what it is.' Their action was bona fide, and it seems to me that they ought not to have been convicted."

F That is clearly acting upon the fallacy that under this Act if you prove you were an honest man you could not be convicted. I think that was wrong. CHANNELL, J., put the matter entirely on the right basis in his judgment. When dealing with the word "innocent" he said: "The innocence contemplated by the Act is innocence of any intention to infringe the Act of Parliament." That, I think, was quite sound. Then he went on to say—I am unable to understand it myself:

G > "It seems to me quite clear that there may be innocence of any intention to infringe the Act, even although there may be suspicion of the genuineness of the article or trade mark,"

and he went on to say that, in his judgment, there was innocence in that case although it was admitted that the appellants intentionally, although quite honest people, sold the china with that mark upon it. I think the right principles were H laid down by CHANNELL, J., but I feel a difficulty in seeing how he applied them to the facts of that case.

There are many later cases which I need not refer to, and there is particularly *Stone* v. *Burn* (2), where all the learned judges decided on the same right lines, and LORD ALVERSTONE, C.J., says that the person who sold the beer, though quite an honest person, had sold it in a bottle to which a false name was applied, and I he says:

> "It appears that he without any intention of doing anything wrong bottled Bass's beer in bottles belonging to and embossed with the name of the Felinfoel Brewery,"

and, therefore, ought to be convicted. Although he was acting quite honestly and put a Bass's label upon it, he ought to be convicted because he intentionally sold the article. PICKFORD, J., cited also passages in the judgment of CHANNELL, J., in *Christie, Manson and Woods* v. *Cooper* (1) and his definition, and LORD COLERIDGE,

J., said (and I quite agree with what he said), again citing the definition given by CHANNELL, J., of what innocence was in *Christie's Case* (1): A

> "The innocence contemplated by the Act is innocence of any intention to infringe the Act of Parliament. Such innocence can only exist where the infraction was committed by inadvertence or mistake of fact."

I think that is the clear scheme of the statute; and in this case on the wider ground that there was no evidence upon which the magistrate could have found that there was innocence or absence of any intention to commit the act forbidden by the Act of Parliament—viz., the sale to a purchaser of these articles to which a false trade description was applied—I think the appeal should be allowed. B

I will only add that I have found another case, an older decision on s. 2 (1), which is entirely analogous to this, and that is *Starey* v. *Chilworth Gunpowder Co.* (3), where some quite honest people sold some gunpowder, quite as good as what they purported to sell, but with a false trade description. The learned judges who decided that case were LORD COLERIDGE, C.J., and MATHEW, J., and the Lord Chief Justice, when dealing with the words "unless he proves that he acted without intent to defraud" in s. 2 (1), said that the fraud contemplated was intentionally selling to a purchaser an article which was not that for which the purchaser was stipulating. MATHEW, J., said: C D

> "I am of opinion that the words 'intent to defraud' mean more than an intent to cheat a customer. The Act makes a new offence by providing—in s. 2 (1)—that every person who applies any false trade description to goods shall be guilty of an offence against the Act. The words 'without intent to defraud' apply to cases where a person uses a particular mark without any intent in so doing to induce a buyer to accept goods which might otherwise be rejected." E

That is to say, fraud is the intent struck at by the real operation of the Act.

On these grounds I think that the plain meaning of the statute is that guilt and innocence are both determined by the question whether intentionally an act has been done which is contrary to the meaning of the statute. Here that the sale was intentional and that the description was false were proved to the satisfaction of the magistrate. There was no evidence put before him to show any innocence of intention, and, therefore, the case must go back to him to convict. F

SALTER, J.—I agree with the judgments which have been delivered, and, if I add any words of my own, it is because in view of the decided cases there may have been some doubt as to the true meaning of this subsection. A person who sells under the description of "silk" goods which are not in fact silk is guilty of an offence against the Act unless he can prove certain things, and in the absence of proof by the accused the law assumes that when he sold the goods under the description he intended to sell them under the description—that is, that he intended to do the act forbidden by the statute. In other words, mens rea is assumed unless the accused can prove either paras. (a) and (b) or para. (c). Paragraphs (a) and (b) afford a special defence; when these paragraphs are proved mens rea is admitted, but, nevertheless, the accused is entitled to acquittal. If he cannot prove (a) and (b) he must be convicted unless he can prove (c)—that is, absence of mens rea—that is to say, in the present case, that there was no intention to sell these stockings under the description of "silk." Here the respondents failed to prove (a); they proved absence of dishonesty, but failed to prove absence of negligence; and as to (c), it is obvious that that was not proved, as it could not be contended that the respondents did not intend to sell these stockings under the description of "silk." There should therefore have been a conviction. G H I

Appeal allowed and case remitted.

Solicitors: *Vizard, Oldham, Crowder & Cash*; *J. Barrington Matthews.*

[*Reported by* J. F. WALKER, ESQ., *Barrister-at-Law.*]

A

ELDER, DEMPSTER & CO., LTD., AND OTHERS *v.* PATERSON, ZOCHONIS & CO., LTD.

B [House of Lords (Viscount Cave, Viscount Finlay, Lord Dunedin, Lord Sumner and Lord Carson), February 19, 21, 22, March 18, 1924]

[Reported [1924] A.C. 522; 93 L.J.K.B. 625; 131 L.T. 449; 40 T.L.R. 464; 68 Sol. Jo. 497; 16 Asp.M.L.C. 351; 29 Com. Cas. 340]

C *Shipping—Seaworthiness—No defect in construction or equipment of ship—Fit to receive cargo—Further cargo stowed on top owing to absence of 'tween decks—'Tween decks usual in ships employed in particular trade—Damage to cargo stowed at bottom of hold—Loading—Shipowner sued for negligence—Not party to contract between charterer and shipper—Right to protection of exception in bill of lading.*

D Under bills of lading, which contained a condition that the charterers of the vessel were not to be liable "for any damage [to the goods shipped] arising from other goods by stowage or contact with the goods shipped hereunder," the plaintiffs shipped a quantity of palm oil in casks for carriage from West Africa to Hull. Unlike ships regularly engaged in the West African trade, the ship had no 'tween decks, the presence of which would have obviated the need to stow cargo on top of the casks, which, following the usual custom, were E stowed in tiers at the bottom of each hold. After the casks had been stowed a large quantity of palm kernels were stowed on top of them with the result that the casks were damaged and much of the oil was lost. In an action by the shippers against the charterers and the shipowners for breach of contract and for negligence in which the shippers contended that the ship was structurally unfit to carry cargoes in the West African trade, and, consequently, F not seaworthy to undertake the charter voyage,

Held (Viscount Finlay dissenting): the question was of the ship's fitness for the shipment of the oil, not of her fitness for that shipment along with another or others; at the time of loading the palm oil there was no defect in her structure or equipment, but she was fit to receive the oil and carry it without injury; the damage to the oil cargo was due to the fact that after the G casks had been stowed there was placed on them a weight which they could not bear; the ship, being seaworthy when the casks were loaded, could not be rendered unseaworthy so far as carrying the casks was concerned by what was done subsequently; and, therefore, the loss of the oil was due to bad stowage and not to the unseaworthiness of the ship, and the shippers were precluded from recovering by the condition in the bill of lading.

H **Held,** further: the condition in the bills of lading was intended to be a stipulation on behalf of all the persons interested in the ship, and, therefore, it operated to protect the owners of the ship although they were not parties to the contract contained in the bills of lading, but were sued in tort.

Notes. Considered: *Werner* v. *Det Bergensk Dampskibsselschaft* (1926), 134 I L.T. 573; *Reed* v. *Page and East*, [1927] 1 K.B. 743. Applied: *Firemen's Fund Insurance Co.* v. *Western Australian Insurance Co., Ltd., and Atlantic Insurance Co., Ltd.*, [1927] All E.R.Rep. 514. Considered: *Cosmopolitan Shipping Co. (Inc.)* v. *Hatton and Cookson, Ltd. (Liverpool)* (1929), 143 L.T. 296; *The Kite*, [1933] All E.R.Rep. 234; *Pyrene Co.* v. *Scindia Steam Navigation Co.*, [1954] 2 All E.R. 158. Distinguished: *Adler* v. *Dickson*, [1954] 3 All E.R. 397. Explained: *Wilson* v. *Darling Island Stevedoring and Lighterage Co., Ltd.*, [1956] 1 Lloyd's Rep. 346. Referred to: *Hall* v. *Brooklands Auto Racing Club*, [1932] All E.R.Rep. 208; *The Arpad*, [1934] All E.R.Rep. 326; *Paterson Steamships, Ltd.*

v. *Canadian Co-operative Wheat Producers, Ltd.*, [1934] All E.R.Rep. 480; *Canadian Transport Co.* v. *Court Line, Ltd.*, [1940] 3 All E.R. 112; *Midland Silicones, Ltd.* v. *Scruttons, Ltd.*, [1959] 2 All E.R. 289.

As to the fitness of a ship to receive goods, see 30 HALSBURY'S LAWS (2nd Edn.) 431–434, 463–468; and for cases see 41 DIGEST 444–447, 471–479.

Cases referred to:

(1) *Lyon* v. *Mells* (1804), 5 East, 428; 1 Smith, K.B. 478; 102 E.R. 1134; 41 Digest 472, *3039*.

(2) *Steel* v. *State Line Steamship Co.* (1877), 3 App. Cas. 72; 37 L.T. 333; 3 Asp.M.L.C. 516, H.L.; 41 Digest 428, *2693*.

(3) *Gilroy, Sons & Co.* v. *Price & Co.*, [1893] A.C. 56; 68 L.T. 302; 7 Asp.M.L.C. 314; 1 R. 76, H.L.; 41 Digest 479, *3121*.

(4) *The Maori King* (*Cargo Owners*) v. *Hughes*, [1895] 2 Q.B. 550; 65 L.J.Q.B. 168; 73 L.T. 141; 44 W.R. 2; 11 T.L.R. 550; 39 Sol. Jo. 688; 8 Asp.M.L.C. 65; 14 R. 646, C.A.; 41 Digest 446, *2797*.

(5) *Queensland National Bank, Ltd.* v. *Peninsular and Oriental Steam Navigation Co.*, [1898] 1 Q.B. 567; 67 L.J.Q.B. 402; 78 L.T. 67; 46 W.R. 324; 14 T.L.R. 166; 42 Sol. Jo. 212; 8 Asp.M.L.C. 338; 3 Com. Cas. 51, C.A.; 41 Digest 478, *3108*.

(6) *Hogarth* v. *Walker*, [1900] 2 Q.B. 283; 82 L.T. 744; 48 W.R. 545; 16 T.L.R. 410; 44 Sol. Jo. 500; 9 Asp.M.L.C. 84; 5 Com. Cas. 292; sub nom. *Hoggarth & Co.* v. *Walker*, 69 L.J.Q.B. 634, C.A.; 29 Digest 93, *516*.

(7) *Kopitoff* v. *Wilson* (1876), 1 Q.B.D. 377; 45 L.J.Q.B. 436; 34 L.T. 677; 24 W.R. 706; 3 Asp.M.L.C. 163; 41 Digest 473, *3045*.

(8) *The Thorsa*, [1916] P. 257; 85 L.J.P. 226; 116 L.T. 300; 13 Asp.M.L.C. 592; 22 Com. Cas. 218, C.A.; 41 Digest 435, *2732*.

(9) *McFadden* v. *Blue Star Line, Ltd.*, [1905] 1 K.B. 697; 74 L.J.K.B. 423; 93 L.T. 52; 53 W.R. 576; 21 T.L.R. 345; 10 Asp.M.L.C. 55; 10 Com. Cas. 123; 41 Digest 445, *2796*.

(10) *Cohn* v. *Davidson* (1877), 2 Q.B.D. 455; 46 L.J.Q.B. 305; 36 L.T. 244; 25 W.R. 369; 3 Asp.M.L.C. 374; 41 Digest 475, *3070*.

(11) *Martin* v. *Great Indian Peninsular Rail. Co.* (1867), L.R. 3 Exch. 9; 37 L.J.Ex. 27; 17 L.T. 349; 8 Digest (Repl.) 67, *449*.

(12) *Hayn* v. *Culliford* (1879), 4 C.P.D. 182; 48 L.J.Q.B. 372; 40 L.T. 536; 27 W.R. 541; 4 Asp.M.L.C. 128, C.A.; 41 Digest 430, *2699*.

(13) *Meux* v. *Great Eastern Rail. Co.*, [1895] 2 Q.B. 387; 64 L.J.Q.B. 657; 73 L.T. 247; 59 J.P. 662; 43 W.R. 680; 11 T.L.R. 517; 39 Sol. Jo. 654; 14 R. 620, C.A.; 8 Digest (Repl.) 132, *851*.

(14) *Gibson* v. *Small* (1853), 4 H.L.Cas. 353; 1 C.L.R. 363; 21 L.T.O.S. 240; 17 Jur. 1131; 10 E.R. 499, H.L.; 29 Digest 189, *1491*.

(15) *The Europa*, [1908] P. 84; 77 L.J.P. 26; 98 L.T. 246; 24 T.L.R. 151; 11 Asp.M.L.C. 19, D.C.; 41 Digest 480, *3129*.

(16) *Kish* v. *Taylor*, [1912] A.C. 604; 81 L.J.K.B. 1027; 106 L.T. 900; 28 T.L.R. 425; 56 Sol. Jo. 518; 12 Asp.M.L.C. 217; 17 Com. Cas. 355, H.L.; 41 Digest 485, *3170*.

(17) *Upperton* v. *Union-Castle Mail Steamship Co., Ltd.* (1902), 89 L.T. 289; 19 T.L.R. 687; 47 Sol. Jo. 738; 9 Asp.M.L.C. 475; 9 Cam. Cas. 50, C.A.; 8 Digest (Repl.) 139, *901*.

(18) *Tattersall* v. *National Steamship Co., Ltd.* (1884), 12 Q.B.D. 297; 53 L.J.Q.B. 332; 50 L.T. 299; 32 W.R. 566; 5 Asp.M.L.C. 206; 41 Digest 496, *3245*.

(19) *The Schwan*, [1909] A.C. 450; 78 L.J.P. 112; 101 L.T. 289; 25 T.L.R. 742; 53 Sol. Jo. 696; 11 Asp.M.L.C. 286, H.L.; 41 Digest 479, *3124*.

(20) *Bond, Connolly & Co. and Woodall & Co.* v. *Federal Steam Navigation Co., Ltd.* (1906), 22 T.L.R. 685, C.A.; 41 Digest 435, *2731*.

(21) *Wade & Sons Co., Ltd.* v. *Cockerline & Co.* (1905), 53 W.R. 420; 21 T.L.R. 296; 49 Sol. Jo. 313; 10 Com. Cas. 115, C.A.; 41 Digest 435, *2730*.

(22) *Marshall* v. *York, Newcastle & Berwick Rail. Co.* (1851), 11 C.B. 655; 21 L.J.C.P. 34; 18 L.T.O.S. 94; 16 Jur. 124; 138 E.R. 632; 8 Digest (Repl.) 132, *849*.

Also referred to in argument:

Bank of Australasia v. *Clan Line Steamers, Ltd.*, [1916] 1 K.B. 39; 84 L.J.K.B. 1250; 113 L.T. 261; 13 Asp.M.L.C. 99; 21 Com. Cas. 13, C.A.; 41 Digest 472, *3036*.

Morris and Morris v. *Oceanic Steam Navigation Co., Ltd.* (1900), 16 T.L.R. 533; 41 Digest 474, *3061*.

Stanton v. *Richardson* (1875), 45 L.J.Q.B. 78; 33 L.T. 193; 24 W.R. 324; 3 Asp.M.L.C. 23, H.L.; 41 Digest 337, *1899*.

Foulkes v. *Metropolitan District Rail. Co.* (1880), 5 C.P.D. 157; 49 L.J.Q.B. 361; 42 L.T. 345; 44 J.P. 568; 28 W.R. 526, C.A.; 8 Digest (Repl.) 118, *757*.

Ingram and Royle, Ltd. v. *Services Maritimes du Tréport*, [1914] 1 K.B. 541; 83 L.J.K.B. 382; 109 L.T. 733; 12 Asp.M.L.C. 387; 19 Com. Cas. 105, C.A.; 41 Digest 417, *2609*.

Wiener & Co. v. *Wilsons and Furness-Leyland Line, Ltd.* (1910), 103 L.T. 168; 11 Asp.M.L.C. 413; 15 Com. Cas. 294, C.A.; 41 Digest 376, *2218*.

The Okehampton, [1913] P. 173; 83 L.J.P. 5; 110 L.T. 130; 29 T.L.R. 731; 12 Asp.M.L.C. 428; 18 Com. Cas. 320, C.A.; 41 Digest 632, *4637*.

The Termagant (1914), 30 T.L.R. 377; 19 Com. Cas. 239; 41 Digest 500, *3278*.

Ciampa v. *British India Steam Navigation Co., Ltd.*, [1915] 2 K.B. 774; 84 L.J.K.B. 1653; 20 Com. Cas. 247; 41 Digest 413, *2569*.

Krüger & Co., Ltd. v. *Moel Tryvan Ship Co., Ltd.*, [1907] A.C. 272; 76 L.J.K.B. 985; 97 L.T. 143; 23 T.L.R. 677; 10 Asp.M.L.C. 465; 13 Com. Cas. 1; sub nom. *Moel Tryvan Ship Co., Ltd.* v. *Kruger & Co., Ltd.*, 51 Sol. Jo. 623, H.L.; 41 Digest 403, *2503*.

Calcutta Steamship Co., Ltd. v. *Andrew Weir & Co.*, [1910] 1 K.B. 759; 79 L.J.K.B. 401; 102 L.T. 428; 26 T.L.R. 237; 11 Asp.M.L.C. 395; 15 Com. Cas. 172; 41 Digest 404, *2507*.

Hedley v. *Pinkney & Sons Steamship Co.*, [1894] A.C. 222; 63 L.J.Q.B. 419; 70 L.T. 630; 42 W.R. 497; 10 T.L.R. 347; 7 Asp.M.L.C. 483; 6 R. 106, H.L.; 41 Digest 476, *3080*.

Readhead v. *Midland Rail. Co.* (1869), L.R. 4 Q.B. 379; 38 L.J.Q.B. 169; 17 W.R. 737; sub nom. *Redhead* v. *Midland Rail. Co.*, 9 B. & S. 519; 20 L.T. 628, Ex. Ch.; 8 Digest (Repl.) 75, *496*.

Delaurier & Co. v. *Wyllie* (1889), 17 R. (Ct. of Sess.) 167; 41 Digest 406, *2526 i.*

Bristol and Exeter Railway (Directors) v. *Collins* (1859), 7 H.L.Cas. 194; 29 L.J.Ex. 41; 34 L.T.O.S. 62; 5 Jur.N.S. 1367; 11 E.R. 78, H.L.; 8 Digest (Repl.) 29, *174*.

Appeal by the defendants from an order of the Court of Appeal (Bankes, L.J., and Eve, J.; Scrutton, L.J., dissenting) affirming the judgment of Rowlatt, J., in an action tried by him without a jury.

The plaintiffs' claim was for damage to a quantity of palm oil in casks and butts while being shipped by them in the steamship *Grelwen* for carriage from ports on the west coast of Africa to Hull. The total number of casks and butts shipped was 437 of which 299 casks were shipped at Sherbro, in West Africa, and 138 butts at Conakry, in French Guinea. On arrival at Hull it was found in many instances that the casks had been crushed or flattened by the weight which had been placed upon them and a large quantity of oil had escaped into the holds and bilges of the vessel. The defendants, Elder, Dempster & Co., Ltd., who were managers of the defendants, the African Steamship Co., and the British and African Steam Navigation Co., Ltd., had chartered, on behalf of those companies, the vessel from the owners, the defendants, the Griffith Lewis Steam Navigation Co. The Court of Appeal, by a majority, held (i) that the ship was unseaworthy inasmuch as she was wanting in the necessary equipment to carry the plaintiffs' oil; (ii) that the

charterers were not exempted from liability for breach of their implied warranty that the vessel was seaworthy when she started; and (iii) that they and the owners of the ship were liable for the loss. The defendants appealed. A

R. A. Wright, *K.C.*, and *Pritt* for the appellants, Elder, Dempster & Co., Ltd., the charterers.

Neilson, *K.C.*, and *Clement Davies* for the appellants, Griffith Lewis Steam Navigation Co., the owners. B

Jowitt, *K.C.*, and *Le Quesne* for the respondents.

The House took time for consideration.

Mar. 18. The following opinions were read.

C

VISCOUNT CAVE (read by LORD CARSON).—The appellants, Elder, Dempster & Co., Ltd., who are managers for the appellants, the African Steamship Co. and the British and African Steam Navigation Co., Ltd., run to the West African ports a line of cargo steamers which carry West African produce. These vessels have their holds fitted with 'tween decks, so that goods stored in the lower part of the hold may be relieved from the weight of those stored in the upper part. D The appellants, Elder, Dempster & Co., Ltd., requiring an additional vessel for their West African trade, chartered from the appellants, the Griffiths Lewis Steam Navigation Co., Ltd. (whom I will refer to as the owners), the steamship *Grelwen*, a ship of the Isherwood type, containing deep holds but no 'tween decks. The *Grelwen* proceeded to the Sherbro River where she loaded from the respondents, Paterson Zochonis & Co., Ltd., 297 casks or butts of palm oil, which were stowed E in two or three tiers at the bottom of holds 2, 3, and 4. She also loaded there from the respondents and other shippers about 51,800 bags of palm kernels, which were stowed partly over the casks of palm oil in holds 2 and 4 (thus completely filling those holds) and partly in other parts of the ship. The vessel then proceeded to the port of Konakry, where she loaded from the respondents a further 147 butts of palm oil which were stowed at the bottom of No. 3 hold, and also F loaded from the respondents and others about 11,400 more bags of palm kernels, which were stowed partly over the palm oil in No. 3 hold (thus filling that hold) and partly elsewhere. She also loaded some piassava and other miscellaneous produce which was stowed in the space between the main and shelter decks. When the vessel arrived at Hull, which was her destination, it was found that the casks and butts of palm oil in holds 2, 3, and 4 had been crushed by the palm kernels G stored above them, which were very heavy—it was stated in evidence that each cask had to carry sixty-four bags of palm kernels or nearly six tons in weight—and the greater part of the oil was lost or damaged. The casks must have begun to give way immediately after the palm kernels were stowed above them, for the log shows that before the vessel left the Sherbro River she had 3 ft. of palm oil in the bilge well of No. 2 hold, and that before she left Konakry the same thing had H happened in hold No. 3; but it is possible that the leakage continued after the vessel left port and was intensified by the rolling of the ship.

The respondents, accordingly, commenced this action against the appellants, claiming damages for breach of the contract entered into by the bills of lading under which the palm oil was shipped, or, alternatively, for negligence or breach of duty. The appellants at the trial attempted to prove that the casks and butts I were frail or leaky, but this attempt failed, and it is not now denied that the damage was caused by the altogether unreasonable and excessive weight placed upon the casks. This being so, the contest resolved itself into the question whether the damage was due to bad stowage, or to the fact that the vessel was structurally unfit or unseaworthy for the carriage of the palm oil by reason of the depth of her holds and the absence of 'tween decks. It was not denied that, if the damage was due to bad stowage, the charterers are protected against liability by the conditions contained in the bills of lading; but if it was due to unseaworthiness,

A then it was contended (and I think rightly) that the charterers were not protected by any of the conditions of the bills of lading and were liable to make good the damage.

The action was tried by ROWLATT, J., who held that, while the ship was well found for the purpose of traversing the sea, she was "not a ship, in the way she was prepared for this voyage, proper to carry these casks of palm oil." He added:

B "This was a ship which was not a 'tween deck ship. It has a deep hold of a depth of 25 ft., and you cannot safely get in at the bottom of that hold casks of palm oil with any sort of a cargo of dead weight or approaching dead weight of gravity on the top of it, and, therefore, it is a hold which you cannot put those casks in at the bottom, which is the place to put them. It could have been made proper for the stowage of such a cargo by the erection of what has C been called a temporary 'tween deck or a platform, by the erection of something (to use perfectly plain and popular language) which would tend to keep the weight of the superincumbent cargo off the bilges of the barrels. That could have been done, and then the hold would have been fit to receive this cargo. That seems to me a fault which goes to the hold. It is not a fault which goes to the stowage as stowage. It is a fault which goes to the D appliances for shipping the cargo safely and makes the ship unseaworthy for the purpose of carrying this cargo on this voyage."

He, accordingly, gave judgment against all the appellants for damages, and ordered an inquiry. On appeal, the decision of the trial judge was affirmed by a majority of the Court of Appeal, consisting of BANKES, L.J., and EVE, J., but SCRUTTON, E L.J., dissented, holding that the damage was due to bad stowage. SCRUTTON, L.J., stated the principle as follows:

"The ship must be fit at loading to carry the cargo the subject of the particular contract. If she is so fit and the cargo when loaded does not make her unseaworthy, . . . the fact that other cargo is stowed so as to endanger the contract cargo is bad stowage on a seaworthy ship, not stowage of the F contract cargo on an unseaworthy ship."

Thereupon the present appeal was brought. It was contended on behalf of the respondents that the finding of the trial judge was one of fact, and that, as there was evidence to support that finding, it should not now be disturbed. I do not think that this position can be maintained. The facts are not now seriously in dispute, and the question is substantially one of law—namely, what on those facts G is the liability of the charterers and owners? Or, at least, it is one of mixed fact and law. I think, therefore, that the decision is open to review.

The general principles which should govern the decision are not in doubt. It is well settled that a shipowner or charterer who contracts to carry goods by sea thereby warrants not only that the ship in which he proposes to carry them shall be seaworthy in the ordinary sense of the word—that is to say, that she shall be H tight, staunch, and strong, and reasonably fit to encounter whatever perils may be expected on the voyage—but also that both the ship and the furniture and equipment shall be reasonably fit for receiving the contract cargo and carrying it across the sea. The latter obligation, which is sometimes referred to as a warranty of seaworthiness for the cargo, was formulated by LORD ELLENBOROUGH in the year 1804: see *Lyon* v. *Mells* (1), and was affirmed by this House in *Steel* v. *State Line* I *Steamship Co.* (2) and *Gilroy, Sons & Co.* v. *Price & Co.* (3). The rule, as it applies to equipment, is well illustrated by such cases as *The Maori King* (*Cargo Owners*) v. *Hughes* (4), where a ship with defective refrigerating machinery was held "unseaworthy" for a cargo of frozen meat; and *Queensland National Bank, Ltd.* v. *Peninsular and Oriental Steam Navigation Co.* (5), where a ship with a bullion room not reasonably fit to resist thieves was held "unseaworthy" for a consignment of bullion. Reference may also be made to *Hogarth* v. *Walker* (6), where it was said by BIGHAM, J., and A. L. SMITH, L.J., that a ship without dunnage mats (which are usually laid on the floor of a grain ship to protect the

grain from being damaged by wet) was unseaworthy for the carriage of a cargo of wheat. It is hardly necessary to add that unseaworthiness and bad stowage are two different things. There are cases (such as *Kopitoff* v. *Wilson* (7)) where, a ship having been injured in consequence of bad stowage, the warranty of seaworthiness of the ship has been held to be broken; but in such cases it is the unseaworthiness and not the bad stowage which constitutes the breach of warranty. There is no rule that, if two parcels of cargo are so stowed that one can injure the other during the course of the voyage, the ship is unseaworthy: per SWINFEN EADY, L.J., in *The Thorsa* (8).

Applying these principles to the present case, I have come to the conclusion that the damage complained of was due, not to unseaworthiness, but to improper stowage. If the fitness or unfitness of the ship is to be ascertained (as was held in *McFadden* v. *Blue Star Line, Ltd.* (9)) at the time of loading, there can be no doubt about the matter. At the moment when the palm oil was loaded the *Grelwen* was unquestionably fit to receive and carry it. She was a well-built and well-found ship, and lacked no equipment necessary for the carriage of palm oil, and if damage arose, it was due to the fact that after the casks had been stowed in the holds the master placed upon them a weight which no casks could be expected to bear. Whether he could have stowed the cargo in a different way without endangering the safety of the ship is a matter upon which the evidence is conflicting; but, if that was impossible, he could have refused to accept some part of the kernels and the oil would then have travelled safely. No doubt, that course might have rendered the voyage less profitable to the charterers, but that appears to me for present purposes to be immaterial. The important thing is that at the time of loading the palm oil the ship was fit to receive and carry it without injury; and, if she did not do so, this was due, not to any unfitness in the ship or her equipment, but to another cause. But it was argued that an owner or charterer loading cargo is to be deemed to warrant the fitness of his ship to receive and carry it, not only at the moment of loading but also at the time when she sails from the port, and that at the moment when the *Grelwen* left each of her ports of departure she was unfit without 'tween decks to carry the cargo which had then been placed in her holds. I think there is some authority for the proposition that the implied warranty of "seaworthiness for the cargo" extends to fitness for the cargo not only at the time of loading but also at the time of sailing: see *Cohn* v. *Davidson* (10); and the observations of PHILLIMORE, L.J., in *The Thorsa* (8). But it is unnecessary to pursue the point, for the proposition, if established, will not avail the present respondents. The evidence of the log is conclusive to show that the injury to the casks was caused at or immediately after the time when the cargo was loaded and before the ship sailed, and, accordingly, that it was not due to any unseaworthiness at the time of sailing. And in any case nothing occurred between the time when the oil was loaded and the time when the ship sailed to make the ship structurally less fit to carry the oil; and it is with reference to the contract cargo—namely, the oil—that the question of fitness must be considered.

It was further argued that, as all the charterers' own ships engaged in the West African trade were fitted with 'tween decks, that equipment must be considered to be reasonably necessary for any vessel engaged in that trade. I do not think that any such universal rule can be properly laid down. It cannot be assumed that every ship running to the West African coast will bring back a cargo of palm oil and palm kernels, or that, if she does so, it will always be necessary to stow them together in one hold. The *Grelwen*, though without 'tween decks, could have carried a full cargo of West African goods without the oil, or could have carried the oil without the heavy cargo laid upon it. If the oil could not be stowed anywhere except at the bottom of the holds, the master could (as the evidence shows) have stowed four tiers of casks in each hold, and could have utilised the space above them for light cargo or could have left it empty; and the fact that he did not choose to take either of these courses is not sufficient to condemn the ship as unseaworthy.

On this view it becomes unnecessary to consider whether, in the event of unseaworthiness being found, the conditions of the bills of lading would have been sufficient to protect the charterers from liability. It is enough to say that, in my opinion, they are not sufficient for that purpose, the requirements of the proviso to condition 2 not having been satisfied.

There remains a further question, which arises between the shippers and the shipowners, the Griffiths Lewis Steam Navigation Co. It is contended on behalf of the respondents that, assuming their loss to be due to bad stowage on the part of the master of the ship, the owners are not protected by the conditions of the bill of lading, to which they were not parties, and are, accordingly, liable in tort for the master's negligence. In support of this contention the respondents rely on such cases as *Martin* v. *Great Indian Peninsular Rail. Co.* (11), *Hayn* v. *Culliford* (12), and *Meux* v. *Great Eastern Rail. Co.* (13). I do not think that this argument should prevail. It was stipulated in the bills of lading that "the shipowners" should not be liable for any damage arising from other goods by stowage or contact with the goods shipped under the bills of lading; and it appears to me that this was intended to be a stipulation on behalf of all the persons interested in the ship —that is to say, charterers and owners alike. It may be that the owners were not directly parties to the contract; but they took possession of the goods (as Scrutton, L.J., says) on behalf of and as the agents of the charterers, and so can claim the same protection as their principals.

For the above reasons I am of opinion that this appeal succeeds, and that the orders of Rowlatt, J., and the Court of Appeal should be set aside and the action dismissed with costs in both courts and in this House.

VISCOUNT FINLAY.—In this case the action was brought by the respondents, the consigness of casks and butts of palm oil shipped at Sherbro and Konakry in West Africa for carriage to the United Kingdom. The defendants, Elder, Dempster & Co., Ltd., are the managers of the African Steamship Co. and the British and African Steam Navigation Co., who are also joined as defendants, and these two companies had a charter from the Griffiths Lewis Steam Navigation Co., owners of the *Grelwen* steamship, who are also defendants. The action was brought to recover damages for loss and damage in respect of palm oil in transit by the *Grelwen* steamship. The plaintiffs alleged that this was caused by the fact that bags of palm kernels had been stowed 16 ft. to 20 ft. high on the top of the butts and casks, and that in consequence of the weight thus placed upon them many of the butts and casks were crushed and collapsed. The defendants' case was that the conditions of the bill of lading exempted the defendants from liability for bad stowage and that it was bad stowage that had caused the loss, if any. The plaintiffs, on the other hand, alleged that the vessel was structurally unfit for the carriage of the goods in respect of the fact that there was no 'tween decks or substitute for a 'tween deck to bear the weight of the bags of palm kernels and prevent their pressure upon the butts and casks, and that this constituted unseaworthiness, from liability for which they were not exempted by the bill of lading.

The substantial issue in the case is whether the absence of such a 'tween deck made the vessel unseaworthy in the sense that it was not structurally fitted for the West African trade, in which it is usual to carry cargo consisting partly of palm oil and partly of bags of palm kernels, and whether the loss was due to this unseaworthiness. The case was tried by Rowlatt, J., without a jury. He found that the vessel was not fit for the carriage of West African cargoes on the ground that she had no 'tween decks or substitute therefor, and gave judgment for the plaintiffs, the present respondents. His decision was affirmed by the Court of Appeal, Scrutton, L.J., dissenting, on the ground that in his opinion the damage was the result of bad stowage, and that the bill of lading exempted the defendants from liability on this ground.

The law as to seaworthiness was discussed by Lord Cairns and by Lord

BLACKBURN in *Steel* v. *State Line Steamship Co.* (2). LORD BLACKBURN expressed himself as follows (3 App. Cas. at p. 86):

> "I take it, my Lords, to be quite clear, both in England and in Scotland, that where there is a contract to carry goods in a ship, whether that contract is in the shape of a bill of lading or any other form, there is a duty on the part of the person who furnishes or supplies that ship, or that ship's room, unless something be stipulated which should prevent it, that the ship shall be fit for its purpose. That is generally expressed by saying that it shall be seaworthy; and I think also in marine contracts, contracts for sea carriage, that is what is properly called a 'warranty,' not merely that they should do their best to make the ship fit, but that the ship should really be fit. I think it is impossible to read the opinion of LORD TENTERDEN, as early as the first edition of ABBOTT ON SHIPPING, at the very beginning of this century, of LORD ELLENBOROUGH, following him, and of PARKE, B., also in *Gibson* v. *Small* (14), without seeing that these three great masters of marine law all concurred in that; and their opinions are spread over a period of about forty or fifty years. I think, therefore, that it may be fairly said that it is clear that there is such a warranty or such an obligation in the case of a contract to carry on board ship."

For any loss or damage caused by unseaworthiness the shipowner is liable, but the mere fact that the ship was unseaworthy does not make the shipowner liable unless the loss was caused by the unseaworthiness: *The Europa* (15) and *Kish* v. *Taylor* (16). Bad stowage does not, in itself, constitute unseaworthiness, but it may be such as to render the vessel unseaworthy: *Kopitoff* v. *Wilson* (7) and *The Thorsa* (8). The vessel is considered unseaworthy for this purpose if she has some defect which renders her unsuitable for the reception and carriage of particular goods in question. For instance, the absence of a bullion room properly equipped for the carriage of bullion makes the vessel unseaworthy for the carriage of bullion: *Queensland National Bank, Ltd.* v. *Peninsular and Oriental Steam Navigation Co.* (5), and so if the room provided for the carriage of passengers' luggage is unfit for the purpose (*Upperton* v. *Union-Castle Mail Steamship Co., Ltd.* (17)). Where the vessel is infectious from the carriage on a previous voyage of sheep suffering from foot-and-mouth disease, she is unseaworthy for the purpose of the carriage of other sheep: *Tattersall* v. *National Steamship Co., Ltd.* (18). Many other illustrations of the application of the principle are to be found in the books.

The question in the present case is whether the *Grelwen* was unfit for the carriage of the palm oil and kernels owing to some structural defect which caused the damage, or whether the damage was merely the result of bad stowage. The *Grelwen* steamship was let on charter by her owners, the Griffith Lewis Co., to Messrs. Elder, Dempster & Co., Ltd., who took the charter on behalf of the African Steamship Co. and the British and African Steam Navigation Co., Ltd. The charter was for twelve months, the owners providing captain and crew, and cl. 10 of the charter provided that the captain, though appointed by the owners, should be under the charterers' orders as regards employment, &c.—the charterers to indemnify owners against any liabilities arising from the captain signing bills of lading. The vessel was sent under the charterparty to Sherbro and Konakry, on the West African coast, and there took on board the palm oil in respect of which this action is brought. The butts and casks containing the oil were, according to invariable practice in this trade, stowed at the bottom of the holds in tiers one above the other; there were not more than three of these tiers and in some places not more than two. It was shown in evidence that it would have been safe to have had four tiers. Planks were laid on the top of the barrels, and over these planks there were stowed a large quantity of bags containing palm kernels, the weight of which must, as the event showed, have exceeded what would have been the weight of a fourth tier of barrels, and it was this which caused the collapse. Bills of lading were given at Sherbro and Konakry which for the present purpose

A are in substantially the same terms. The most material clause is the second. It contains a provision that

> "The company shall not be liable . . . for any damage arising from other goods by stowage or contact with the goods shipped hereunder."

Both courts below have held, and rightly, that this provision would exempt the B defendants from liability in the present case if it were merely a case of loss by bad stowage by putting on the barrels a weight in excess of that which they could safely bear. The contest in the case has been whether the loss was due to unseaworthiness in the sense that the vessel was structurally unfit for the reception of mixed cargoes of palm oil and palm kernels such as are usual in the West African trade, and, if so, whether this cl. No. 2 exempts the charterers and owners from C liability for loss arising from such unseaworthiness.

All the vessels regularly employed in this West African trade are provided with 'tween decks. The African Steamship Co. and the British and African Steam Navigation Co. wanted a vessel in addition to their own fleet, and for this purpose, through Elder, Dempster & Co., Ltd., took on charter the *Grelwen*. The case made for the plaintiffs, which was accepted by ROWLATT, J., and by the majority D of the Court of Appeal, was that for the West African trade a 'tween deck or some efficient substitute is an essential part of the equipment of the vessel, and that without it a vessel is not seaworthy for the purposes of the trade there carried on. The barrels containing the palm oil are stored at the bottom of the hold, and the plaintiffs urged that, if the hold is to be filled up with superincumbent goods, there must be 'tween decks to prevent the pressure upon the barrels below, as otherwise E they may be crushed whenever the superincumbent weight exceeds what would have been the weight of a fourth tier of barrels, which is the limit of safety. Of course, light goods may be safely stowed over the barrels, but the palm kernels which are very commonly shipped from West Africa are dead-weight goods, and it was urged that without 'tween decks the vessel was not fit to receive and carry composite cargoes of palm oil and kernels, such as are usual in this trade.

F In my opinion, the contention of the plaintiffs on this point is made good by the evidence. The existence of 'tween decks would have prevented the danger which caused the damage in the present case. The captain stated in his evidence that he was told by the representative of Elder, Dempster & Co., Ltd., what to load. It would, of course, have been possible for him to refuse to load all the bags of palm G kernels sent down for shipment on the ground that the weight upon the barrels would in his opinion be excessive, and to leave the bags of palm kernels behind. It is, however, obvious that the absence of any provision in the ship for relieving the barrels of palm oil from pressure of the superincumbent cargo must be a source of danger and that it puts the captain into a very awkward position. The captain will be naturally desirous not to leave behind goods which have been sent down for H shipment, and the question whether the weight is too great or not will be in every case a matter of estimate—and the captain's estimate may be wrong. As the practice of the trade involves the superimposition over the palm oil barrels of bags of palm kernels, it is only reasonable that there should be 'tween decks which will relieve the barrels from the superincumbent pressure and enable the ship to take a full cargo with safety. I think that for the purpose of this particular trade, I involving the carriage of cargoes consisting of barrels of palm oil and bags of palm kernels, a vessel without 'tween decks would not be properly equipped. For safe stowage of such a cargo 'tween decks or some efficient substitute will be necessary, and without such equipment the vessel is not seaworthy, as this term is used to denote not merely fitness of the ship itself to encounter perils of the sea, but also fitness of the ship to receive and carry the cargo in port and upon the voyage. If the ship is not fitted with all appliances which are reasonably necessary for safe stowage she is not seaworthy. All ships regularly engaged in this trade have 'tween decks, and if a vessel without 'tween decks is put upon such service she

ought to be provided with a temporary substitute. If the *Grelwen* had been so provided the loss in the present case would not have occurred. A

Seaworthiness, in its proper sense, relates to the condition of the vessel as regards its capacity to perform the voyage with safety to itself and the goods and persons on board. Is the vessel fit to cope with the perils of the seas? The "seaworthiness" which is in question in the present case is of a totally different nature, and relates to the fitness of the vessel for the reception of particular goods, and the absence of such fitness is described as "unseaworthiness." It is unfortunate that for this purpose no more suitable term has been devised, as the use of the term "unseaworthiness" in this connection is apt to lead to confusion. The term "unseaworthy" is not apt to describe the unfitness of the vessel for the carriage of particular goods. For instance, a vessel which has no strong-room for the carriage of bullion is described as unseaworthy for the purposes of bullion, and a vessel which has carried sheep suffering from foot-and-mouth disease without being disinfected at the close of that voyage is described as unseaworthy for the carriage of another cargo of sheep. The expression is at once awkward and misleading. The unseaworthiness alleged in the present case is the absence of a 'tween deck. The *Grelwen* was of the Isherwood type, and vessels of the Isherwood type have not the ordinary 'tween deck. For work of many kinds such a type of vessel may be as good as or better than a type involving the use of 'tween decks, and certainly the Isherwood type is extensively used. In the course of the present case it has been said more than once that it cannot be supposed that the Isherwood type involves unseaworthiness. This is really a play upon words. What is urged for the respondents is that, with all its excellencies, the Isherwood type makes a vessel unsuitable for the reception of cargoes of the special type common in the West African trade. This contention involves no aspersion whatever upon the Isherwood type; it is merely a statement that such a type of vessel is not suitable for use in this particular trade, because the composite cargo there carried—palm oil and kernels—makes a 'tween deck necessary. The casks of palm oil are stowed at the bottom of the hold; in the absence of a 'tween deck they are liable to be damaged by the pressure of superincumbent kernels. B C D E F

On the part of the respondents, one argument was greatly insisted on. It was said that the contract of carriage sued on in the present case related to the palm oil, and it is urged that in these circumstances the only question is whether the vessel was seaworthy for the carriage of the palm oil taken by itself. To put the question in this form involves a misconception of the real point of the case. The fact that a vessel may be perfectly safe to carry barrels of palm oil, if that were the only cargo, is for the purposes of the present case immaterial. The unfitness of the vessel alleged is unfitness to receive a composite cargo of palm oil and kernels. Such a cargo is the common cargo from West Africa, and the cargo to be carried on the present occasion was such a composite cargo. In dealing with the case, you cannot stop when the palm oil has been put on board and say that the case is at an end, as the warranty of unseaworthiness must be with reference merely to the palm oil. This would involve ignoring the real issue. It was perfectly well known that in this trade the palm oil is not carried alone, but in company with kernels. The palm oil must be put at the bottom of the hold and the kernels above. It is for this reason that the 'tween deck is wanted, and, therefore, all the vessels regularly engaged in the West African trade are fitted with 'tween decks. The essence of the case is that the cargo was to be composite, as the bill of lading shows, and as is universally the case in this trade. Was the *Grelwen* fit for the reception of such a cargo? In my opinion, she was not. G H I

But then it was said that the stowage was bad and that this was the real cause of the damage. In the first place, suggestions were made at the Bar as to other plans of stowage which, it was said, would have accommodated all the goods without difficulty. None of these plans was put forward at the trial, when it could have been tested by evidence, and that matter cannot be put forward now. The same attempt to suggest other schemes of stowage for this vessel seems to have

A been made in the Court of Appeal, and it was with reference to such suggestions that BANKES, L.J., made, with great justice, the following observations:

> "In dealing with this case I do not think that the court is at liberty to take the stowage plan and endeavour to stow the cargo so that damage could have been avoided. No one has suggested that it would have been possible and the court has no evidence on which to act."

B

I think that in the result the appellants' counsel did not press the point that another scheme of stowage should have been adopted, but confined themselves to the assertion that the captain ought to have realised that to put the kernels on the top of the palm-oil barrels would be dangerous, and should, therefore, have refused to load the kernels and left them behind him at Sherbro and Konakry. In my C opinion, this form of dealing with the stowage does some injustice to the captain and is based on an imperfect appreciation of the facts. It appears that the captain had never been engaged in the West African trade before. He was directed by Mr. Ward, the representative of Elder, Dempster & Co., Ltd., at Sherbro, to load the kernels, which had been brought down for the purpose. Mr. Ward met the ship on her arrival there, stayed on board, and told the captain what to load. Messrs. D Elder, Dempster & Co., Ltd., are, of course, quite entitled, in point of law, to urge that, if the real efficient cause of the damage was negligent stowage in putting on the barrels of palm oil a weight which they could not bear, they are not liable, as the exemption in the bill of lading, whether this negligence was on the part of the captain or of their own representatives at the port of loading or of both together, would protect them. But an examination of the evidence, I think, shows that it E is not possible to regard such negligence as the sole cause of the damage, and that it was largely contributed to by the want of 'tween decks in the vessel.

The evidence is clear and uncontradicted that all ships regularly engaged in the trade have a 'tween deck. A 'tween deck is necessary where palm oil and kernels have to be carried in order to ensure that a full cargo can be carried. It is further necessary, in order to avoid the danger of mistake in calculating what quantity of F kernels may with safety be put on the top of the palm-oil barrels. If there is a 'tween deck, no calculation is necessary on this point, as the 'tween deck relieves the barrels of palm oil from all pressure by the superincumbent kernels. But without a 'tween deck it is necessarily left to the estimate of the person superintending the loading what amount of kernels may be safely stowed. There may be mistakes in making this calculation in one of two ways: the person superintend- G ing the loading may erroneously think that the palm-oil barrels will bear an amount of pressure which in fact is beyond their capacity. Or, on the other hand, in his anxiety to secure safety, he may stop the stowage of the kernels too soon and may refuse to put on board kernels which might with safety have been there stowed. Mistakes are certain to be made from time to time in the absence of a 'tween deck. The presence of a 'tween deck, of course, dispenses with all the necessity for any H such calculations. If the mistake made is such as that which, it is alleged, the captain here made, putting on more weight than the palm-oil barrels will bear, the results may be disastrous, as the history of the present case proves. If, on the other hand, in his anxiety to be on the safe side the kernels which could have been carried are left behind, the ship sails with an insufficient cargo. From whatever point of view the matter is looked at, for a trade of this description the 'tween deck J is necessary, and this is recognised by the constant practice of having 'tween decks in this trade. In the present case its absence was accidental as this vessel had been specially called in to supply a temporary deficiency in the fleet of the African Steamship Co. According to the plaintiffs, the *Grelwen* ought, in the present case, to have sailed away with little more than half a cargo, owing to the absence of a 'tween deck and the danger of crushing the palm-oil barrels by putting the kernels upon them. It appears to me, that a type of vessel which entails such results cannot be regarded as suitable for receiving on board such composite cargo as forms a staple of the West African trade.

It is said that the captain ought to have refused to take the kernels on board. Judging by the result, it appears that it would have been more prudent to have done so, but I do not think that the difficulty of the situation in which the captain was placed has been adequately appreciated by the appellants. The kernels had been sent down to be put on board, the captain had been told by the representative on the spot of Messrs. Elder, Dempster & Co., Ltd., to put them on board, and very difficult questions might have arisen if he had left the kernels at the port. It would, no doubt, have been alleged that they had been left behind without any adequate reason, and this would have been as strongly urged as it is now urged by the light of what afterwards happened, that the captain committed an error of judgment in taking the kernels on board. The case is a very good illustration of the propriety and, indeed, the necessity of having in vessels in this trade a 'tween deck. Where the 'tween deck is provided no difficulty whatever of this nature can arise; the want of it puts all concerned in a very difficult position with great risk of disaster.

A good deal of argument was directed in the course of the case on behalf of the appellants to the effect that it would be difficult or impossible to rig up a temporary 'tween deck on the west coast of Africa. It has also been urged that it is not usual for vessels to carry beams for the purpose of putting up a temporary 'tween deck. Both these contentions appear to me rather to miss the point of the case. It is very probable to my mind that it would be difficult to provide beams and other appliances on the West African coast. I doubt whether it could be said that there would be much difficulty in carrying beams from England, and, if the necessity for them had been realised, I have no doubt that this would have been done. The truth is that the point was overlooked and Messrs. Elder, Dempster & Co., Ltd., sent this vessel out to Africa without in the least realising what the results of sending a vessel of the Isherwood type, for the purposes of the trade on this coast, were likely to be. If the subject had been considered, a vessel of another type would have been sent; the *Grelwen* was obviously unfit for this trade, and the case made is, indeed, that safety should have been secured by leaving a great deal of the proposed cargo on the beach at Sherbro and Konakry.

Assuming that the loss was the result of unseaworthiness as above explained, the question remains whether the bill of lading exempts the charterers from liability. For this purpose the second clause must be examined in detail. That clause concludes with the general provision that it is to be in addition to and not in derogation of or in substitution for any statutory exemption or provision in favour of the company. This particular provision is applicable to the whole of cl. 2. Apart from this last provision, cl. 2 consists of three portions, each of which begins with the words "The company shall not be liable for," and enumerates under each head the matters liability for which is excluded. The first head begins with the initial words of the clause itself, "The company shall not be liable for," and ends with the words "or evaporation from such goods or any other goods." It provides against liability for the act of God, the King's enemies, &c., barratry, restraints of rulers, &c., the effects of disinfection, &c., the effects of climate, fire, &c., damage arising from other goods by stowage, &c., sweating, evaporation, &c. This first head forms one sentence with a full stop at the end. The second head begins likewise with the words "The company shall not be liable for" and enumerates lighterage, &c., storage, transhipment, loss from explosion, fire, boilers, &c., damage to or defect in hull, &c., fuel, machinery, &c. Like the first head it consists of one sentence only and it ends with the words "or other appurtenances," after which follows the full stop. The third head is as follows:

> "The company shall not be liable for or for any loss or damage arising from or due to collision, stranding, straining, jettison or any other peril of the sea, rivers, navigation, or land transit, of whatsoever nature or kind; whether any perils, causes or things, in this clause mentioned, are due to, or arise directly or indirectly from the wrongful act, omission or error in judgment or negli-

A gence of the company's pilot, master, officer, engineer, crew, stevedore, or any person whomsoever in the service of the company, or any person or persons or company for whose acts the company would otherwise be liable, or not, and whether on the ship carrying these goods or not; and whether due to or arising directly or indirectly from unseaworthiness of the ship, vessel, craft or lighter at the commencement of the carriage or during the carriage or any part thereof; B provided in case of any loss, injury or damage arising from or due to unseaworthiness of the ship at the beginning of the voyage all reasonable means shall have been taken to provide against such unseaworthiness. The company may entrust to experienced or qualified officers, servants or agents the duty of providing against unseaworthiness, and shall then be deemed to have fulfilled its obligation hereunder."

C It should be observed that the initial words of this third head exempt from liability "for loss of damage arising from or due to collision, stranding, straining, jettison or any other peril of the sea, rivers, navigation, or land transit of whatsoever nature or kind." After this word "kind" there is a semicolon, which is followed by the words "whether any perils, causes or things in this clause mentioned are due to, or arise directly or indirectly" from negligence of master, crew, D &c. Then after another semicolon follow the words "and whether due to or arising directly or indirectly from unseaworthiness." Then after another semicolon follow words containing the proviso that in case of loss or unseaworthiness of the ship "at the beginning of the voyage all reasonable means shall have been taken to provide against such unseaworthiness." There follows in a separate sentence the E provision that the company may entrust to qualified officers, &c., the duty of providing against unseaworthiness "and shall then be deemed to have fulfilled its obligation hereunder."

The appellants contend that the effect of this third head of cl. 2 is to exempt them from liability for the consequences of unseaworthiness. In my opinion, this contention fails for two reasons. In the first place, the words as to unseaworthiness F in this head relate only to a loss or damage from the causes to which this head 3 of the clause relates. The sentence provides that the company shall not be liable for consequences of certain perils whether due to or arising from unseaworthiness or not. It is quite impossible to apply this provision as to unseaworthiness except to the perils dealt with by the sentence in which the provision itself occurs. These words cannot apply to the damage arising from stowage mentioned under the first G head in the clause. So to apply them would be to disregard, not merely the punctuation, but the whole structure of cl. 2 and the plain meaning of the sentence in which the provision occurs. The words as to unseaworthiness qualify only the provisions under head 3 itself. In the second place, the exemption from liability for unseaworthiness is not absolute, but subject to the condition that all reasonable means were taken to provide against such unseaworthiness. The appellants have H entirely failed to show that this condition was fulfilled; in fact, it is clear that it was not. The provision that the company may entrust to qualified officers the duty of providing against unseaworthiness and shall be thereby deemed to have fulfilled its obligation under the clause has no application to the present case. The company never entrusted to anyone the duty of providing 'tween decks for the *Grelwen*; the necessity for providing them was entirely overlooked.

I It was urged for the plaintiffs that, even if their case against Elder, Dempster & Co., Ltd., failed on account of the terms of the bill of lading, they ought to succeed against the owners, Griffiths Lewis Steamship Navigation Co., Ltd. It was said that the master and crew were in the service of this company as owners, and that their conduct in putting an excessive weight on the palm-oil barrels amounted to a tort, for which the owners were liable, as having been committed by their servants. The case on which the appellants principally relied on this point was that of *Hayn* v. *Culliford* (12). They laid particular stress on the judgment of BRAMWELL, L.J., in that case. It appears to me, that, if the plaintiffs

are to succeed, it must be upon the bill of lading. The owners of the goods put them on board the *Grelwen* to be carried on the terms of the bill of lading. It is said that the imposition of the weight of the kernels on the top of the palm-oil barrels was a wrongful act, resulting in the destruction of the barrels and the loss of the oil, and that for this wrongful act, committed by their servants, the shipowners are liable, apart from contract altogether, so that the plaintiffs, in claiming from the shipowners, would not be hampered by the conditions of the bill of lading. This contention seems to me to overlook the fact that the act complained of was done in the course of the stowage under the bill of lading, and that the bill of lading provided that the owners were not to be liable for bad stowage. If the act complained of had been an independent tort unconnected with the performance of the contract evidenced by the bill of lading, the case would have been different. But when the act is done in the course of rendering the very services provided for in the bill of lading, the limitation on liability therein contained must attach, whatever the form of the action and whether owner or charterer be sued. It would be absurd that the owner of the goods could get rid of the protective clauses of the bill of lading, in respect of all stowage, by suing the owner of the ship in tort. The Court of Appeal were, in my opinion, right in rejecting this contention, which would lead to results so extraordinary as those referred to by SCRUTTON, L.J., in his judgment. I agree with ROWLATT, J., and the majority of the Court of Appeal in thinking that the appellants were liable on the ground that the vessel was unseaworthy in being improperly equipped for the service in which she was sent under the charterparty and that the loss resulted from this defective equipment. In my opinion the appeal should be dismissed.

LORD DUNEDIN.—I have had the advantage of reading the opinion of my noble and learned friend, LORD SUMNER. That opinion expresses so conclusively and fully the result at which I have myself arrived that I find it unnecessary on my own part to add anything.

LORD SUMNER.—This case is now reduced to a question of unseaworthiness. The contract of carriage excepts liability for damage by improper stowage, but, if there was a breach of the implied warranty of seaworthiness, which there is nothing in the contract to limit or to oust, none of the exceptions or limitations contained in the bill of lading avails to prevent the cargo-owner from recovering. Two things must, therefore, be shown—(i) that the ship was unseaworthy in the sense of the words established by the decisions, and (ii) that the damage complained of was caused thereby and would not have arisen but for that unseaworthiness. For my part I neither think that the alleged defects in the ship and her equipments amount in law to unseaworthiness, nor that the damage to the puncheons of oil was due to them. No structural defect in the *Grelwen* caused this damage, nor was her equipment defective. In fact, the ship was at all times reasonably fit to load and carry the puncheons, but the puncheons were not able to carry the palm kernels. The casks were as directly and as promptly stove in, as if the Krooboys, who had loaded them, had attacked them with crowbars. I think that the ship's design, with her peculiarities and, if you will, her defects, was no more than a causa sine qua non.

The proof of this is easy. It is to be found in the ship's log. The plaintiff's Sherbro cargo and Konakry cargo, being loaded at separate ports and carried under separate bills of lading, may, for present purposes, be considered as independent adventures. The ship loaded at three anchorages in the Sherbro River, so near together that she was never under way while shifting anchorage for so much as an hour and a half at a time. Once she took the ground for about ninety-five minutes, but she got off under her own steam without damage, and, except for a little squally weather at the Bomplake anchorage, she was uniformly fortunate in her weather. She was at all times in sheltered waters and there is no suggestion of any marine peril that affected her cargo. In No. 2 hold she took in palm oil at the bottom, afterwards stowing palm kernels in bags above. Before she had

A left the third anchorage to proceed out of the Sherbro River to sea, she had 3 ft. of palm oil in the bilge well of No. 2 hold. As this is the first log entry about the bilges one way or the other and it is impossible to be sure from the entries when palm kernels first were stowed on the palm-oil puncheons, I cannot tell how short a time had passed before the superincumbent weight crushed the puncheons, but at any rate they were crushed in directly and solely by that weight before the ship B could get to sea and their subsequent total collapse was inevitable. Thus it was not in the course of the voyage that the mischief was done but before ever the voyage began. The same thing happened at Konakry. 229 casks or barrels of palm oil had already been loaded in No. 3 hold at Sherbro. In less than thirty-six hours from the commencement of further loading of oil in this hold at Konakry the log records 2 ft. 8 in. of oil in one bilge in No. 3 and 3 ft. 5 in. C in the other, and this continued with some little variation till the ship went to sea. At the time when the discovery of this amount of leakage is recorded, loading cargo had finished for the day, and not only had enough puncheons been taken in to complete the oil stowed in that hold, but 1,095 bags of kernels as well, though whether all of them went into that hold is not quite certain. Deep holds, however, would naturally be proceeded with before shelter deck spaces were filled up. D Before the ship left port and shifted to the outer anchorage the oil in No. 3 port bilge had risen to 4 ft. 2 in., though the loading of cargo in that hold had not yet finished. In this state she proceeded to sea in perfectly fine weather. This is an explicit record of bad stowage. After that, whether the ship took a list or not and whether she ran into bad weather or not, the oil cargo was ruined and such occurrences could make no difference. I will only add that the log makes no E mention of what happened in No. 4 hold, the remaining hold containing oil, but, as the ultimate condition was found to be the same on arrival, there is no reason to doubt that the beginning of it was the same also.

A simple calculation will show that the damage caused by the improper stowage can only be remotely connected with the unseaworthiness alleged. The plaintiffs' expert, Captain Cockrill, to whom is due the theory that the ship ought to have F had a 'tween deck, original or temporary, in order to make her fit to take this cargo, gives the following figures. If they cannot be accepted, for other witnesses vary them somewhat, then his whole expert evidence is unworthy of credit. The puncheons are 2 ft. 10 in. in diameter. No more than three tiers, he says, should be stowed upon them. Thus we get a maximum safe height of oil casks of 8 ft. 6 in. Now, No. 2 hold is 25 ft. deep. In this hold, therefore, dividing its total depth, G within reasonable variations, between the upper and lower space, 'tween decks could not be so laid that there would not remain, either in the upper or the lower hold, 3 ft. to 4 ft. of empty space above any oil cargo that could be safely stowed there, for I put aside as fantastic the idea of a lower hold 9 ft. deep and a 'tween deck of 16 ft. above it and the whole evidence assumes that the proper place for oil casks is at the very bottom of the ship. If so, the safety of the oil cargo, even H in a ship so equipped, must still depend, and directly depend, on the stowage. If other cargo is put on the casks to fill up the hold, the casks suffer. If the captain does what he ought to have done here and refuses to put an unsafe weight on the oil casks, all is well. In other words the whole difference between damage and safety depends in any case on proper stowage alone, and unseaworthiness, if unseaworthiness there was, at any rate was not the direct cause of the loss.

I The respondents argued that the ship was one in which the cargo actually loaded could not be carried in safety, and on this ground they distinguished *The Thorsa* (8), a case not impeached, nor, in my opinion, impeachable. There it was said the chocolate or the cheese might have been stowed somewhere else; here, with the palm kernels, this could not be, for the structure of the ship did not permit it. My answer is a short one. The peccant palm kernels need not have been put into the ship at all; they could have been left behind. The only cargo that the plaintiffs are concerned with is the damaged palm oil; they cannot lose their rights, and equally they cannot enlarge them, because contracts of carriage were made with

third parties. The warranty they rely on is a warranty with respect to their own cargo, that at the time when these puncheons were tendered for shipment the *Grelwen* was then fit to receive them, whatever might befall them afterwards, and if that warranty was satisfied they must look for their remedy to some cause of action in damages for what was done to their cargo by the stowage of the cargo of other persons. Whether the palm kernels that did this damage were the plaintiffs' own palm kernels or not, they failed to prove. It is not unlikely, but it remains uncertain. As long as a ship was supplied, which was seaworthy for the particular cargo, as to which the warranty of seaworthiness now in question was given, I cannot see how the ship became unseaworthy or how that warranty was broken by things done or omitted to be done under other contracts relating to other cargo. The question on this warranty is one of the ship's fitness for this shipment, not of her fitness for this shipment along with others. It is alike novel and contrary to principle to measure the warranty, which is implied with regard to the palm oil, by reference to other cargo, with which the oil had no connection except that of association under the same deck. The owners of the oil are entitled to have the oil and the kernels properly stowed in relation to each other, but not to have the whole cargo included in one common warranty of seaworthiness. It must be remembered that the *Grelwen* was chartered to run in a line, loading on the berth as a general ship and calling at various ports to pick up such parcels of country produce as might be available. There is nothing in the charter to bind the shipowners towards the respondents at all. Their contract with the plaintiffs is in the bill of lading, if anywhere. As to the relations between the shipowners and the charterers they were not gone into at the trial, but there is no evidence that, even as between these parties, there was any contract but the bill of lading contract. If the captain had shut out all palm kernels that he could only carry in holds containing oil, there is nothing to show that the plaintiffs could have objected, and, apart from a point to be mentioned presently with regard to the plaintiffs' own consignments of palm kernels, he was contractually free to do whatever was right in the interests of the palm oil, even to the extent of sailing with holds Nos. 2, 3, and 4 half empty. The plaintiffs' real case is, in my opinion, that he ought to have done so.

It was, however, contended for the respondents that, so far the case being one of bad stowage, the captain had no choice but to stow the cargo as he did; that he only performed his duty in the arrangements which were adopted; and that improper stowage is a complete misnomer. With all respect I think that this argument is a mere paradox and rests on a complete misapprehension both of the evidence and the captain's duty. The captain's evidence is that at Sherbro the charterers' shore agent came on board and "told him what to load." The ship's mate, however, was in charge of the loading itself. On this slender statement, which was not further developed or even put to the shore agent when he gave evidence, it is said that the captain had no choice in the matter, and that, as the total cargo could not have been so stowed as to prevent some such damage as occurred, it follows that the ship was not fit to receive and carry her cargo and this palm oil as part of it, but was unseaworthy from the outset. How can the captain's duty to stow the whole cargo and every parcel of it properly—a duty owed alike to the shippers of cargo and to the owners of the ship—be affected by the mode in which the charterers choose to carry on their business of procuring cargo? If they arrange to have certain parcels of local produce lifted by a particular vessel and it turns out that the captain cannot take them all without improperly stowing some of them, how does that turn his improper stowage, when he nevertheless does take them, into something else, which is not improper? Again, if the charterers require him to load an aggregate cargo, for which his ship is not fit, how does that prevent her from being fit for a several parcel, whose owners make no demand or contract at all as to the carriage of the deleterious parcels along with it? The charterers' rights depend on the time charter, whose provisions were but little examined at your Lordships' Bar. It seems to have been

A assumed that the captain was bound under the charter to receive and stow the cargo actually tendered to him on behalf of the various consignors, and that on behalf of his owners he had an interest in accepting and stowing it all, whether it could be properly stowed or not. This is not so. The charter is a time charter; the hire is a fixed sum per month. The captain could not increase that hire by accepting more cargo than he could safely stow; he could only impose liability on B his owners under bills of lading signed on their behalf and this without any corresponding advantage to them. Nothing in the charter requires him to take cargo irrespective of his ability to stow it properly, nor is there anything in it to relieve him from his responsibility for seeing to the stowage of his own ship. No doubt it might be a somewhat difficult problem for him to estimate exactly what weight of palm kernels the oil puncheons would bear, but that is the kind of C difficulty a captain is expected to solve. It is his business to keep on the safe side. Nothing in the charter, at any rate, operates to relieve him from this duty or to transfer its effects to the ship herself, merely because she is not so built that errors in stowing cannot do anybody any harm. Even if the captain's conduct was excusable in him, the stowage remains improper, for it does not depend on his difficulties but on the cargo's safety.

D The respondents further attempted to found an argument on the accident that several kinds of cargo shipped by the plaintiffs were included at each loading port in a single bill of lading. Nothing really comes of this; the point is a fallacy. For convenience—presumably because the plaintiffs did not contemplate selling any of their cargo while on passage for delivery ex ship at destination—only one bill of lading was signed at each port, but there is nothing in it to make all the E goods named in it one composite consignment to be stowed together. No such contention was gone into at the trial. No such contract is likely in business. The oil and the palm kernels seem to have come aboard at random and quite independently of one another. The mate's receipts for the palm oil at each port of shipment are given without reference to any other cargo. One bill of lading includes goatskins, and the other bags of cocoa, which no one suggests are com- F modities that could or would be stowed or carried with oil casks as parts of a joint parcel. Any warranty with regard to the oil is a warranty arising out of the shipment of the oil—for the bill of lading itself is only evidence of the contract of carriage—and does not arise also out of the subsequent shipment of the superincumbent kernels. In fact the Sherbro cargo was loaded in the so-called Sherbro River, while the bill of lading was only signed subsequently at Sierra Leone, and G the obligations as to the stowage and carriage of the oil are not complicated or affected by the distinct though parallel obligations as to the kernels. Of course, if the damage was done by a third party's palm kernels, as is quite possible and is left open on the evidence, no question of any warranty but that implied in favour of the plaintiffs can arise at all.

I turn to the question whether the plaintiffs really proved their allegations against H the ship. [His Lordship reviewed the evidence and continued:] I think that in effect the decisions in both the courts below come to this. If the ship had been built on a different plan, if instead of being designed to have deep unobstructed holds she had been provided with 'tween decks or the means of erecting a substitute for 'tween decks, the oil casks would not have been crushed; but what is this except saying that, if the ship had been so designed that those in charge of the I stowage could not commit the particular blunder which they did commit in stowing her, then this cargo would not have been damaged, at any rate in the particular way in which it was damaged? Of course, a ship perfectly fit to carry one cargo may be unfit to carry another and so be unseaworthy in that connection, but a ship does not become unseaworthy merely because her construction or appliances are not fool-proof or because she does not carry about the world contrivances for preventing by anticipation the consequences of any want of care or skill, of which those in charge of the cargo may be guilty. If a captain, having a perfectly good hold at his disposal, puts cargo into it in the wrong way, or puts more cargo into

it than is consistent with the safety of individual packages, the result is not that he makes his ship unseaworthy, but that he proves himself to be an incompetent officer. One result of improper stowage is that damage will result thereby, and the cargo will be discharged at its destination more or less injured during the voyage, but such a loss is not caused by unseaworthiness merely because it happens during the voyage. It is the direct result of bad stowage, even though in a different ship that particular error in stowing could not have been committed. We are not now concerned with any question on the right to make a ship seaworthy for her service in stages, nor is there any suggestion here, as there was in *Cohn* v. *Davidson* (10), that, during or after the loading and before sailing, the ship sustained any damage, which rendered her unseaworthy before proceeding to sea, though she had been seaworthy previously. Such as she was when she loaded the oil, such she was also when she put to sea, and the whole case turns on the ship's original design and construction, and on the absence of any "equipment" or endeavour to fit her with 'tween decks pro hac vice.

It appears to me to have been decided, that, even in the case of something which is a defect in the ship herself, structural or accidental, sufficient to render the ship unseaworthy if not properly handled or adjusted, though I can find no such defect here, it is an answer to an allegation of unseaworthiness to show that, in the ordinary course of proper management, the ship so constructed, or the appliance so adjusted, will be restricted to its proper uses and prevented from being a source of danger. The reasoning of your Lordships' House in *The Schwan* (19) shows that, assuming the three-way cock to have been an unfit contrivance in itself, the ship would nevertheless have been seaworthy if those in charge could in the ordinary course have seen its risks and known how to meet them. Lord Gorell said:

> "The position is this. The vessel was not reasonably fit to carry the cargo in the circumstances, for the cock in question was of an unusual, improper and dangerous character, and those who had to use it on the voyage had no reason to suspect this, though, if they had known the truth, they could have adjusted the cock so as to prevent any risk of water getting to the cargo."

The latter part of this sentence is irrelevant, if the construction of the cock itself was sufficient to make the ship unseaworthy. So, in *Steel* v. *State Line Steamship Co.* (2), the porthole, which was designed to be opened or shut as occasion might require, only became an element of unseaworthiness because the cargo had been so stowed that it remained loose during the voyage, since it could not be got at and fastened. There was no improper stowage of the cargo as cargo, but there was an obstruction to a part of the ship's appliances affecting the proper working of it as part of the ship, and so the ship sailed with an open hole in her side that could not be closed. If the porthole had continued to be accessible, but had been left open by the carelessness of those responsible for shutting it, the ship would not have been unseaworthy, but the officers or crew would have been careless. To load bullion in a ship which has no efficient strong-room, or passengers' luggage in a ship which has nothing but a water-closet to put it into, is not mere bad stowage, if it is bad stowage at all; it is accepting goods for carriage in a ship that has no fit place to put any of them in at all. No case has been cited in which unseaworthiness has been held to arise without the ship or some part of her being affected so as to make her less than fit for her purpose, and I accept the great authority in these matters of Scrutton, L.J., for the statement that the respondents' argument goes beyond any of the decided cases and beyond the principles of the law as to unseaworthiness and produces results in connection with unexceptionable vessels which are almost absurd. I can see no analogy between the separation cloths, dunnage mats, or temporary bulkheads (mere perpendicular separations of planks), mentioned in *Hogarth* v. *Walker* (6), and the elaborate structural alteration of this ship, which the respondents postulate.

Nearly twenty years ago the Court of Appeal held, affirming Channell, J., that

A a ship is not unseaworthy where the mode in which the cargo is stowed practically puts the ventilation system out of action on the voyage, whereby for want of ventilation other cargo is damaged. In that case the cause of action was for bad stowage (*Bond, Connolly & Co. and Woodall & Co.* v. *Federal Steam Navigation Co., Ltd.* (20), and SIR GORELL BARNES, P., treated the case for unseaworthiness as unarguable. If that case stands—and it has not been challenged—the present case
B must a fortiori be one of improper stowage only, for here no part of the ship or her appliances was obstructed or affected at all. She was simply the good ship that she was designed to be. There must have been a point in the loading at which the weight borne by the puncheons changed from an amount that they could carry to an amount that they could not. It seems to me to be a mere paradox to say that beyond that point the ship, theretofore seaworthy in every sense, became on a
C sudden unseaworthy in respect of all the oil already loaded, as well as for any loaded thereafter, and became unseaworthy retrospectively, though nothing had changed except the admission of the further cargo. If this ship had sailed as soon as the oil puncheons were on board, her fitness to load and carry the cargo could not have been impugned. Even as it was, when she sailed, she and all the appliances were exactly the same, structurally and functionally, as they would
D have been in that case, and all attempts to show that in her actual condition she and her cargo were exposed to accidents or perils of the sea to any different or greater extent than if she had had 'tween decks broke down completely on the evidence.

The distinction between unseaworthiness of the ship and improper stowage is very plainly stated in *Wade & Sons Co., Ltd.* v. *Cockerline & Co.* (21) by KENNEDY,
E J., whose judgment was affirmed in the Court of Appeal. He said:

> "I could not give a case in which the immediate cause included in the exceptions . . . could be better exemplified than by what happened in this case. The ship was perfectly seaworthy to be loaded with the cargo upon deck. She did not become an unseaworthy ship, but an accident was produced on board. I suppose that immediately before the accident she could not safely
F taken in any more wood cargo on deck, but she was safe up to that moment. With a little care up to the moment at which the accident happened, the defect in stowage might and, if the stevedores had given heed to the warnings of the officers, would have been set right. I do not see how unseaworthiness of this vessel at any time can properly be alleged. The ship, as a ship, never was unseaworthy to receive the cargo."

G Adapting this language to the present case, I say: "She did not become an unseaworthy ship, but improper stowage was produced on board." Unseaworthiness is a quality of the ship, however arising. A warranty of seaworthiness means that the ship is reasonably fit to

> "meet and undergo the perils of the sea and other incidental risks, to which
H she must of necessity be exposed in the course of the voyage,"

to quote LORD TENTERDEN'S language, adopted in *Kopitoff* v. *Wilson* (7). True, this refers to the laden ship and to her fitness with her cargo to undergo these perils, but her cargo is to be considered distributively, and unfitness with regard to one parcel is not necessarily involved in unfitness as to all. Bad stowage, which endangers the safety of the ship, may amount to unseaworthiness, of course, but
I bad stowage, which affects nothing but the cargo damaged by it, is bad stowage and nothing more, and still leaves the ship seaworthy for the adventure, even though the adventure be the carrying of that cargo.

There is a sense, but I think one sense only, in which the *Grelwen* might be said to have been unfit for the carriage of this cargo. One must distinguish between general fitness for what the nature of the trade requires and fitness to receive and carry a particular cargo, or part of a cargo, tendered in the course of that trade. A ship which in a certain trade, and in certain not improbable combinations of cargo offering in the trade, has to shut out cargo and to sail less than a full ship,

because if she takes the cargo offered she will thereby damage other cargo already loaded, is pro tanto an unprofitable ship. She is not as good a freight-earner as she might be. For the cargo, however, that she does carry without sacrificing it to enable her owners to carry more cargo and so earn more freight she is perfectly fitted and quite seaworthy. All that can be said is that she might have paid better in another trade, or that another ship differently built might have paid better in the same trade. The *Grelwen* was not structurally unfitted for the West African trade, nor is that the question; but it may be that ships of another design might do better than she could. The circumstance, so much harped upon, that all Elder, Dempster & Co., Ltd.'s own ships had 'tween decks is really accidental. Being better suited to the trade, they were more able to load full cargoes, however made up; the point is not that they can carry palm oil better than the *Grelwen*, but that they can carry palm kernels too. So far as I can see, if an entire cargo of palm kernels be assumed the *Grelwen* is better fitted for its carriage than a 'tween deck ship would be, for, with her unencumbered holds and absence of 'tween decks to occupy cargo space, she can carry more palm kernels than a ship of the same dead-weight capacity equipped with 'tween decks. Really that is all.

Beyond all doubt, the plaintiffs, the owners of the oil cargo, have been very badly used, and, as the oil was carried on terms which relieved the defendants from liability for bad stowage, and only make them liable if the plaintiffs can show the ship to have been unseaworthy, I am very sensible of the temptation to do substantial justice by accepting a finding of unseaworthiness. The consequences of such a finding are, however, grave, since unseaworthiness affects not merely the contracts of carriage but the contracts of insurance. The unseaworthiness alleged consists in this—that a ship, unimpeached in herself, built to have holds unencumbered by transverse 'tween deck beams, is unfit to engage in the ordinary carrying trade of the West African coast unless, in some mode or other, she is fitted with 'tween decks and so made structurally other than what she was designed and built to be. Accordingly, I have thought it right to resist the impulse to take the injured plaintiffs' part and have ventured to examine the facts closely, lest I should arrive at a conclusion that would be seriously inconsistent with the way in which this class of ship is and necessarily must be employed in commerce. Ships built under the Isherwood patents are a numerous, and, so far as I know, an accepted type of ship, and in their freedom from 'tween decks and 'tween deck beams they have an advantage for carrying larger cargoes, which is part of their design. I shrink, as SCRUTTON, L.J., shrank, from saying on this evidence that in the ordinary West African trade such a ship is an unseaworthy ship by reason of her construction and design. If the question had not been encumbered with the technicalities and refinements of modern bills of lading it would not have occurred to anyone acquainted with practical shipping to affirm that this ship was unseaworthy, or to dispute that her cargo was improperly stowed. I could have understood that it might be argued, perhaps paradoxically, that the ship was not reasonably fit to load and carry this oil because she was in charge of a captain and mate who were without experience of such a cargo and knew their business no better thant o overload the puncheons till they inevitably collapsed; but the argument which actually has been advanced is, I think, one which begins and ends with the circumstance that improper stowage is here the subject of an exception, unless the ship was what is called unseaworthy, whereby the loss occurred.

There was, finally, an argument that the shipowners might be liable in tort, or at any rate as bailees quasi ex contractu, though the charterers and their agents were not. This fails, to my mind. *Hayn* v. *Culliford* (12) was the authority on which the respondents contended that the shipowners were responsible for misfeasance, consisting in bad stowage, even though they were strangers to the contract of carriage. That case has little resemblance to such a case as this. There DENMAN, J., found that the defendants were, in fact, parties to the bill of lading and, as the evidence supported that finding, the observations of the Court of Appeal as to an alternative cause of action in tort were obiter. Of the various

reports of the case, that in 40 L.T. 536 alone states the arguments of counsel, and from it BRAMWELL, L.J., appears to have treated the case as analogous to *Marshall* v. *York, Newcastle & Berwick Rail. Co.* (22), where the only question was one of the right of a servant, whose master bought his ticket, to claim for the destruction of his own luggage. There is thus no connection between *Hayn* v. *Culliford* (12) and the present case, where the *Grelwen* was temporarily placed in a well-known line, trading under a well-known form of bill of lading. Further, so far as I know, *Hayn* v. *Culliford* (12) is now regarded as an authority in ordinary shipping cases only upon the question of the meaning of "negligence in navigation" or similar expressions. It may be that in the circumstances of this case the terms to be inferred from the reception of the cargo for carriage to the United Kingdom amount to a bailment upon terms which include the exceptions and limitations of liability stipulated in the known and contemplated form of bill of lading. It may be that, the vessel being placed in the Elder, Dempster & Co., Ltd.'s line, the captain signs the bills of lading and takes possession of the cargo only as agent for the charterers, though the time charter recognises the ship's possessory lien for hire. The former I regard as the preferable view, but, be this as it may, I cannot find here any such bald bailment with unrestricted liability, or such tortious handling entirely independent of contract, as would be necessary to support the contention. I think the appeal ought to be allowed with costs here and below, and that judgment should be entered for the defendants.

LORD CARSON.—I agree that the appeal should be allowed, and I have nothing to add to the opinions of my noble and learned friends LORD CAVE and LORD SUMNER, with which I concur.

Appeal allowed.

Solicitors: *Lawrence Jones & Co.*; *Pritchard & Sons*, for *A. M. Jackson & Co.*, Hull; *Rawle, Johnstone & Co.*, for *Hill, Dickinson & Co.*, Liverpool.

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

BALDRY *v.* MARSHALL, LTD.

[COURT OF APPEAL (Bankes, Atkin and Sargant, L.JJ.), November 20, 1924]

[Reported [1925] 1 K.B. 260; 94 L.J.K.B. 208; 132 L.T. 326]

Sale of Goods—Implied condition of fitness—Exception of sale of article under trade name—Extent of application of exception—Purchase of motor car "to standard specification" after informing seller of requirements—Sale of Goods Act, 1893 (56 & 57 *Vict.*, *c.* 71), *s.* 14 (1) *proviso.*

By s. 14 (1) of the Sale of Goods Act, 1893: "Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill and judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose, provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose."

The buyer told the sellers, motor-car dealers, that he wanted a car which would be flexible, easily managed, comfortable, and suitable for the ordinary purposes of a motor car. The sellers said that they thought that a B. car

would satisfy the buyer's requirements, the buyer inspected a B. car, and entered into a written agreement with the sellers to buy "on the terms and conditions hereinafter specified one eight-cylinder B. car, fully equipped and finished to standard specification as per the car inspected." A B. car similar to the one he had inspected was delivered to the buyer who later found that it was not suitable and claimed from the sellers the return of the purchase money.

Held: for the proviso to s. 14 (1) to apply the buyer must buy an article by its trade name in such circumstances that it is clear that he is not relying on the seller's skill and judgment; that could not be said in the present case; and, therefore, the buyer was entitled to succeed.

Per SARGANT, L.J.: In my judgment, the proviso does not apply to an article such as a motor car which is sold under a very elaborate and specific description.

Notes. Referred to: *Cammell Laird & Co., Ltd.* v. *Manganese Bronze and Brass Co., Ltd.*, [1934] All E.R.Rep. 1; *Nicholson and Venn* v. *Smith Marriott* (1947), 177 L.T. 189; *Wilson* v. *Rickett Cockerell & Co.*, [1954] 1 All E.R. 868.

As to terms as to quality or fitness implied in a contract of sale, see 29 HALSBURY'S LAWS (2nd Edn.) 63 et seq.; and for cases see 39 DIGEST 438 et seq. For Sale of Goods Act, 1893, see 22 HALSBURY'S STATUTES (2nd Edn.) 988.

Cases referred to:

(1) *Wallis, Son and Wells* v. *Pratt and Haynes*, [1910] 2 K.B. 1003; 79 L.J.K.B. 1013; 103 L.T. 118; 26 T.L.R. 572, C.A.; reversed, [1911] A.C. 394; 80 L.J.K.B. 1058; 105 L.T. 146; 27 T.L.R. 431; 55 Sol. Jo. 496, H.L.; 39 Digest 477, *996*.

(2) *Chanter* v. *Hopkins* (1838), 4 M. & W. 399; 1 Horn & H. 377; 8 L.J.Ex. 14; 3 Jur. 58; 150 E.R. 1484; 39 Digest 447, *753*.

(3) *Prideaux* v. *Bunnett* (1857), 1 C.B.N.S. 613; 140 E.R. 252; 39 Digest 447, *755*.

(4) *Ollivant* v. *Bayley* (1843), 5 Q.B. 288; 114 E.R. 1257; sub nom. *Oliphant* v. *Dayley*, Dav. & Mer. 373; 13 L.J.Q.B. 34; 7 Jur. 1130; 39 Digest 441, *701*.

(5) *Wimble, Sons & Co.* v. *Lillico & Son (London)* (1922), 38 T.L.R. 296; 39 Digest 436, *653*.

Appeal by the defendants from an order of GREER, J., in an action tried by him without a jury.

The plaintiff was a stockbroker and was the owner of a Talbot racing car. The defendants, who were motor-car dealers, were, inter alia, agents for the sale of Bugatti cars. Early in 1923 the plaintiff interviewed the defendants and said he wanted a car which would be flexible, easily managed, and "comfortable and suitable for the ordinary purpose of a touring car." The defendants said that they thought a Bugatti car would satisfy these requirements, and the plaintiff subsequently inspected an eight-cylinder Bugatti car, which was then in an unfinished condition at the coach-builder's. On May 4, 1923, the plaintiff entered into a written agreement with the defendants to purchase "on the terms and conditions hereinafter specified one eight-cylinder Bugatti car, fully equipped and finished to standard specification as per the car inspected at the coach-builder's," at the price of £1,150 upon certain specified terms. Among the terms and conditions printed on the back of the document were the following:

"The company reserve the right to withdraw any model or alter specifications or prices without notice. Illustrations and specifications must be taken as a general guide and not as binding in detail,"

and

"Guarantee the same as received by us (the defendants) from the manufacturers, a copy of which can be supplied on application."

The guarantee given by the manufacturers to the defendants, which was for twelve months against breakage of parts due to faulty material contained the following clause:

> "The foregoing guarantee is accepted instead of and expressly excludes any other guarantee or warranty express or otherwise."

A Bugatti car similar to the one he had inspected was delivered to the plaintiff, and he paid to the defendants £1,050, being a part payment of the agreed purchase price. Subsequently the plaintiff found upon testing the car that it was not suitable for the purpose for which he required it, and he brought the present action claiming the return of the purchase money. GREER, J., held, that the plaintiff was justified in rejecting the car upon the ground that there was a breach of the condition implied in the written agreement under s. 14 (1) of the Sale of Goods Act, 1893, that the car should be reasonably fit for touring purposes. The defendants appealed.

Jowitt, K.C., and *Astell Burt* for the defendants.
Neilson, K.C., *Shove*, and *Wynn Werninck* for the plaintiff.

BANKES, L.J.—This is an appeal from a judgment of GREER, J., and upon the facts as found by the learned judge his conclusion was, in my opinion, quite right. I need not set out the history of the case in any great detail, but I would refer to the first two letters in the correspondence from which it appears that on April 13 the plaintiff wrote a letter to the defendants saying:

> "Can you tell me if the Bugatti eight-cylinder is likely to be on the market this year? If so, will you send particulars,"

indicating that, according to his (the plaintiff's) impression, this was a new type of car which was going to be put upon the market and that he understood it to be an eight-cylinder car made by Bugatti. The answer of the defendants on April 17 says, among other things:

> "As no doubt you are already aware we specialise in the sale of these cars."

I think the defendants' letter intimated to the plaintiff that he might rely upon them as specialists in the sale of these cars and as persons upon whose skill and judgment he could properly rely. There was a conversation which preceded the contract and at that conversation, according to the learned judge, the plaintiff made plain to the defendants the purpose for which he required the car. I need not go into the facts in relation to that part of the case, because the learned judge who heard what the purpose was from the plaintiff's mouth and had himself been in the car to ascertain whether the car did fulfil that purpose, came to the conclusion that it did not. In those circumstances one passes on to the contract which was in a printed form. Although it is called a purchase agreement it is in the form of a request by the plaintiff to the defendants to supply him with an eight-cylinder car fully equipped and finished to standard specification "as per the car inspected at the coach-builder's. This order is subject to confirmation." I assume it was confirmed. On the back there is this very significant intimation (it is very significant, it seems to me, when people try to establish that this particular car had a trade name) under a heading which is in big print.

> "Alterations to prices and specifications: The company reserves the right to withdraw any model or alter specifications or prices without notice. Illustrations and specifications must be taken as a general guide and not as binding in detail."

The agreement is for an eight-cylinder Bugatti car fully equipped and finished to standard specification as per the car inspected at the coach works.

Speaking for myself I should be prepared to decide this case upon the ground that taking this contract as a whole it is not a sale of a car by any accepted trade name. But I do not propose to decide the case entirely upon that ground, because it seems to me that it is quite possible to go further and to take the same view as

the learned judge took having regard to the decision in *Wallis* v. *Pratt* (1). This purchase agreement contained a clause that the guarantee was to be "the same as received by us from the manufacturers, a copy of which can be supplied on application." When one comes to look at that guarantee, it purports to be an intimation by the manufacturers that they are prepared to guarantee the original purchaser for twelve months. I think myself there is a good deal to be said for the view that these two documents might be construed as an intimation by the manufacturers that the agent might pass on this contract to the original purchaser in such a way as to make the original seller, the manufacturer, and the original purchaser parties to the contract and guarantee. But again I do not decide the case upon that ground. I take the same view that the learned judge took, namely, that the effect of these two documents is that the defendants incorporated in their contract a guarantee substituting themselves for the manufacturers. The effect, therefore, is that this guarantee is to be read as though it were a guarantee in which the name of the defendants was inserted instead of that of the manufacturers. It uses the terms "guarantee," "warranty" and "condition." It has been suggested, in the course of the argument, that in a business-man's mind there is very great confusion between those terms. That may be very true, but the law does not recognise any confusion. If there is one thing more clearly established than another it is the distinction between a warranty and a condition. It is quite true that in certain circumstances a condition may become and be used as a warranty, but the distinction between the two is quite plain. It was very marked in *Wallis* v. *Pratt* (1), where, although a business man had endeavoured to cover himself as completely as he could by the use of the word "warranty," and by giving a certain warranty had sought to exclude any liability for any other possible warranty, the House of Lords ultimately decided that he had not used words which touched the question of his liability under the condition, and held him responsible.

Here, in my opinion, reading this guarantee as one likes, it speaks of nothing but what the law would recognise as a warranty. Whether it uses the word "guarantee" or whether it uses the word "warranty" all that this guarantee amounts to is an attempt by the person who gives it to exclude any liability for anything except what is expressly covered by this particular guarantee. That being so, there being here no exclusion of any implied condition, we have to consider what s. 14 of the Sale of Goods Act, 1893, means. I do not propose to attempt to lay down a definition of what the proviso to the exception in s. 14 (1) exactly means, but I can safely say that it does not include this case because, in my opinion, there was no sale here under a trade name. I think I can go safely further than that and say this, to give three illustrations of cases which it seems to me indicate the meaning of the proviso. The first case is where a buyer asks a seller for an article which will fulfil some particular purpose, and in answer to that the seller sells him an article by a well-known trade name. It seems to me to be quite clear that the proviso applies to that case. Then there is another case where a buyer says to the seller: "I have been recommended such an article," calling it by its trade name. "Will it suit my particular purpose which is so-and-so?" and the seller thereupon sells him the article without more. It seems to me again that the proviso applies to that case. But there is a third case where a buyer goes to a seller and says: "I have been recommended so-and-so," giving its trade name, "as suitable for the particular purpose for which I want it. Please sell it to me." In those circumstances it seems to me that the proviso does not apply. I am inclined to think that the key to the meaning of the proviso is to see whether or not the buyer has specified an article by its trade name in such a way as to indicate that he is satisfied, at any rate, rightly or wrongly, that it will fulfil his particular purpose and that he is not relying upon the skill or judgment of the seller, however great that skill or judgment may be. In my opinion, the view taken by the learned judge of this case was quite correct and the appeal must be dismissed with costs.

ATKIN, L.J.—I agree, although I am bound to say that as in other cases I have had considerable difficulty in construing the proviso to s. 14 (1) of the Sale of Goods Act, I regret that in this particular case we have not the assistance of the learned judge's view upon this matter, because he happens by inadvertence not to have dealt with the matter at all. Possibly it was not put clearly before him at the trial. I am quite satisfied with the learned judge's finding of fact; and apart from the proviso I should assume that there was to be implied in the contract a condition that the goods were reasonably fit for the purpose for which the buyer wanted the car, namely, for a touring car which would be comfortable for his wife. I am quite satisfied with the finding of the learned judge that there was a breach of that condition.

But the question is whether this is a case of the sale of a specified article under its patent or other trade name. There lurk ambiguities in nearly every word of the proviso. What is meant by a specified article and what is meant by the sale of it under its patent or trade name and what is meant by trade name? I am bound to say that my difficulties have not been entirely resolved in the course of this case. To begin with I do find considerable difficulty in saying that when a person ultimately buys a motor car upon a special specification which is sent to him in reference to an article which he has already seen, although as to chassis and as to body in respect of such a machine as a motor car it can clearly be adapted for the special needs of the purchaser if the purchaser so requires—that there the article is sold under its trade name. It seems rather to be sold under the specification with conditions adapted to the needs of the particular purchaser. If so, that would take the case out of the proviso. But the difficulty again arises in such a case as was put by my Lord, where a buyer goes to a seller whose business it is to deal in goods of the character which he is seeking to buy and says to a dealer in, say, motor vans: "I require a motor van for the purposes of my business. There are special needs that I have to bear in mind. It must not be of excessive weight because of the nature of the roads. It must be of a particular speed and of a particular capacity and power because it is to carry a given maximum load at times up a given hill." The dealer then says to him: "You cannot do better than buy such-and-such a van," naming it, and then a contract is entered into for a sale of a 20-h.p. X. motor van. In those circumstances is the warranty excluded? It seems to me to be very odd if it were.

I think that the real object of the proviso was to meet precisely such a case as *Chanter* v. *Hopkins* (2), where a man wrote to the manufacturer saying:

> "Send me your patent heater and apparatus to fit up my brewing copper with your smoke-consuming furnace."

The goods were sent, and, although it was perfectly obvious from that letter that the purchaser required them for brewery purposes inasmuch as he got that which he had in fact ordered, there was no warranty. That one can understand, and I think it will be found that all the cases which preceded the Act really proceed upon that footing. There was *Prideaux* v. *Bunnett* (3), where a firm had advertised. They called themselves the Smoke Prevention Co., and they had a patent self-closing or smoke-consuming valve. The defendant who filled up a circular said: "Please prepare us a smoke-preventing valve." That was supplied and was insufficient for the purpose. The plaintiff sued for the price, and the defendant made as an answer: breach of warranty that it should be fit for the purpose to which it was to be applied. There was an application for a rule for a new trial, judgment having been given for the plaintiff. COCKBURN, C.J., said:

> "The card refers to a patent article, and the defendant intended to purchase the very thing."

CRESSWELL, J., said:

> "Taking all the evidence together, is it not clear that the order was given for the patented, the ascertained article?"

That case was like *Chanter* v. *Hopkins* (2).

Then there is *Ollivant* v. *Bayley* (4). There the defendant, a cotton printer, called at the plaintiff's premises, and said he wanted a two-colour machine with shafting, &c.; an estimate was sent to him the next day; and he afterwards called again at the plaintiff's and ordered a two-colour machine on the plaintiff's patent principle, but desired to have it stronger than one he had seen at the plaintiff's shop. The plaintiff gave him the following memorandum in writing: "I undertake to make you a two-colour printing machine on my patent principle." That again failed. There in the same way the judge held that the contract was to supply the article which was in fact ordered. CRESSWELL, J., in summing up, told the jury that:

> "If the patent two-colour printing machine was a known, ascertained article, the defendant, having ordered one, must pay for it, whether it answered his purpose or not; but that, if it was not a known, ascertained article, and the defendant ordered a machine for printing two colours, and the plaintiff undertook to supply it, he could not recover the price unless the machine supplied was reasonably fit for the purpose for which it was ordered."

In those circumstances it appears to me probable—I will not say any more—that the right view of the matter is that where the proviso speaks of a specified article under its patent or other trade name it means by that an article specified by the purchaser. In those circumstances, if he specifies the article he wants to buy and if it is sold to him under its patent or trade name, it seems quite plain that the warranty is excluded even though he has made known to the seller the purpose for which he intends to use it. It is, I think, perfectly true that the mere statement of those circumstances seems to negative the idea that the buyer was relying on the judgment or skill of the seller. Nevertheless, I see no reason why there should not be a proviso to the subsection which, at any rate, would meet the first part of it and would make quite plain that in those circumstances no warranty arises and the question has not to be considered whether or not the buyer relied on the skill or judgment of the seller.

That difficulty—and I admit it is a difficulty—being disposed of, it appears to me that the learned judge was proceeding upon entirely the right lines in construing the so-called warranty. The view taken by the learned judge was that inasmuch as the guarantee only states that there shall be no warranty or guarantee, whether statutory or otherwise, except the limited one which has been given, that does not exclude the operation of that which is not a warranty, namely, an implied condition of principal purpose. He applies the reasoning of the House of Lords in *Wallis* v. *Pratt* (1), and, to my mind, it is quite plain that in that case the learned Law Lords also based their decision upon the express difference drawn in the Sale of Goods Act between "condition" and "warranty" and treated the condition that goods were to be equal to description—which is a condition just as the condition of fitness in the present case is a condition—as not being excluded by a clause which excluded warranty. In my opinion, the learned judge was right in treating the word "guarantee" or "warranty" as being different from, certainly as not including, a condition. I think another way of looking at it is this, as was said by FLETCHER MOULTON, L.J., in *Wallis* v. *Pratt* (1), and was said also by at least one of their Lordships in the House of Lords in the same case, namely, that if a person wishes in a contract of sale to exclude what would be the ordinary statutory rights of a purchaser, he must do so in plain and unambiguous terms. In the present case the words are very, very far from being plain. I think that is the right view and I think a similar view was quite correctly expressed by MCCARDIE, J., in *Wimble, Sons & Co.* v. *Lillico & Son (London)* (5).

I have no difficulty in this case in coming to the same conclusion upon this point because it seems to me that the form of contract in this case is very carefully drawn so as to conceal from the buyer the fact that the warranty is a very limited warranty. If the sellers consider that it is to their advantage to draw their contract

of sale in such terms as not to express upon the face of it the guarantee at all and to refer to a guarantee which when it is looked at—if it is ever looked at—will be found to be of a very limited nature, I think they cannot complain if the courts come to the conclusion that they have failed to take sufficient care to make that guarantee a contractual term in the sense in which they may have intended it. I agree with the decision given by the learned judge and I think this appeal should be dismissed with costs.

SARGANT, L.J.—I am of the same opinion and I will only deal with the question of the proviso to sub-s. (1) of s. 14 of the Sale of Goods Act. The proviso is in these terms:

> "provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose."

It seems to me that the articles which are dealt with in that proviso are in the main, at any rate, and primarily patent medicines and common articles sold under well-known trade names. In my judgment, the proviso does not apply to an article such as the motor car in the present case, which is sold under a very elaborate and specific description.

What, then, is the meaning and effect of the proviso, because, if a specified article is ordered, it cannot be, apart from anything else, that the buyer who orders it is relying upon the judgment of the seller, for the proviso applies only to the case of a contract for sale of a specified article under its patent or other trade name. It seems to me that this is one of the mischiefs which it was sought to prevent by the proviso. It is well known that patent medicines and articles sold under trade names are very often sold under puffing or laudatory trade names which imply that the article will perform a certain definite function satisfactorily. Take such a case—I am not sure that this is an actual case—as holeproof hose, or of "perfection" soap, or a case, which I came across in my experience as a judge, of someone in the Isle of Wight who sold a patent medicine as a stomach strengthener. Suppose someone came and ordered holeproof hose or a stomach strengthener, he would be obviously relying upon the skill and judgment of the vendor to sell him an article which would produce the desired results; that would be implied from the name of the article which was used. But if there is on the market a well-known article known as holeproof hose, then it seems to me that the proviso is aimed at preventing the ordering of that article under the laudatory name from creating the implication that the buyer is asking the seller to provide him with something which fulfils the requirements indicated by the name. That, I think, is the main purpose of the proviso, although I do not say that it is the only purpose. Beyond that it seems to me that too much importance has been attached to the proviso in the argument on behalf of the defendants, because it seems to me that the proviso applies in the absence of other matters, that is to say, that primâ facie the ordering of the article under that name is not to raise the implication. The proviso does not say that in every case of that sort sub-s. (1) shall be excluded notwithstanding anything else that may have occurred. In my judgment, although a person may be ordering an article under a patent or other trade name within the meaning of the proviso, yet if at the same time as the order is given the buyer makes it clear to the vendor that he is relying upon the skill and judgment of the vendor for the purpose of convincing or assuring himself that the article will produce the results held out, then I think that the proviso has no application and the buyer is entitled to the benefit of the provisions of sub-s. (1). I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *George A. Herbert*; *Christopher & Son.*

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

A

ATTORNEY-GENERAL *v.* WESTMINSTER CITY COUNCIL

[COURT OF APPEAL (Sir Ernest Pollock, M.R., Warrington and Sargant, L.JJ.), June 2, 4, 1924]

[Reported [1924] 2 Ch. 416; 93 L.J.Ch. 573; 131 L.T. 802; 88 J.P. 145; 40 T.L.R. 711; 68 Sol. Jo. 736; 22 L.G.R. 506] B

Library—Public library—Right of library authority to close library building and use it for general administrative purposes—Letting of library building when not required—Temporary letting only.

Under s. 12 (4) of the Public Libraries Act, 1892, a library authority may let a building or land vested in them for the purposes of the Act, which is not required for those purposes, but the letting must be only temporary, and the authority has no right to close such a building and incorporate it into the buildings held by the authority in their capacity as city or other council and use it for the general administrative purposes of the district. C

Attorney-General—Institution of proceedings—Enforcement of public rights—Right to sue not to be questioned by court—Claim for injunction—Need to prove commission of public wrong. D

The discretion as to the institution of proceedings for the enforcement of public rights is a matter for the Attorney-General, and the court must accept the discretion which has been exercised by him and cannot question his right to sue. If the Attorney-General, acting on behalf of the public, in the exercise of his discretion as a public officer, comes to the conclusion that he is E justified in asking the court to restrain an illegal act on the part of a public body, the court is not entitled to refuse an injunction merely because there is no evidence of any public wrong being done.

A.-G. v. *Great Eastern Rail. Co.* (1) (1879), 11 Ch.D. at p. 500, and *L.C.C.* v. *A.-G.* (2), [1902] A.C. at pp. 168, 169, applied.

Notes. Referred to: *A.-G.* v. *Ripon Cathedral* (*Dean and Chapter*), [1945] 1 F All E.R. 479.

As to the powers and duties of library authorities, see 24 HALSBURY'S LAWS (3rd Edn.) 636 et seq.; and as to proceedings by the Attorney-General for an injunction, see ibid., vol. 21, pp. 403, 404. For cases see 16 DIGEST 481–488 and 38 DIGEST 227. For Public Libraries Act, 1892, see 19 HALSBURY'S STATUTES (2nd Edn.) 148. G

Cases referred to:

(1) *A.-G.* v. *Great Eastern Rail. Co.* (1879), 11 Ch.D. 449; 48 L.J.Ch. 428; 40 L.T. 265; 27 W.R. 759, C.A.; affirmed (1880), 5 App. Cas. 473; 49 L.J.Ch. 545; 40 L.T. 265; 28 W.R. 769, H.L.; 16 Digest 486, *3684*.

(2) *A.-G.* v. *L.C.C.*, [1901] 1 Ch. 781; 70 L.J.Ch. 367; 84 L.T. 245; 49 W.R.Dig. H 97; 17 T.L.R. 309, C.A.; affirmed sub nom. *L.C.C.* v. *A.-G.*, [1902] A.C. 165; 71 L.J.Ch. 268; 86 L.T. 161; 66 J.P. 340; 50 W.R. 497; 18 T.L.R. 298, H.L.; 16 Digest 482, *3637*.

Witness Action brought by the Attorney-General, on the relation of the rector of St. Martin-in-the-Fields and the vicar of St. Paul's, Covent Garden, both in London, claiming a declaration that the defendants were not entitled to use the I library building in St. Martin's Lane for their own administrative purposes, or to incorporate it in their city hall, or to use it otherwise than as a public library, and for an injunction accordingly.

In 1887 the parish of St. Martin-in-the-Fields adopted the Public Libraries Act, and pursuant thereto a site in St. Martin's Lane was acquired by the Public Libraries Commissioners for the parish, and a public library was opened there for the parish in 1889. The earlier Public Libraries Acts were repealed by s. 28 of the Public Libraries Act, 1892, and it was thereby provided that an earlier adoption

of those Acts should be deemed to be an adoption of this Act. In 1893 the parish of St. Paul's, Covent Garden, adopted the Public Libraries Act, 1892, and came to an arrangement by which the library in St. Martin's Lane was used as a joint library for the two parishes. By the London Government Act, 1899, the two parishes became included in the area of the Westminster City Council, and by cl. 2 of the London (Adoptive Acts) Scheme, 1900, the Commissioners for Public Libraries in any existing parish ceased to exist, and their powers, duties, property, and liabilities were transferred to the council of the metropolitan borough comprising that parish. By the City of Westminster (Adoptive Acts) Scheme, 1902, it was directed that the Public Libraries Acts, 1892 to 1901, should be administered by the defendants "uniformly throughout the parishes comprised in that city," and that it should form a "single library district." The library in St. Martin's Lane continued in use till the outbreak of the war of 1914–1918, when it was closed and used for national purposes by the defendants. It remained closed till April, 1919, when, as a result of protests of ratepayers, the reference library on the first floor was opened till February, 1922. In 1920 the defendants decided to incorporate the library into the city hall for use for administrative purposes, and up to the date when the writ in this action was issued no alternative premises for the library had been acquired. Tomlin, J., granted a declaration that the defendants were not entitled to use the library premises for their administrative purposes, or to incorporate the same in the city hall, or to use the same otherwise than for the purposes of the Public Libraries Act, and an injunction in the same form. The defendants appealed.

By the Public Libraries Act, 1892, s. 12:

"(1) For the purpose of the purchase of land under this Act by a library authority the Lands Clauses Acts, with the exception of the provisions relating to the purchase of land otherwise than by agreement, shall be incorporated with this Act. (2) The library authority of any library district which is an urban district may, with the sanction of the Local Government Board, appropriate for the purposes of this Act any land which is vested in that authority. (3) A library authority may, with the sanction of the Local Government Board, sell any land vested in them for the purposes of this Act, or exchange any such land for other land better adapted for these purposes, and the money arising from the sale or received by way of equality of exchange shall be applied in or towards the purchase of other land better adapted for the said purposes, or may be applied for any purpose for which capital money may be applied, and which is approved by the Local Government Board. (4) A library authority may let a house or building, or any part thereof, or any land vested in them, for the purposes of the Act, which is not at the time of such letting required for those purposes, and shall apply the rents and profits thereof for the purposes of this Act."

Maugham, K.C., and *Alan Ellis* (*Sheldon* with them) for the defendants.

Macmorran, K.C., *Giveen*, and *W. Lawson Campbell* for the Attorney-General.

SIR ERNEST POLLOCK, M.R.—This is an appeal from a decision of Tomlin, J., which raises an interesting point as to the powers of the city of Westminster and the exercise of their duties as the library authority for the area of the city.

Shortly put, the question which is raised is this: Are the city of Westminster, who have had a library in St. Martin's Lane, able to close that library and make provision for the library elsewhere and make use of the premises which have been closed for the purposes of the administration of the many important duties which fall to them as the city of Westminster? The whole question really turns upon the meaning and effect of s. 12 of the Public Libraries Act, 1892. That section comprises four subsections, and sub-s. (2) provides:

"The library authority of any library district which is an urban district may, with the sanction of the [Minister of Education] appropriate for the purposes of this Act any land which is vested in that authority."

By sub-s. (3): A

"A library authority may, with the sanction of the [Minister of Education] sell any land vested in them for the purposes of this Act, or exchange any such land for other land better adapted for those purposes . . ."

and apply any money received towards the purchase of other land better adapted for the purposes of the Act or for a purpose approved by the education authority. B With regard to these two subsections, it is clear that no approval of the authority has been obtained to what has been done. Subsection (4), which is, to my mind, ancillary to the powers which have gone before, gives power to a library authority to let a house, or any part of a house, or any land vested in them, which is not at the time of such letting required for the purposes of the Act. In my judgment, the powers which are conferred by sub-s. (4) are not intended to be a contradiction C of the powers granted by sub-s. (3). I do not think it would be possible for a library authority to let for such a period as ninety-nine years, which might enable them to do what they could not do under sub-s. (3). Under sub-s. (4) they do not have to obtain the approval of the education authority to a letting, whereas, under sub-s. (3), for the purposes of sale or exchange, they do. If sub-s. (4) were interpreted as meaning that they had all powers of letting, so that they could let D for a very long term of years at, say, a peppercorn rent, the powers under sub-s. (4) would render nugatory the restrictions which are imposed by sub-s. (3). In my judgment, sub-s. (4) is to be read as ancillary to, and only as ancillary to, the powers, and is intended to confer upon a library authority the right to let for temporary purposes land which is not, at the time of the letting, required for those purposes. It is a subsection which was introduced and added to the powers E of the library authority in 1892, and I think it must be read, if not totally subject to, at any rate as ancillary to, and not in contradiction of, the other powers which are contained in s. 12.

What is suggested here is that the city of Westminster, the library authority, have power to close this library in St. Martin's Lane, and to make use of the premises for the purposes of the administration of the city. It appears, on looking F at s. 12, that there is no such power, and I think that, as WARRINGTON, L.J., pointed out, it is very important to observe that they must exercise the powers conferred on them as library authority with a single eye to that capacity, and they are not entitled to, so to speak, pool their powers, or treat their position of library authority as a mere part of their powers as if they were a sanitary authority, or the holders of many other powers which they exercise. They have to exercise G the powers given to them under s. 12, and to deal with the land which has been acquired for the purposes of the library in accordance with the Public Libraries Act.

Counsel, on behalf of the defendants, suggested that, in the present case, no useful purpose would be served by the granting and continuing of the injunction, and he said that, although it was true that the action was brought by the Attorney- H General, yet the matter should be carefully examined and the Attorney-General's powers and responsibilities should be considered and the court should not accede to the Attorney-General's application for an injunction, although founded upon right, in the sense that the statutory powers of a public body had been exceeded, unless and until the court were satisfied that that was, on its merits, a fit and proper course. I am not quite certain that I have stated the proposition submitted I on behalf of the defendants quite accurately; perhaps I have stated it too widely; but I did not intend to do so. On the other hand, I think it is important that there should be no doubt as to what are the powers and duties of the Attorney-General. Counsel for the defendants quoted to us a passage from a judgment of JAMES, L.J., in *A.-G.* v. *Great Eastern Rail. Co.* (1) (11 Ch.D. at pp. 483, 484), which has been referred to in a certain number of cases. Perhaps I may call attention, in referring to that case, to the fact that the learned lord justice's observations about the powers and duties of the Attorney-General were not accepted

by Baggallay, L.J. Indeed, I understand Baggallay, L.J., expressly to dissent from them. He says this (11 Ch.D. at p. 500):

> "It is in the interest of the public that the law should in all respects be respected and observed, and if the law is transgressed, or threatened to be transgressed, as in my opinion it has been by the Great Eastern Railway Co., it is the duty of the Attorney-General to take the necessary steps to enforce it, nor does it make any difference whether he sues ex officio, or at the instance of relators."

Having regard to the observations of James, L.J., it is perhaps important to observe that in that very case Baggallay, L.J., who had the advantage of the experience of a law officer, which James, L.J., had not, immediately took the opportunity to dissociate himself from the observations which had been made. Those observations really are no longer observations which could be taken as well founded, because, in view of what has been now laid down in the House of Lords, in *A.-G.* v. *L.C.C.* (2), I think the discretion of the Attorney-General is not fettered or circumscribed in the way suggested. Perhaps I ought also to refer to the fact that the observations made by James, L.J., in *A.-G.* v. *Great Eastern Rail. Co.* (1) were considered when *A.-G.* v. *L.C.C.* (2) was before this court, Rigby, L.J. ([1901] 1 Ch. at p. 803), says: "For the relators are also plaintiffs," and I gather that he does not accept the view which had been presented as to the duties of the Attorney-General. I think that Vaughan Williams, L.J., says words to the same effect. That case went to the House of Lords, where Lord Halsbury said that with all the respect that every member of the profession would feel towards James, L.J., he did not accept the view that he had presented. He went on:

> "In a case where, as a part of his public duty, he has a right to intervene, that which the courts can decide is whether there is the excess of power which he, the Attorney-General, alleges. Those are the functions of the court; but the initiation of the litigation and the determination of the question whether it is a proper case for the Attorney-General to proceed in is a matter entirely beyond the jurisdiction of this or any other court. It is a question which the law of this country has made to reside exclusively in the Attorney-General. I make this observation upon it, though the thing has not been urged here at all, because it seems to me to be very undesirable to throw any doubt upon the jurisdiction, or the independent exercise of it, by the first law officer of the Crown."

A grave and important duty is cast on the Attorney-General whether or not he will grant his fiat, and whether or not he will allow an action to be brought, either in his own name or upon the relation of others, either by himself or with others joined with him as plaintiffs. After what Lord Halsbury has said, the duty of deciding whether the action is one proper to bring to enforce certain rights must be vested in him, and in him alone, and I have no doubt that that jurisdiction has been exercised, as it always has been exercised, with very great care and with due regard to the public interest and to the responsibility which lies upon the Attorney-General. If he decides that it is a right and proper action to bring, he is entitled to bring the matter before the court, and the court must accept the discretion which has been exercised by him. I add those words of my own, but I also want to emphasise the fact that all that had been said by Lord Halsbury was affirmed and assented to by Lord Macnaghten. Having regard to the position which the Attorney-General occupies before this court, it does not seem to me to be possible to be questioned, as a matter of discretion, whether or not he is entitled to the redress which he asks in the public interest, in reference to matter upon which a public authority has exceeded its powers. The Attorney-General has been satisfied that this is a case in which his duty requires him to take steps to see that that excess or attempted excess of public powers shall be brought to an end. Having regard to that, we are of opinion that the powers of the statute have been exceeded, and I think the Attorney-General has established his right to relief.

It has been said that, in view of the recent events, this court ought not to affirm the injunction. We are informed that the City of Westminster Council are now fortunately able to provide a library in Wardour Street, that they are in process of arranging for a lending library to be established and carried on in the basement of the building in St. Martin's Lane. All that is satisfactory news. There is little doubt that, as a public library authority, they are desirous of affording proper and full facilities, and no doubt they have many difficulties to contend with; but the learned judge appears to have been right to have declared the rights of the parties correctly, and the only remedy for which the Attorney-General can ask in these circumstances is that there should be an injunction restraining the defendants from any further or continuing excess. We are told that the city of Westminster intend to go to Parliament, or it may be that they will go to the [Minister of] Education, as they may be advised. Whether they go to the High Court of Parliament, or to the [Minister], it appears to me that their position will be strengthened by the fact that there is this injunction against them, and that it has been authoritatively established that they have not the power which they purported to exercise. In any event, they would have the opportunity of coming back to the court if the situation should require that some alteration should be made in the injunction; but as the matter stands at the present time the injunction is the right course. The learned judge was correct in his declaration of the law. I think that the injunction must be continued, and that, for the reasons which have been given by TOMLIN, J., the plaintiff, the Attorney-General, is entitled to succeed on this appeal.

WARRINGTON, L.J.—I am of the same opinion. TOMLIN, J., has declared "that the defendants are not entitled to use the library premises for their administrative purposes, or to incorporate the same into their city hall, or to use the same otherwise than for the purposes of the Public Libraries Acts." To that declaration I see no objection. I only wish to add on my own account a few words on the argument addressed to us by the learned junior counsel for the city of Westminster. At the time that these premises were purchased, the library authority in the case of metropolitan districts was not necessarily, and I may say was not simply, the ordinary local authority. It was a separate body of commissioners constituted by s. 22 of the Public Libraries Act, 1892. Subsequently, the library authority as a separate body became merged in the several governing bodies of the metropolitan area, and in this case became merged in the Westminster City Council and the city council is now the public library authority for the city of Westminster. The argument addressed to us was to the effect that this property had become part of the common property of the city of Westminster, capable of being used for any purposes for which the property belonging to the city of Westminster could be used. In my opinion, the answer to that argument is that when the property was acquired there was imposed on it, by the legislation then in operation, a particular purpose for which the property could be used, and the mere fact that for the convenience of administration or for other purposes the legislature has thought fit to get rid of a particular library authority and give the power of that separate authority to the city council cannot, in the absence of express provision, have the effect of withdrawing from the land in question the restrictions which were originally imposed upon it.

With regard to the injunction, it was contended on behalf of the city council that the court ought not, in its discretion, to grant an injunction, even at the suit of the Attorney General, unless the Attorney-General makes out that that which the public body concerned is doing unlawfully is of injury to the public. In support of that, counsel for the council relied upon the well-known passage in the judgment of JAMES, L.J., in *A.-G.* v. *Great Eastern Rail. Co.* (1) (11 Ch.D. at pp. 483, 484). That passage appears in the judgment of JAMES, L.J., only. He had three brethren sitting with him, one of them concurred in his decision, which I will mention directly, and the two others dissented from his decision and from the extreme views expressed by him in the passage in question. That part of the judgment of

A JAMES, L.J., was a dictum; it was not necessary for his decision, because he came to the conclusion on the merits that the Attorney-General was not entitled to the injunction for which he asked. Whatever may be the force of that passage in the judgment of JAMES, L.J., I think that now the question is entirely set at rest by the opinion in the House of Lords of LORD HALSBURY, followed by that of LORD MACNAGHTEN, in *A.-G.* v. *L.C.C.* (2). If the Attorney-General, acting on behalf B of the public, in the exercise of his discretion as a public officer, comes to the conclusion that he is justified in asking the court to restrain an illegal act on the part of a public body, I do not think this court is entitled to refuse the injunction merely because it is said that there is no evidence of any public wrong being done. The real result, if that argument were to be acceded to, would be that in such a case there would be no means of preventing that kind of illegal act on the part of C the public body in question.

It seems to me, therefore, that as far as that is concerned, the learned judge was right in granting the injunction. Nor do I think that anything that has happened since would justify us in discharging or suspending the injunction. It may be said, and has been said, and it may be the fact, that under s. 12 of the Public Libraries Act, 1892, the city council can lawfully carry out an exchange of the land in D question for other land vested in them for other than library purposes. Speaking for myself, I do not express any opinion, adverse or otherwise, on the question whether such arrangements could lawfully be carried into effect; but, inasmuch as the absolute form in which the injunction at present stands might be held to prevent the city council from carrying through and acting on such an arrangement by s. 12, I agree—and as to this counsel for the Attorney-General does not object— E that the injunction should be prefaced by some such words as "without prejudice to the exercise by the city council of the powers conferred upon them by s. 12 of the Public Libraries Act, 1892." In other respects I think that the appeal should be dismissed.

SARGANT, L.J.—I am of the same opinion. I desire to add my protest to that F of WARRINGTON, L.J., against the argument that the council, having become possessed of these premises acquired under the Public Libraries Act, and having other premises acquired under other statutory authority, are entitled to aggregate all their properties and all their powers and use any of their powers with regard to any of their properties. I think their powers in respect of these premises are only powers under the Public Libraries Acts as the library authority, otherwise G illimitable confusion may be caused by a mere consolidation or re-grouping of administrative powers under a single authority. With regard to the position of the Attorney-General, it seems to me to be now well settled that the Attorney-General has the same discretion in authorising, initiating, or pursuing proceedings for the enforcement of public rights as a private individual has in proceedings for the enforcement of his private rights. In neither case can the exercise of the dis- H cretion be questioned by the court. Of course, the discretion as to the relief to be granted, whether by injunction or otherwise, still rests with the court, but as to the principles on which that has to be exercised, I agree with the view expressed by the learned judge towards the conclusion of his judgment. In my view, therefore, the injunction was rightly granted at the time when he granted it, and I cannot see that there is any sufficient change of circumstances since the date of I that judgment as a result of which we ought to vary the substance of the judgment.

SIR ERNEST POLLOCK, M.R.—The appeal will be dismissed with costs, but there will be the addition to the order which WARRINGTON, L.J., has indicated.

Appeal dismissed.

Solicitors: *Allen & Son*; *Travers Smith, Braithwaite & Co.*

[*Reported by* G. P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

A

THE KOURSK

[Court of Appeal (Bankes, Scrutton and Sargant, L.JJ.), February 11, 12, 22, 1924]

[Reported [1924] P. 140; 93 L.J.P. 72; 131 L.T. 700; 40 T.L.R. 399; 68 Sol. Jo. 842; 16 Asp.M.L.C. 374] B

Tort—Joint tortfeasors—Judgment against one joint tortfeasor—Bar to action against other joint tortfeasor—Need for tort to be committed in concert or as part of common plan.

To constitute a joint tort there must be some connection between the act of the one alleged tortfeasor and that of the other. Where, therefore, the negligence of two ships, the K. and the C., caused damage to a third ship, the I., the negligence of the K. consisting in deviating from her course into the track of the C. and the negligence of the C. consisting in not reversing her engines and so coming into collision with the I., C

Held: the two negligences were separate and independent, and not committed in concert or as part of a common plan; the K. and the C. were not joint tortfeasors of the same tort, but were separate tortfeasors of two different torts; and the fact that the owners of the I. had recovered from the owners of the C. damages in respect of the damage caused to the I. by the C. did not bar the owners of the I. from pursuing against the owners of the K. a claim in respect of the damage caused to the I. by the K. D E

Notes. Applied: *Brooke* v. *Bool*, [1928] All E.R.Rep. 155. Referred to: *Debenham's, Ltd.* v. *Perkins*, [1925] All E.R.Rep. 234; *Rowntree & Sons, Ltd.* v. *Frederick Allen & Sons (Poplar), Ltd.* (1935), 41 Com. Cas. 90; *Ash* v. *Hutchinson & Co. (Publishers), Ltd.*, [1936] All E.R. 1496; *The Carslogie*, [1951] P. 167; *Drinkwater* v. *Kimber*, [1952] 1 All E.R. 701; *Jones* v. *Manchester Corpn.*, [1952] 2 All E.R. 125; *Romford Ice and Cold Storage Co.* v. *Lister*, [1955] 3 All E.R. 460. F

As to the liability of joint tortfeasors, see 32 Halsbury's Laws (2nd Edn.) 187–189; and for cases see 42 Digest 975–983.

Cases referred to:

(1) *Brown* v. *Wootton* (1605), Cro. Jac. 73; Moore, K.B. 762; 79 E.R. 62; sub nom. *Broome* v. *Wooton*, Yelv. 67; 21 Digest 221, *555*. G

(2) *King* v. *Hoare* (1844), 13 M. & W. 494; 2 Dow. & L. 382; 1 New Pract. Cas. 72; 14 L.J.Ex. 29; 4 L.T.O.S. 174; 8 Jur. 1127; 153 E.R. 206; 21 Digest 218, *538*.

(3) *Brinsmead* v. *Harrison* (1872), L.R. 7 C.P. 547; 41 L.J.C.P. 190; 27 L.T. 99; 20 W.R. 784, Ex.Ch.; 21 Digest 221, *556*.

(4) *Devonshire (Owners)* v. *Barge Leslie (Owners)*, [1912] A.C. 634; 81 L.J.P. 94; 107 L.T. 179; 28 T.L.R. 551; 57 Sol. Jo. 10; 12 Asp.M.L.C. 210, H.L.; 42 Digest 976, *64*. H

(5) *The W.H. No. 1 and The Knight Errant*, [1910] P. 199; 79 L.J.P. 61; 102 L.T. 643; 11 Asp.M.L.C. 407, C.A.; on appeal sub nom. *Comet (Owners)* v. *The W.H. No. 1 (Owners)*, *The W.H. No. 1 and The Knight Errant*, [1911] A.C. 30; 80 L.J.P. 22; 103 L.T. 677; 11 Asp.M.L.C. 497, H.L.; 41 Digest 700, *5330*. I

(6) *Thompson* v. *L.C.C.*, [1899] 1 Q.B. 840; 68 L.J.Q.B. 625; 80 L.T. 512; 47 W.R. 433; 43 Sol. Jo. 379, C.A.; 36 Digest (Repl.) 126, *637*.

(7) *Petrie* v. *Lamont* (1841), Car. & M. 93, N.P.; 36 Digest (Repl.) 480, 499.

(8) *The Frankland*, [1901] P. 161; 70 L.J.P. 42; 84 L.T. 395; 17 T.L.R. 419; 9 Asp.M.L.C. 196; 41 Digest 798, *6590*.

(9) *Kendall* v. *Hamilton* (1879), 4 App. Cas. 504; 48 L.J.Q.B. 705; 41 L.T. 418; 28 W.R. 97, H.L.; 21 Digest 218, *540*.

(10) *Parr* v. *Snell*, [1923] 1 K.B. 1; 91 L.J.K.B. 865; 128 L.T. 106, C.A.; 21 Digest 220, *550.*

(11) *Cooke* (*Cook*) v. *Gill* (1873), L.R. 8 C.P. 107; 42 L.J.C.P. 98; 28 L.T. 32; 21 W.R. 334; 1 Digest 13, *106.*

(12) *Read* v. *Brown* (1888), 22 Q.B.D. 128; 58 L.J.Q.B. 120; 60 L.T. 250; 37 W.R. 131; 5 T.L.R. 97, C.A.; 1 Digest 13, *107.*

(13) *Brunsden* v. *Humphrey* (1884), 14 Q.B.D. 141; 53 L.J.Q.B. 476; 51 L.T. 529; 49 J.P. 4; 32 W.R. 944, C.A.; 36 Digest (Repl.) 195, *1026.*

(14) *The Tongariro* (*Cargo Owners*) v. *Drumlanrig* (*Owners*), *The Drumlanrig*, [1911] A.C. 16; 80 L.J.P. 9; 27 T.L.R. 146; 103 L.T. 773; 11 Asp.M.L.C. 520; 55 Sol. Jo. 138, H.L.; 41 Digest 786, *6473.*

(15) *Mills* v. *Armstrong, The Bernina* (1888), 13 App. Cas. 1; 57 L.J.P. 65; 58 L.T. 423; 52 J.P. 212; 36 W.R. 870; 4 T.L.R. 360; 6 Asp.M.L.C. 257, H.L.; 41 Digest 787, *6480.*

(16) *Armstrong* v. *Lancashire and Yorkshire Rail Co.* (1875), L.R. 10 Exch. 47; 44 L.J.Ex. 89; 33 L.T. 228; 39 J.P. 136; 23 W.R. 295; 36 Digest (Repl.) 193, *1022.*

(17) *The Avon and Thomas Jolliffe*, [1891] P. 7; 39 W.R. 176; sub nom. *The Thomas Joliffe*, 63 L.T. 712; 6 Asp.M.L.C. 605; 42 Digest 977, *81.*

(18) *The Englishman and The Australia*, [1895] P. 212; 64 L.J.P. 74; 72 L.T. 203; 7 Asp.M.L.C. 605; 11 R. 757; 42 Digest 982, *122.*

Also referred to in argument:

Buckland v. *Johnson* (1854), 15 C.B. 145; 2 C.L.R. 784; 23 L.J.C.P. 204; 23 L.T.O.S. 190; 18 Jur. 775; 2 W.R. 565; 139 E.R. 375; 21 Digest 222, *566.*

London Association for Protection of Trade v. *Greenlands, Ltd.*, [1916] 2 A.C. 15; 85 L.J.K.B. 698; 114 L.T. 434; 32 T.L.R. 281; 60 Sol. Jo. 272, H.L.; 42 Digest 976, *67.*

Bullock v. *London General Omnibus Co.*, [1907] 1 K.B. 264; 76 L.J.K.B. 127; 95 L.T. 905; 23 T.L.R. 62; 51 Sol. Jo. 66, C.A.; Digest Practice 407, *1077.*

Goldrei Foucard & Son v. *Sinclair and Russian Chamber of Commerce in London*, [1918] 1 K.B. 180; 87 L.J.K.B. 261; 118 L.T. 147; 34 T.L.R. 74, C.A.; 21 Digest 222, *568.*

Salford Corpn. v. *Lever*, [1891] 1 Q.B. 168; 60 L.J.Q.B. 39; 63 L.T. 658; 55 J.P. 244; 39 W.R. 85; 7 T.L.R. 18, C.A.; 42 Digest 978, *88.*

Re Beck, Attia v. *Seed* (1918), 87 L.J.Ch. 335; 118 L.T. 629; 34 T.L.R. 286, C.A.; 24 Digest (Repl.) 823, *8137.*

Smurthwaite v. *Hanny*, [1894] A.C. 494; 63 L.J.Q.B. 737; 71 L.T. 157; 43 W.R. 113; 10 T.L.R. 649; 7 Asp.M.L.C. 485; 6 R. 299, H.L.; 41 Digest 537, *3643.*

O'Keefe v. *Walsh*, [1903] 2 I.R. 681; 42 Digest 986, *d.*

Phillips v. *Berryman* (1783), 3 Dong. K.B. 286; 99 E.R. 658; 18 Digest (Repl.) 381, *1318.*

Ratcliffe v. *Evans*, [1892] 2 Q.B. 524; 61 L.J.Q.B. 535; 66 L.T. 794; 56 J.P. 837; 40 W.R. 578; 8 T.L.R. 597; 36 Sol. Jo. 539, C.A.; 32 Digest 170, *2086.*

Hoare v. *Niblett*, [1891] 1 Q.B. 781; 60 L.J.Q.B. 565; 64 L.T. 659; 55 J.P. 664; 39 W.R. 491; 7 T.L.R. 468, D.C.; 21 Digest 219, *545.*

Day v. *Porter* (1838), 2 Mood. & R. 151, N.P.; 43 Digest 401, *235.*

Morris v. *Robinson* (1824), 3 B. & C. 196; 5 Dow. & Ry.K.B. 34; 107 E.R. 706; 21 Digest 226, *589.*

Darley Main Colliery Co. v. *Mitchell* (1886), 11 App. Cas. 127; 55 L.J.Q.B. 529; 54 L.T. 882; 51 J.P. 148; 2 T.L.R. 301, H.L.; 1 Digest 15, *118.*

Appeal from an order of HILL, J., in an action of damage by collision.

The defendants were the owners of the steamship *Koursk*. The plaintiffs were

the owners of the steamship *Itria*, and they claimed to recover from the defendants damages for injuries sustained by the *Itria* in a collision which took place in April, 1918, between the *Itria* and the steamship *Clan Chisholm*, which, the plaintiffs contended, was caused by the fault of the *Koursk*. By their defence the defendants pleaded that the plaintiffs had recovered judgment against the owners of the *Clan Chisholm* for the damage which they had sustained by reason of the collision between the *Itria* and the *Clan Chisholm*, which they claimed in the present action against the defendants, and that if, contrary to their contentions, the navigation of the *Koursk* was in any way responsible for the loss of or damage to the *Itria*, the plaintiffs had suffered damage by reason of a joint tort committed jointly by the owners of the *Clan Chisholm* and the owners of the *Koursk* or their servants and had recovered judgment against one of the joint tortfeasors and so were not entitled to proceed against the other.

HILL, J., in delivering judgment, said: I think that the question [whether tortfeasors are joint tortfeasors] must always be one dependent upon the particular facts of the case. Where there are two negligent persons causing one damage I think one has to find out whether they are participating in one act or taking part in separate acts of negligence combining to produce the same damage? I think the matter may also be fairly tested by considering what you have to plead. If one would have to make quite separate charges of negligence against the one from those which one would have to make against the other, then one has a test whether they are both of them taking part in one act or neglect, or whether they are guilty of separate acts or neglects, which combined to effect one damage. Apply that to the present case. There were two quite separate acts, or neglects, which, by their combined effect, caused the *Clan Chisholm* to run into and sink the *Itria*. Those in charge of the *Koursk* were guilty of want of due care towards the *Itria*, because they allowed the *Koursk* to get out of position in the convoy, and did not correct that mistake, and brought themselves into collision with the *Clan Chisholm*, and thereby contributed one of the causes which drove the *Clan Chisholm* against the *Itria*. The *Clan Chisholm* was in fault, because, being put in a dangerous situation by the *Koursk*, those in charge of her did not reverse, with the result that she did not prevent herself from being driven against the *Itria*. It was the combined effect of those two separate acts of negligence which, in my view, produced the one damage, and that was not one tort, but is two torts. HIS LORDSHIP held, accordingly, that the rule that a judgment obtained against one joint tortfeasor was a bar to an action against another did not apply, and, therefore, the plaintiffs were not deprived of their action against the defendants.

The defendants appealed.

Dunlop, K.C., and *Dumas* for the defendants.
Stephens, K.C., and *Darby* for the plaintiffs.

Cur. adv. vult.

Feb. 22. The following judgments were read.

BANKES, L.J.—The question for decision in this appeal is whether a judgment recovered by the plaintiffs against the owners of the steamship *Clan Chisholm* is a bar to the present action brought by the plaintiffs against the defendants. The material facts which raise the question are as follows. Three vessels, the *Itria*, the *Clan Chisholm* and the *Koursk*, with two others were in convoy in line abreast. The *Itria* was the guide vessel in the centre, having the *Clan Chisholm* next her on her port side and the *Koursk* beyond the *Clan Chisholm*. Owing to the negligent navigation of the *Koursk*, that vessel failed to keep position and threatened to run into the *Clan Chisholm*, whereupon, in order to avoid the collision, the *Clan Chisholm* ported and kept her speed. In spite of this manœuvre the two vessels collided, and as a result of the *Clan Chisholm's* porting and keeping her speed she ran into the *Itria*. A number of actions were brought. The owners of the *Itria* sued the owners of the *Clan Chisholm*, and the owners of the latter vessel sued the *Koursk*. These two actions

were tried together, and it was decided that as between the *Itria* and the *Clan Chisholm* the latter was alone to blame for the collision between those two vessels, and that as between the *Clan Chisholm* and the *Koursk* both vessels were to blame for the collision between them, though the blame was apportioned as to two-thirds to the *Koursk* and one-third to the *Clan Chisholm*. The amount recoverable from the owners of the *Clan Chisholm* under the judgment recovered against them by the owners of the *Itria* was not nearly sufficient to cover the latter's loss, as the *Clan Chisholm* had taken the usual proceedings to limit her liability to the statutory sum. It was in these circumstances that the present action was brought, in which the owners of the *Itria* claimed a judgment against the owners of the *Koursk* for the damage and loss occasioned by the loss of the *Itria* and a reference to the registrar and merchants to assess the amount thereof. To this claim the defendants pleaded that the damage complained of was the result of the joint tort committed by those in charge of the *Koursk* and of the *Clan Chisholm*, and that the judgment recovered against the latter was a bar to the present action.

There is no doubt, and HILL, J., so found, that the combined negligence of those in charge of the *Clan Chisholm* and the *Koursk* had the effect of bringing about the collision of the *Clan Chisholm* with the *Itria*. The question for decision is whether the rule originally laid down in *Brown* v. *Wootton* (1) and approved in *King* v. *Hoare* (2) (13 M. & W. at p. 504), and accepted in *Brinsmead* v. *Harrison* (3), applies to the facts of this case. The rule shortly stated by WILLES, J., in the last-mentioned case is this:

> "If two commit a joint tort the judgment against one is of itself without execution a sufficient bar to an action against the other for the same cause."

It is curious to notice the different reasons given by different judges for the rule. It is unnecessary to discuss them, as the rule must be accepted. It is a curious fact also that, at any rate so far as my researches go, the question of what constitutes a "joint tort" or "the same cause" within the meaning of the rule has never been closely considered in any reported case. The test of whether this rule applies or not has sometimes been said to be whether the cause of action against the two persons said to be joint tortfeasors is the same or different. With submission to those who have held that view, I think that this cannot be considered an exhaustive test, as I can imagine cases in which as against two obvious tortfeasors it would be quite possible to frame two quite distinct causes of action in respect of the injury caused by the joint tort. As an instance I may take the case where A., B. and C. conspire to assault X., and A. and B. commit the assault. X. would have a cause of action for assault and battery against A. and B., and quite a separate cause of action against C. for the conspiracy if he elected to proceed against the joint tortfeasors separately. In *King* v. *Hoare* (2), PARKE, B., undoubtedly adopts the cause of action test where he says:

> "If there be a breach of contract, or wrong done, or any other cause of action by one against another, and judgment be recovered in a court of record, the judgment is a bar to the original cause of action, because it is thereby reduced to a certainty, and the object of the suit attained, so far as it can be at that stage; and it would be useless and vexatious to subject the defendant to another suit for the purpose of obtaining the same result. Hence the legal maxim, transit in rem judicatam—the cause of action is changed into matter of record, which is of a higher nature, and the inferior remedy is merged in the higher. This appears to be equally true where there is but one cause of action, whether it be against a single person or many. The judgment of a court of record changes the nature of that cause of action, and prevents it being the subject of another suit, and the cause of action, being single, cannot afterwards be divided into two."

The learned judge appears to me to be dealing with a case where there is only one possible cause of action, or substantially only one cause of action, as he speaks

of the cause of action "being single." In such a case the test is no doubt an accurate one. A

As I have already said, I can find no case in which the question has been closely considered, but I do find dicta which support both sides of the argument which has been addressed to this court. There is no doubt that in *The Devonshire* (4) ([1912] A.C. at p. 657), LORD ATKINSON, and in *The W.H. No. 1* (5) ([1910] P. at p. 204), the then President, spoke of what appear to be separate torts producing one damage as joint torts and the authors as joint tortfeasors. The point now under discussion was not under consideration in either case, and I cannot regard these dicta as authorities. It is no doubt quite common to speak of each of two separate tortfeasors as joint tortfeasors in the sense that where each has contributed to the injury complained of, each is liable for the whole of the damage done. In my opinion, the use of the expression in such circumstances is inaccurate and misleading. I find a dictum of COLLINS, L.J., in *Thompson* v. *L.C.C.* (6) ([1899] 1 Q.B. at p. 844), supporting this view. The question there was whether, under the practice rules then existing, it was permissible to join as defendants, the water company, and the London County Council, whose separate acts of negligence acting in combination had caused injury to the plaintiff's property. A considerable interval had elapsed between the first act of negligence and the second, but that does not, in my opinion, weaken what the lord justice says: B C D

> "But an argument was presented to us which, it appears to me, was based upon a fallacy, that was that because the plaintiffs had claimed only one damage that, therefore, their cause of action was necessarily one also, however many persons they chose to put on the writ as bringing about that one damage. It seems to me that that is no test at all. The damage is one thing, and the injuria is another. What constitutes the cause of action is the injuria, the wrong done by a separate tortfeasor; and when we analyse this case (the facts are not in dispute) we find we are dealing with it upon the assumption that the two acts which were done, the one by the London County Council and the other by the New River Co., are entirely disconnected torts, each of them a separate injuria—if it be injuria at all—quite distinct one from the other. The one was done recently by the county council by excavation, and the other at a much earlier date by the water company allowing water from its mains to weaken the soil in front of the plaintiffs' property, and the joint result of those two independent torts has been that the plaintiffs' house has come down. The damage is one, but the causes of action which have led to that damage are two, committed by two distinct personalities." E F G

The lord justice mentions the interval of time in support of his view, but not as the foundation of it.

It is easy to put instances the mere mention of which indicates that the law must require something more than the single damnum to convert two quite separate and distinct torts into a joint tort. For instance, A., who wishes to approach B.'s house in order to commit a burglary, trespasses on his land and crosses a brook by an already damaged bridge, which he seriously weakens by his weight. Next day C., wishing to approach the same house, mistaking it for that of a friend, trespasses on B.'s land, and in crossing the same bridge, breaks it completely down by his weight. Can it possibly be said that the damage to the bridge was caused by a joint tort, or that A. and C. are joint tortfeasors? I think not, and if this view is correct it follows that in order to constitute a joint tort there must be some connection between the act of the one alleged tortfeasor and that of the other. It would be unwise to attempt to define the necessary amount of connection. Each case must depend upon its own circumstances. The learned authors of CLERK AND LINDSELL ON TORTS (7th Edn.), p. 59, say this: H I

> "Persons are said to be joint tortfeasors when their respective shares in the commission of the tort are done in furtherance of a common design,"

and they cite a dictum of TINDAL, C.J., in *Petrie* v. *Lamont* (7) (Car. & M. at p. 96)

in support of their statement. Later, they say "there must be concerted action towards a common end."

I am not sure that the rule is here stated sufficiently widely to cover every possible case, though it clearly supports the general conclusion as to the law which I have already indicated. Applying the rule thus explained to the facts of the present case, it seems to me clear that the judgment of HILL, J., was right. The negligence of those in charge of the *Koursk* was not keeping station and running into the *Clan Chisholm*. This negligence clearly contributed to the loss of the *Itria*, as the learned judge has found that after the collision with the *Koursk*, the *Clan Chisholm* could not have avoided the collision with the *Itria*. The negligence of the *Clan Chisholm*, as found by the learned judge and the House of Lords, consisted in not stopping and reversing after she hard-a-ported. This negligence contributed both to the collision with the *Koursk* and to the consequent collision with the *Itria*. The damnum no doubt is only one, and the act of negligence of each contributed to that damnum, but the acts of negligence are still, in my opinion, separate. There is no possible connection between them. They began, they continued, and they ended as separate acts; they never became a joint act. On the question of fact whether the *Clan Chisholm* could after the collision with the *Koursk* have avoided the collision with the *Itria*, I agree with the view taken by the learned judge that she could not. For these reasons the appeal, in my opinion, fails, and must be dismissed with costs.

It is not necessary, in the present case, to say anything which may hereafter have to be seriously considered as to how far a defendant in such an action as the present may be entitled to credit for anything recovered from a contributing tortfeasor; nor have I referred to the rule in Admiralty as to the division of damages where the vessels of both plaintiff and defendant are to blame, nor have I referred to the application of R.S.C., Ord. 16, r. 1, which permits the joinder of claims by persons in whom a right of relief in respect of or arising out of the same transaction whether jointly, severally, or in the alternative. None of these questions is material to the present appeal, but with regard to the last I will merely indicate that, in my opinion, the ordinary case of a claim against both owners of two separate vehicles which are alleged to have contributed to the damage in a running down case is more correctly dealt with as a claim against them severally or in the alternative, than as a claim against them jointly.

SCRUTTON, L.J.—A collision between the steamships *Clan Chisholm* and *Koursk* has been held by the House of Lords to be caused by the negligence of each ship, in the proportion of two-thirds liability to the *Koursk* and one-third to the *Clan Chisholm*. The negligence of the *Koursk* consisted in deviating from her convoy course into the track of the *Clan Chisholm*. The negligence of the *Clan Chisholm* consisted in not reversing her engines when she saw the *Koursk* out of her course. The two negligences were separate and independent, not taken in concert, or as part of a common plan, and both, in the view of the House of Lords, contributed to the collision. The question is then raised whether there was separate negligence of the *Clan Chisholm* after her collision with the *Koursk*, so that her subsequent collision with the *Itria* could not be attributed to the preceding negligence of the *Koursk*. The *Itria* had got judgment against the *Clan Chisholm* on this second collision on the ground of her original negligence, and in that action it was immaterial to decide whether the *Clan Chisholm* was guilty of any subsequent negligence. In the action between the *Clan Chisholm* and the *Koursk*, HILL, J., did decide that there was no negligence of the *Clan Chisholm* subsequent to the first collision, and this brought the damage to the *Itria* so far as that damage was paid by the *Clan Chisholm* into the damage to be apportioned between the *Clan Chisholm* and the *Koursk*. The *Itria* got judgment against the *Clan Chisholm* for the whole of the damage, but the *Clan Chisholm*'s limitation of liability would prevent the *Itria* from recovering a great part of her damage against the *Clan Chisholm*. The *Itria*, therefore, proceeded against the *Koursk*, as soon as she

ceased to be a requisitioned ship, to recover some part of the remainder of her damage. The *Koursk* took two points in answer: (i) That the *Clan Chisholm* was negligent after the first collision, so that her collision with the *Itria* was not the result of the *Koursk*'s negligence before the first collision. Though this point had been decided against the *Koursk* in the *Clan Chisholm*'s action by HILL, J., and not challenged in the House of Lords, it could be raised again in the action by the *Itria*, who was not a party to the first action by the *Clan Chisholm* against the *Koursk*. HILL, J., on the advice of his assessors, repeated the previous finding of no subsequent negligence against the *Clan Chisholm*, and this court, with the concurrence of its assessors, upheld his decision. The first defence of the *Koursk* against the *Itria*, therefore, failed. The second defence was more formidable. It was that the *Koursk* and *Clan Chisholm* were "joint tortfeasors," and that the *Itria*, by taking judgment against the *Clan Chisholm*, had lost her remedy against the *Koursk* for the "joint tort."

I consider separately the position at common law and in Admiralty, because undoubtedly the fact that whereas, at common law, contributory negligence bars the claim of either party [but now the position is the same as in Admiralty: see Law Reform (Contributory Negligence) Act, 1945, s. 1 (1)], at Admiralty it results in a liability of either party for half the damages suffered by the other, and may produce different results: see *The Frankland* (8). The common law rule both in contract and tort is stated by PARKE, B., in *King* v. *Hoare* (2):

> "If there be a breach of contract, or wrong done, or any other cause of action by one against another, and judgment be recovered in a court of record, the judgment is a bar to the original cause of action, because it is thereby reduced to a certainty, and the object of the suit attained, so far as it can be at that stage; and it would be useless and vexatious to subject the defendant to another suit for the purpose of obtaining the same result. Hence the legal maxim, transit in rem judicatam—the cause of action is changed into matter of record, which is of a higher nature, and the inferior remedy is merged in the higher. This appears to be equally true where there is but one cause of action, whether it be against a single person or many. The judgment of a court of record changes the nature of that cause of action and prevents its being the subject of another suit, and the cause of action being single, cannot afterwards be divided into two. Thus it has been held, that if two commit a joint tort, the judgment against one is, of itself, without execution, a sufficient bar to an action against the other for the same cause: *Brown* v. *Wootton* (1)."

When in *Kendall* v. *Hamilton* (9), 4 App. Cas. 526, 542, the House of Lords had to consider whether there was in cases of contract any equitable power to relieve against the common law rule, and held there was not, both LORD PENZANCE, who dissented, and LORD BLACKBURN, who agreed, put the rule on the same ground. LORD PENZANCE said:

> "When that which was originally only a right of action has been advanced into a judgment of a court of record, the judgment is a bar to an action brought on the original cause of action."

LORD BLACKBURN said:

> "But *King* v. *Hoare* (2) proceeded on the ground that the judgment being for the same cause of action, that cause of action was gone. Transivit in rem judicatam, which was a bar, partly on positive decision and partly on the ground of public policy, that there should be an end of litigation, and that there should not be a vexatious succession of suits for the same cause of action. The basis of the judgment was that an action against one on a joint contract was an action on the same cause of action as that in an action against another of the joint contractors, or in an action against all the joint contractors on the same contract."

This court in *Parr* v. *Snell* (10) had held that when the judicature rules have

destroyed the effect of the rule in certain classes of cases, it is still in force in claims for unliquidated damages and judgments thereon.

The substantial question in the present case is: What is meant by "joint tortfeasors"? and one way of answering it is: "Is the cause of action against them the same?" Certain classes of persons seem clearly to be "joint tortfeasors." The agent who commits a tort within the scope of his employment for his principal, and the principal; the servant who commits a tort in the course of his employment, and his master; two persons who agree in common action, in the course of and to further which one of them commits a tort. These seem clearly joint tortfeasors; there is one tort committed by one of them on behalf of or in concert with another.

Counsel for the *Koursk* argued at first that if the physical damage was the same all persons who contributed to it without lawful excuse were joint tortfeasors. This would cover the case of two ships which by quite independent action and separate negligence ran into a third ship, one on the starboard, one on the port side, whereby she sank; of two persons uttering independently separate and distinct slanders concerning a servant, whereby his master dismissed him; of two separate excavators who by independent excavations brought down the house of a third party. But in none of these cases would the cause of action be the same. LORD ESHER in *Cooke* v. *Gill* (11) and *Read* v. *Brown* (12) (22 Q.B.D. 131) defined "cause of action" as "every fact which it would be necessary for the plaintiff to prove, if traversed, to support his right to the judgment of the court." Now, in the cases put, to succeed against one tortfeasor it would not be necessary to prove the negligence of the other tortfeasor. In the cases of master and servant, principal and agent, and concerted action, after proving the wrongful act causing damage of one tortfeasor, it would only be necessary to add to the same tort, injuria plus damnum, the nexus of responsibility for that tort, of agency, employment or concerted action. But the same damage does not mean the same tort, and, therefore, does not mean the same cause of action. Counsel for the *Koursk* then suggested an amended definition, "a joint tort is a tort for which two or more persons are jointly and severally liable to the injured person." This seems directed rather to the remedy for the tort than to the nature of the tort itself, and to say that a joint tort is one for which persons are jointly liable only leads to the inquiry: For what torts are persons jointly liable? The answer is: For a tort (damage plus injuria) which they both commit or are responsible for the commission of, but not for tort where such is responsible for a different injuria and the two injuria happen to produce the same damnum.

I am of opinion that the definition in CLERK AND LINDSELL ON TORTS (7th Edn.), p. 59, is much nearer the correct view.

> "Persons are said to be joint tortfeasors when their respective shares in the commission of the tort are done in furtherance of a common design. . . . But mere similarity of design on the part of independent actors causing independent damage is not enough; there must be concerted action to a common end."

Still more so when there is not even similarity of design, but independent negligences accidentally resulting in one damage. This is the view of SIR JOHN SALMOND:

> "Persons are not joint wrongdoers simply because their independent acts have been the cause of the same wrongful damage: SALMOND ON TORTS (5th Edn.), pp. 84–85.

I myself should put 'wrongful' before 'acts' instead of before 'damage.' I think it is also the view of COLLINS, L.J., in *Thompson* v. *L.C.C.* (6):

> "The fallacy that . . . because the plaintiffs had claimed only one damage, that therefore their cause of action was necessarily one also. . . . What constitutes the cause of action is the injuria, the wrong done by a separate tortfeasor."

To make the tort, one wants a wrongful act causing damage; and to make the

tort the same cause of action, both elements must be the same. Thus, in *Brunsden* A
v. *Humphrey* (13), where the negligence was the same, but one damage was to the person and one to the property, a judgment for one cause of action, wrongful injury to property, was not a bar to a second cause of action, trespass to the person. If this is so where the same negligence causes different kinds of damage, still more is it so where different and independent wrongful acts cause the same damage; there are two causes of action, and a judgment on one does not bar the B
other."

The judgment below in effect takes the same view as to the meaning of "joint tortfeasors." In the present case the *Koursk* was guilty of negligence in proceeding out of course across the line of its convoy; the *Clan Chisholm* was guilty of quite independent negligence in not reversing when the action of the *Koursk* was observed. These two separate and independent negligences resulted in a collision, C
the direct consequence of which was a collision with the *Itria*. In my view, the *Koursk* and the *Clan Chisholm* were not joint tortfeasors of the same tort, but separate tortfeasors of two different torts, and, therefore, at common law judgment against one in respect of the cause of action against it would not be an answer to a claim against the other in respect of the different cause of action on which it was sued. It is true that in various cases to which we were referred eminent D
judges have used the phrase "joint tortfeasors" in respect of separate acts of negligence. This was always obiter and in regard to a matter immaterial to the decision. If there is no contribution between joint tortfeasors there is, of course, no contribution between independent tortfeasors, and the phrase "no contribution between joint tortfeasors" is equally true if read "no contribution between tortfeasors." Lord Atkinson, in *The Devonshire* (4), uses the phrase "joint tort- E
feasors" about persons guilty of independent acts of negligence where "tortfeasors" would be equally accurate as far as the consequence of several liability for all the damage, the matter then being discussed, was concerned; indeed, he uses the phrase "tortfeasors" in the same sentence. I am quite unable to regard these casual and irrelevant inaccuracies as amounting to a determination of principle.

In Admiralty, the result is at least the same. For it has been decided that F
one of two ships who, by separate acts of negligence, damage a third can bring the damage it has to pay the third into the calculation of half damages following on the judgment "both to blame": *The Frankland* (8). The *Clan Chisholm* can apparently, therefore, bring into her claim against the *Koursk* the damages she has paid to the *Itria*. Further, innocent cargo owners in a ship in collision caused by its own negligence and that of the other ship can only recover half their damage G
against either ship: *The Drumlanrig* (14), and it would seem to follow that a judgment against one tortfeasing ship for one-half cannot be a bar to a claim for the other half against the other tortfeasor. In the present case, owing to limitation of liability, the *Itria* will not recover her whole damage unless she can sue both the *Clan Chisholm* and the *Koursk*, perhaps not even then. It seems clear that persons who are not joint tortfeasors at common law are not joint tortfeasors in Admiralty; H
indeed, in the latter court they are in a better position as to contribution. In my view, the appeal should be dismissed with costs.

SARGANT, L.J.—On the facts established in this case a very interesting and difficult question has to be determined as to the liability sought to be established by the plaintiffs against the defendants, or, to use the brief and figurative language I
which was employed by Hill, J., and will be adopted in this judgment, by the *Itria* against the *Koursk*. To make the reasons for my judgment clear, it is necessary to state the salient facts of the case, but I will do this as briefly as possible.

On April 18, 1918, a convoy of five vessels under escort were in the Mediterranean making for the United Kingdom in line abreast, with a prescribed distance of four cables between each adjoining pair of vessels. The centre ship, and that from which the distances had to be taken, was the *Itria*; nearest to her on her port hand was the *Clan Chisholm*, and beyond this ship again, and furthest to port, was

the *Koursk*. The two vessels on the starboard side of the *Itria* were not in any way concerned in the collision which forms the subject of the present litigation, and need not be further considered or mentioned. The course prescribed was a zig-zag changed at short intervals of fifteen, ten and five minutes. The ships were proceeding without lights, and in the dark, the time of the collision being just before 3 a.m. A few minutes before that hour the *Koursk* got out of position and was observed heading for the *Clan Chisholm* at a distance of about one-and-a-half cables. The *Clan Chisholm* hard-a-ported, hoping to avoid collision or to receive a slanting blow only; but did not reverse her engines. A collision ensued between the *Koursk* and the *Clan Chisholm*, and within about a minute this was succeeded by a second collision between the *Clan Chisholm* and the *Itria*, which sank the latter vessel. As the result of these collisions three or four actions were begun. There were cross-actions between the *Koursk* and the *Clan Chisholm*; there was an action by the *Itria* against the *Clan Chisholm*; and lastly, there was the present action by the *Itria* against the *Koursk*. This last action has been delayed for various reasons and has only recently been tried. The other three actions came on for trial together in March, 1919, by HILL, J., and the result of his judgment, as ultimately restored by the House of Lords after an intermediate reversal, was this. In the actions in respect of the collision between the *Koursk* and the *Clan Chisholm* the *Koursk* was found two-thirds to blame and the *Clan Chisholm* was found one-third to blame (her contributory negligence consisting in not having reversed before the first collision); and in the action by the *Itria* against the *Clan Chisholm* judgment was given against the *Clan Chisholm*, it being admitted that the *Itria* was blameless, and the finding that the *Clan Chisholm* was to blame in respect of the first collision involving the finding that she was also to blame for the immediately subsequent collision. The present action by the *Itria* against the *Koursk* was tried by HILL, J., in June last, and by agreement between the parties the materials which had been used on the previous trial in March, 1919, were again used at the second trial. At this second trial the *Koursk*, while not questioning the finding of fact that the first collision was due partly to the negligence of the *Koursk*, raised two defences, one of fact and the other of law. The first defence was that the second collision was proximately caused not by the first collision, but by an intervening act of negligence on the part of the *Clan Chisholm* subsequent to the first collision, namely, a second failure to reverse. The second defence was that even if the causation of the first collision and the second collision was indistinguishable, they were caused by the joint tort of the *Clan Chisholm* and the *Koursk*, and that the *Itria*, having recovered judgment against one of the joint tortfeasors, is barred from now recovering against the other.

[The learned lord justice dealt with the first point, saying that in his opinion the judgment of HILL, J., finding that there was no intervening negligence, was unquestionably right, and continued:] As regards the second defence, HILL, J., took time to consider his judgment and ultimately decided that, though there was but one damage, it was caused by two separate acts of negligence; that there were, therefore, two separate torts and not one joint tort; and, accordingly, that the *Itria* was still entitled to recover against the *Koursk*. It is with respect to this second part of the learned judge's judgment that the main argument has taken place before us and that the real difficulty arises. The definition of joint tortfeasors in CLERK AND LINDSELL ON TORTS (7th Edn.), pp. 59–60, is as follows:

> "Persons are said to be joint tortfeasors when their respective shares in the commission of the tort are done in furtherance of a common design. 'All persons in trespass who aid or counsel, direct, or join, are joint trespassers.' If one person employs another to commit a tort on his behalf, the principal and the agent are joint tortfeasors, and recovery of judgment against the principal is a bar to an action against the agent. But mere similarity of design on the part of independent actors, causing independent damage, is not enough; there must be concerted action towards a common end."

The discussion in SALMOND ON TORTS (5th Edn.), p. 84, is to much the same effect. Stress is laid there on the feature that there must be responsibility for the same action, the imputation by the law of the commission of the same wrongful act to two or more persons at once. The examples given are under three heads—agency, vicarious liability, and common action.

It would appear, therefore, if these definitions are correct, that in order to constitute joint tortfeasance in the strict sense of the word (and apart from certain expressions in *The Frankland* (8) and *The Devonshire* (4) hereinafter mentioned, we have not been referred to any less strict definition) there must be a concurrence in the act or acts causing damage, not merely a coincidence of separate acts which by their conjoined effect cause damage. This view is strongly supported by a passage in the opinion of LORD BRAMWELL in *The Bernina* (15). He there says (13 App. Cas. at p. 14):

> "But take the case put in argument of injury not to a passenger, but to one of the public by separate acts of negligence in two persons, which acts conjoined caused the injury. . . . Such a case it is not easy to imagine, but let us suppose it. I should say an action might be maintained against the two jointly. If their conduct was wilful, it clearly might be, and I do not know why its being negligent should make a difference."

It seems to me that LORD BRAMWELL obviously considered that in the case supposed the two persons guilty of separate negligence were not joint tortfeasors. If they had been they would ipso facto have been liable jointly, and it would have been wholly unnecessary to go through the process of reasoning employed. The case supposed by LORD BRAMWELL in the above passage is precisely similar to the present case, and also to the case of *The Bernina* (15), when once that case was simplified by the very important decision that a passenger in one of two colliding vessels was not in any way identified with the vessel by which he was travelling, but was in the same position as one of the general public, or as the *Itria* in the present case, and it may, therefore, be useful to refer to some passages in the judgments in *The Bernina* (15) to ascertain the precise legal position of two persons who, by the combined effect of separate acts of negligence, cause damage to a third person. LORD ESHER said:

> "If no fault can be attributed to the plaintiff and there is negligence by the defendant and also by another independent person, both negligences partly directly causing the accident, the plaintiff can maintain an action for all the damages occasioned to him against either the defendant or the other wrongdoer."

LINDLEY, L.J., said, speaking of the decision in *Armstrong* v. *Lancashire and Yorkshire Rail. Co.* (16):

> "But if the proximate cause was the combined negligence of the two companies, I confess my inability to understand upon what principle the plaintiff could be held not entitled to sue either company; or in other words, to be without a remedy."

LORD HERSCHELL said:

> "If by a collision between two vessels a person unconnected with either were injured the owner of neither vehicle could maintain as a defence 'I am not guilty because but for the negligence of another person the accident would not have happened.' "

These passages seem to me merely to lay down the principle that in such cases as these, the damage resulting from the combination of two negligences must not be regarded as too remote in an action against either wrongdoer, provided that the negligence of that wrong-doer was a proximate, though partial, cause of the accident; and see BEVEN ON NEGLIGENCE (3rd Edn.), vol. i, p. 77. They seem to me inconsistent with the theory that the combination of the two negligences constitutes

A a joint tort, and they get rid of the difficulty which I felt during the progress of the present appeal, in accepting the contention of counsel for the *Itria* that different facts would have to be established in the actions brought by the *Itria* against the *Clan Chisholm* and the *Koursk* respectively. It seems to me that in the first action the *Itria* would have to prove only negligence on the part of the *Clan Chisholm*, proximately, though it may be only partly, causing the accident, and in the B second action the *Itria* would have to prove only negligence on the part of the *Koursk*, proximately, though it may be only partly, causing the accident. It would be for the defendant vessel in either action, if thought fit, to raise the defence that the negligence of the defendant alone and apart from the contributory negligence of the third vessel would not have caused the accident. This contention would not on the principles above stated avail the defendant, and in any case C would be a defence only and not a part of the cause of action that would have to be established by the plaintiff. It seems to me, therefore, that the *Itria* had two separate and distinct causes of action, the one against the *Clan Chisholm*, and the other against the *Koursk*, though the resulting damage was the same in both cases.

As regards the language in four Admiralty cases which have been referred to, namely, (i) *The Avon and Thomas Jolliffe* (17), (ii) *The Englishman and The* D *Australia* (18), (iii) *The Devonshire* (4), and (iv) *The Frankland* (8), the first two present no difficulty. In each of these cases the operation was a joint one, conducted under a single ultimate direction, and the requirements of the strict definition of joint tortfeasance were satisfied. In the third and fourth cases the circumstances were different, the negligent vessels were under separate direction, and were guilty of separate negligences, and so far as legal cause of action was concerned, E their position was strictly analogous to that of the *Clan Chisholm* and the *Koursk* here. In the third case both LORD MERSEY and LORD ATKINSON, and in the fourth case SIR FRANCIS JEUNE, speak of the two negligent vessels as joint tortfeasors. Accordingly, these judgments form some authority for treating two separate negligences with one resulting damage as constituting a joint tort, if the phrase joint tortfeasors is to be treated as used there in its strict and technical sense. But F when these cases are carefully examined there is no need for putting so strict a meaning on the phrase. The liability established in those cases was in no way dependent on the tort being joint, but might have resulted equally from separate negligences combining, indeed, to produce one damage, but forming on the principle above stated separate causes of action. The difference was quite immaterial for the purpose of the decision and no argument seems to have been addressed to G it. I cannot attach to the use of the phrase "joint tortfeasors" in these cases any real importance for the present purpose. It follows, therefore, that the judgment of the learned judge was right and that his decision should be affirmed. I am relieved to think that the result cannot follow here that the *Itria* should recover from the *Clan Chisholm* and the *Koursk* together more than the total damage done her, but this may, perhaps, be so in other cases. I regret that the Admiralty rule H as to apportionment of damage applies only to that sustained by the two vessels who collide through their own negligence, and further, that in cases like this of damage by two acts of mere negligence the courts have not worked out some equitable system of contribution such as was effected by the Court of Chancery in the case of persons liable to one common debt or duty and as gave rise to the principles of general average: see SPENCE'S EQUITABLE JURISDICTION OF THE COURT I OF CHANCERY, Vol. i, pp. 661–663.

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[*Reported by* GEOFFREY HUTCHINSON, ESQ., *Barrister-at-Law.*]

A

Re GOODWIN. AINSLIE *v.* GOODWIN

[CHANCERY DIVISION (Romer, J.), January 30, 1924]

[Reported [1924] 2 Ch. 26; 93 L.J.Ch. 331; 130 L.T. 822; 68 Sol. Jo. 478]

B

Will—Condition—Time specified for performance—When time of the essence—Matters to be considered—Intention of testator—Personal condition.

Where a gift in a will is made subject to a condition, even a condition precedent, to be performed within a specified time, but the condition is not performed within that time, then, at any rate in the absence of an express gift over, it is always a question for the court to determine whether the time so specified was of the essence of the matter. In determining that question the court must have regard to what was presumably the intention of the testator in inserting the condition, what it was that he desired to bring about or to guard against, and if the court finds that a performance of the condition at a time subsequent to the expiration of the period fixed by the testator in substance provides for the very thing that the testator intended to provide for, so that all parties can be put in substantially the same position as they would have been in had the condition been performed within the proper time, time is not regarded as of the essence and such performance is treated as a sufficient compliance with the condition.

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By his will a testator gave to his trustees during the lifetime of his wife an annuity of £300 commencing from the date of his death, the first payment to be made at the expiration of three calendar months after his death. Certain properties were charged with the annuity and the will continued: "My trustees shall stand possessed of the said annuity upon trust to pay the same as and when received to my said wife. Provided always and I declare that the said annuity is intended to be in lieu of and in substitution for the annuity of £70 per annum which I have covenanted by deed to pay to my said wife and that the bequest thereof herein contained and the trusts thereof hereby declared shall become and be absolutely void and of no effect (except as regards any money actually paid to my said wife on account of the said annuity) unless my said wife shall within six calendar months after my death absolutely release and discharge my estate and effects and my trustees from payment of the said annuity of £70 per annum so covenanted to be paid by me to my said wife as aforesaid as from the date of my death to the satisfaction in all things of my trustees." The testator died in 1906. His estate was heavily encumbered, and down to the death of his widow, in 1921, it remained doubtful whether it would ever produce anything for the beneficiaries. Nothing was done by the widow during her life to release the estate from payment of the £70 annuity, and she received no payment in respect of either of the annuities. Her claim as a creditor of the testator at his death was not completely satisfied until 1923. On a question whether a release by the executors of the testator's widow would in 1924 be a sufficient compliance with the condition,

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Held: on construction, the only object of the testator in imposing the condition that the £70 annuity should be released was that the widow should not be paid both the £300 annuity and the £70 annuity; the condition was not one personal to her although both annuities ceased with her life; the release at the present time of the £70 annuity would put all the parties in the position which the testator intended they should occupy and in the same position as if the widow had executed a release of the £70 annuity within six months of the testator's death; and, therefore, time was not of the essence of the condition, and a release by the widow's executors would be a sufficient compliance with the condition.

I

Notes. Applied: *Re Goldsmith's Will Trusts, Brett* v. *Bingham*, [1947] 1 All E.R. 451; *Sellinger's Will Trusts*, [1959] 1 All E.R. 407. Considered: *Re Sage, Lloyds Bank, Ltd.* v. *Holland*, [1946] Ch. 332.

As to performance of conditions in a will, see 34 HALSBURY'S LAWS (2nd Edn.) 118–121; and for cases see 44 DIGEST 465 et seq. (as to time, pp. 472–475).

Adjourned Summons to determine effect of a condition in a will.

The facts are stated in the headnote and the judgment.

Bryan Farrer for the testator's trustees, the plaintiffs.
Eardley-Wilmot for the defendant, H. T. Goodwin, a residuary legatee.
T. R. Hughes, K.C., and *Bradley Dyne* for the widow's executors.

ROMER, J.—The testator by his will gave to his trustees during the lifetime of his wife an annuity of £300 a year commencing from the date of his death—it was subsequently increased by a codicil to £500 a year—to be payable quarterly, and the first payment to be made at the expiration of three calendar months after his death. After providing that certain properties of his were to be exclusively charged with that annuity in exoneration of the rest of the estate, he says:

> "My trustees shall stand possessed of the said annuity upon trust to pay the same as and when received to my said wife. Provided always and I declare that the said annuity is intended to be in lieu of and in substitution for the annuity of £70 per annum which I have covenanted by deed to pay to my said wife and that the bequest thereof herein contained and the trusts thereof hereby declared shall become and be absolutely void and of no effect (except as regards any money actually paid to my said wife on account of the said annuity) unless my said wife shall within six calendar months after my death absolutely release and discharge my estate and effects and my trustees from payment of the said annuity of £70 per annum so covenanted to be paid by me to my said wife as aforesaid as from the date of my death to the satisfaction in all things of my trustees."

The testator died on Nov. 1, 1906. His estate turned out to be very heavily encumbered and right down to the death of his widow, which took place on Feb. 12, 1921, it remained doubtful whether the estate would ever produce anything for the beneficiaries. In those circumstances nothing was specifically done by the widow, the annuitant, to comply with the condition expressed in the will. It is said, having regard to the correspondence that took place between her and her advisers and the executors and the executors' advisers for two or three years after the death of the testator, that a release by her of the £70 annuity must be implied. I have looked at that correspondence, and I think it sufficient to say that after the month of March, 1907, the correspondence is consistent with the idea that the lady had given up all claim to the annuity of £70 a year as from the date of her husband's death. At the same time I cannot say that it is inconsistent with her retaining to herself a right, if it turned out that the estate of the testator was insolvent, to pursue her claim as a creditor in respect of the instalments accruing after the testator's death. I do not think that I can imply any release from the correspondence. At the same time I am convinced that she never did elect to retain her right to enforce the deed of covenant that the testator had entered into, so far as regards any arrears of the annuity accruing after the testator's death; she never elected so far as I read the correspondence one way or the other. She did at one time indeed put forward a claim as a creditor of the testator for a sum which included the annuity of £70 a year from the death of the testator on Nov. 1, 1906, to some date in March, 1907, but in April, 1907, that claim, which was probably put forward by mistake, was reduced and her claim thenceforward as a creditor against the testator's estate, so far as the £70 annuity was concerned, was confined to the arrears accrued up to the date of the testator's death.

The question arises whether, having regard to the fact that the lady never released the testator's estate from the liability under the covenant in respect of

the £70 annuity, the condition which I have read is operative so as to deprive her estate of all claim to the annuity of £500 a year from the death of the testator down to the death of the annuitant. Nothing was ever paid to her during her life in respect of this £500 annuity, nor, indeed, was even her claim as a creditor of the testator at his death ever completely satisfied until the month of November, 1923. It is well settled by authority that where a gift in a will is made subject to a condition, even a condition precedent, to be performed within a specified time, but the condition is not in fact performed within that time, then, at any rate in the absence of an express gift over, it is always a question for the court to determine whether the time so specified was of the essence of the matter. In determining that question the court must have regard to what was presumably the intention of the testator in inserting the condition, what it was that he desired to bring about or to guard against, and if the court find that a performance of the condition at a time subsequent to the expiration of the period fixed by the testator in substance provides for the very thing that the testator intended to provide for, so that all parties can be put in really substantially the same position as they would have been in had the condition been performed within the proper time, time is not regarded as of the essence and such performance is treated as a sufficient compliance with the condition.

In the present case there can, I think, be no doubt that the only object of the testator in imposing the condition that the £70 annuity should be released was that the lady should not be paid both the larger annuity and the £70 a year. His only object in fixing a time within which the release should be executed was to enable the executors to make an early distribution of his estate among the beneficiaries. In point of fact, as I have already said, the £500 a year was never paid, nor was any part of it, and, indeed, having regard to the state of the testator's assets, it was not possible to pay any beneficiary during her lifetime. If, therefore, she were now living and released her claim to the £70 a year as from the testator's death, she would have complied in substance with the condition and done that which the testator intended should be done. An execution of a release by her at the present time would, so far as the other parties are concerned, have precisely the same effect as though she had executed the release within the six months specified by the testator. If, therefore, she were still living, I should have no hesitation in saying, following the authority to which my attention has been called, that an execution of the release by her now would be a sufficient compliance with the condition expressed in the testator's will.

It has, however, been argued that, although that might be so if she were now living, yet inasmuch as she is dead, the performance of the condition was one so personal to her that it cannot be done by her legal personal representative. In the case of a gift made by a will of a legacy of £1,000 to a legatee upon the condition that the legatee should within a specified time release the testator's estate from a debt, if a release after the time specified would be a substantial compliance with the condition and the time was not of the essence, it appears to me that it would be immaterial whether the release were made by the legatee or his legal representative. I do not think that this was disputed by counsel for the residuary legatee. He argued, however, that the condition here is a condition personal to the annuitant, because the benefit taken by her under the will is one that ceases with her life, and the annuity under the deed of covenant is one that also ceases with her life. That, in my opinion, does not make the condition a condition personal to the annuitant any more than the condition was personal to the legatee in the case mentioned above. In what respect the claim of the executors of the annuitant in respect of the arrears of the two annuities of £500 and £70 differs from the case of the claim of the executors of the legatee to the legacy and the debt, I cannot myself understand. It does not appear to me that this condition was a condition in any sense personal to the annuitant. If in any case the condition be really personal to the legatee, it cannot of course be complied with by the legatee's executors. Such a condition as a condition to take and use a name, or to marry,

or to occupy a house, or any condition of that sort, is, no doubt, personal to the legatee. This one is not, and, inasmuch as a release at the present time of the £70 annuity will put all the parties in the position which the testator intended that they should occupy, and will place them in the same position as though a release had been executed by the lady within six months of the testator's death, I hold that a release by her executors will be a sufficient compliance with the condition.

Solicitors: *Dawson & Co.*; *Leader, Plunkett & Leader*, for *George Gardner Leader*, Newbury.

[*Reported by* G. P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

Re HAMMOND. PARRY *v.* HAMMOND

[CHANCERY DIVISION (Tomlin, J.), May 7, 1924]

[Reported [1924] 2 Ch. 276; 93 L.J.Ch. 620; 131 L.T. 632; 68 Sol. Jo. 706]

Will—Gift of realty—Gift to son during lifetime and then to children—Rule in Shelley's Case—Estate tail taken by son.

Will—Gift of personalty—Gift "equally between" two daughters and "their respective issue"—Moiety of estate to each daughter and her issue—Issue taking as purchasers in competition with mother.

A testator by his will made certain specific bequests in favour of his wife and also bequeathed to her the entire income of the remainder of his estate during her life. After her death he bequeathd his freehold farm to his son "during his lifetime and afterwards to his children, if any. Should my son leave no issue, then the farm shall return to my two daughters . . . and to their issue afterwards." The testator left all his residuary personal estate, subject to the life interest of his wife, equally between his two daughters and their respective issue.

Held: (i) there was imported into the gift of realty to the son during his lifetime, and afterwards to his children, a gift to the heritable blood generally to which the rule in *Shelley's Case* (2) applied, and, therefore, the son took an estate tail, notwithstanding that it was expressed to be to him during his life; (ii) "issue" was not a word of limitation, but the issue took as purchasers, and, therefore, the residuary personal estate went in moieties, one moiety to each of the daughters and her issue, all of the issue coming into existence before the period of distribution, namely, the death of the tenant for life, taking in competition with their mother.

Dicta of PARKER, J., in *Re Coulden* (1), [1908] 1 Ch. at p. 324, applied.

Notes. As to a gift to a person and his issue, see 34 HALSBURY'S LAWS (2nd Edn.) 352–354; and for cases see 44 DIGEST 1025–1028.

Cases referred to:

(1) *Re Coulden, Coulden* v. *Coulden*, [1908] 1 Ch. 320; 77 L.J.Ch. 209; 98 L.T. 389; 52 Sol. Jo. 172; 44 Digest 1026, *8849*.

(2) *Shelley's Case* (1581), 1 Co. Rep. 93; Moore K.B. 136; 1 Cmd. 69; 76 E.R. 199; 44 Digest 922, *7798*.

Also referred to in argument:

Donn v. *Penny* (1815), 19 Ves. 545; 1 Mer. 20; 34 E.R. 618; 44 Digest 1261, *10893.*

Gibbs v. *Tait* (1836), 8 Sim. 132; 5 L.J.Ch. 344; 59 E.R. 53; 44 Digest 1028, *8860.*

Harvey v. *Towell* (1847), 7 Hare 231; 17 L.J.Ch. 217; 68 E.R. 94; sub nom. *Harney* v. *Towell*, 12 Jur. 241; 44 Digest 1026, *8847.*

Samuel v. *Samuel* (1845), 2 Coop. temp. Cott. 119; 14 L.J.Ch. 222; 5 L.T.O.S. 34; 9 Jur. 222; 47 E.R. 1082; 44 Digest 1028, *8861.*

Parkin v. *Knight* (1846), 15 Sim. 83; 15 L.J.Ch. 209; 6 L.T.O.S. 450; 10 Jur. 23; 60 E.R. 548; 44 Digest 1025, *8836.*

Tate v. *Clarke* (1838), 1 Beav. 100; 8 L.J.Ch. 60; 48 E.R. 876; 44 Digest 1026, *8846.*

Prentice v. *Brooke* (1880), 5 L.R.Ir. 435.

Summons for decision of questions relating to construction of a will.

The testator, by his will, dated April 24, 1923, gave his wife certain specific bequests, and he also bequeathed to her the entire income of the remainder of his estate during her lifetime. After her decease he bequeathed his freehold farm, Coedybrain, to his son, Wyndham James Hammond,

> "during his lifetime and afterwards to his children, if any. Should my son leave no issue, then the farm shall return to my two daughters, Eurina Mary Parry and Olive Martha Hammond, and to their issue afterwards. . . . All other of my possessions I leave equally between my two daughters, Eurina Mary Parry and Olive Martha Hammond, and their respective issue."

He appointed the plaintiff, E. M. Parry, and the defendants, W. J. Hammond and O. M. Hammond, to be the executors of his will. The testator died on Aug. 16, 1923. Except for the farm, Coedybrain, his estate consisted entirely of personalty. This summons asked whether the testator's residuary personal estate was vested (subject to the life estate of his widow) in his two daughters absolutely or how otherwise. It also raised the question what estate or interest W. J. Hammond took in the freehold farm Coedybrain.

Waddilove, for the plaintiff, referred to JARMAN ON WILLS (6th Edn.), p. 1193; THEOBALD'S LAW OF WILLS (7th Edn.), p. 478; HAWKINS ON THE CONSTRUCTION OF WILLS, p. 197.

Shufeldt for Olive Hammond.

Baden Fuller for the two infant children of the plaintiff.

W. G. Hart for the testator's son.

TOMLIN, J.—I have to determine two questions on this short will. The first question is as to the effect of a gift of a freehold farm expressed in the following terms:

> "To my son Wyndham James Hammond during his lifetime and afterwards to his children, if any. Should my son leave no issue, then the farm shall return to my two daughters [naming them] and to their issue afterwards."

I have come to a conclusion as to the construction of the language, and if, on the construction of the language, I conclude that there is imported into it a gift to the heritable blood generally, then I am bound to apply the rule in *Shelley's Case* (2), and that would operate to give Wyndham James Hammond an estate in tail, notwithstanding that it is expressed to be to him during his life. When a will presents difficulties of this kind, it seems to me that it is prudent to depart as little as possible from the primary meaning of the several words used, and if, by following that course, there results by the application of some rule of law a consequence which will give effect to what the testator's intention appears to be, I think adherence to this primary meaning should be maintained. Bearing that in mind, I think it is my duty to construe these words as meaning what they say,

A that is, "children" means children, and "issue" means issue, something more than children, and on this footing I think it is plain that what the testator was contemplating was that his son and his son's children and his son's children's children should succeed one after the other to the property, and that, when he says: "Should my son leave no issue," he really means that, if there shall at any time be a failure of the issue of his son in the wide sense, then the property is to go over, B and is indicating that what he is contemplating is the descent of the estate through the heritable blood generally. If I come to that conclusion, as I do, it seems to me that I am bound to apply the rule in *Shelley's Case* (2), and, having applied the rule in *Shelley's Case* (2), the result is that the son takes an estate tail, and taking an estate tail effect is given in the best possible way to the intention of the testator that the estate should descend through the heritable blood. My conclusion C on the first question is that the son takes an estate tail.

With regard to the residue I am embarrassed by the statements in textbooks, to which I have had my attention called, and which show a diversity of view, and I am embarrassed also by reference to the authorities cited in support of those statements which I confess, when examined, do not seem to me to perform the function for which they were cited. The result is that I am left more or less to D the light of nature to determine what the meaning of these words may be. I think, however, that, with reference to a gift of personalty to persons and their respective issue, the law is correctly stated by PARKER, J., in *Re Coulden* (1), where he says ([1908] 1 Ch. at p. 324):

> "In gifts of real estate the word 'issue,' in a gift to A. and his issue, is, E according to the decisions, primâ facie a word of limitation creating an estate tail. The reason is that an estate tail in the ancestor is the only way of providing for all the issue of the ancestor, and the courts have assumed that in a devise to one and his issue the whole line of issue is intended. There is no similar reason for holding that 'issue' is primâ facie a word of limitation in gifts of personal property. On the contrary, to hold 'issue' in such a case F to be a word of limitation would, by conferring an absolute interest on the ancestor, deprive the issue of all benefit under the will. Therefore I do not think that there is any rule of construction compelling me to hold that in gifts of personalty 'issue' is primâ facie a word of limitation. That the word 'issue' may in gifts of personal property be a word of limitation no one doubts, but, in my judgment, whether it be so or not is purely a question of construction on G each particular instrument, the court which has to interpret such instrument being unfettered by any general rule. Indeed, by a gift of personalty to A. and his issue, it seems to me more likely that a testator means the issue to take jointly with or by substitution for A. than that A. should take to the exclusion of his issue, and where there are words of division, such as a gift to divide between A. and his issue, it is, in my judgment, almost conclusive that H the word 'issue' cannot be used as a word of limitation."

Treating myself, therefore, as unbound by any rule, I am in the happy position of being able to give effect to what I believe to be the meaning of the words. I think, therefore, in this case that "issue" is not a word of limitation, but that the issue take as purchasers, that, having regard to the words "equally between" and the words "their respective issue," there is intended to be a stirpital division, that I the residue, therefore, goes in moieties, one moiety to each of the daughters and her issue, and that, in regard to each daughter and her issue, all of the issue who come into existence before the period of distribution, namely, the death of this tenant for life, will take in competition with their mother.

There may, however, be a question whether, as between a daughter and her issue, they take as tenants in common or as joint tenants. That question has not been argued, and I am not sure it is proper to be determined at the present time. It seems to me that is a question that may be left, and may properly be left, for determination at the cessation of the life interest, when there may be in existence

those who will be interested in arguing one way or the other. The declaration will be on those lines, but without prejudice to the question whether, in relation to any moiety, the daughter and her issue take as joint tenants or as tenants in equal shares.

Solicitors: *Gibson & Weldon*, for *T. Price Thomas*, Ystrad-mynach, Glamorgan.

[*Reported by* L. Morgan May, Esq., *Barrister-at-Law.*]

COMPANIA MERCANTIL ARGENTINA *v.* UNITED STATES SHIPPING BOARD

[Court of Appeal (Bankes and Warrington, L.JJ., and Eve, J.), March 25, 1924]

[Reported 93 L.J.K.B. 816; 131 L.T. 388; 40 T.L.R. 601; 68 Sol. Jo. 666]

Constitutional Law—Foreign sovereign State—Immunity from legal process—Government Department carrying on trading—Contract with subject of another State—Dispute arising out of contract—Waiver of immunity—Submission to arbitration.

A foreign sovereign State does not, by entering into a trading contract with the subject of another State, lose its immunity from process in British courts as regards matters arising out of the contract, nor does it lose its immunity from being impleaded in British courts by making a submission to arbitration in this country.

Notes. Applied: *Krajina* v. *Tass Agency*, [1949] 2 All E.R. 274. Considered: *Baccus S.R.L.* v. *Servicio Nacional Del Trigo*, [1956] 3 All E.R. 441.

As to the liability of foreign sovereigns and governments to be sued in English courts, see 7 Halsbury's Laws (3rd Edn.) 265–267; and for cases see 1 Digest 44 et seq.

Cases referred to:

(1) *Mighell* v. *Sultan of Johore*, [1894] 1 Q.B. 149; 63 L.J.Q.B. 593; 70 L.T. 64; 58 J.P. 244; 10 T.L.R. 115; 9 R. 447, C.A.; 11 Digest (Repl.) 615, *435*.

(2) *The Charkieh* (1873), L.R. 4 A. & E. 59; 42 L.J.Adm. 17; 28 L.T. 513; 1 Asp.M.L.C. 581; 11 Digest (Repl.) 615, *434*.

(3) *The Parlement Belge* (1880), 5 P.D. 197; 42 L.T. 273; 28 W.R. 642; 4 Asp.M.L.C. 234, C.A.; 11 Digest (Repl.) 628, *516*.

(4) *The Porto Alexandre*, [1920] P. 30; 89 L.J.P. 97; 122 L.T. 661; 36 T.L.R. 66; 15 Asp.M.L.C. 1, C.A.; Digest (Supp.) 1, Adm. *141c*.

Appeal from an order of Roche, J., in chambers, affirming an order of the master.

The plaintiffs were a Dutch company, and sued as the assignees of the consignees of cargo carried on board a ship of the defendants to Cadiz. The defendants were, according to a certificate of the American ambassador, and an affidavit of a Mr. Gregory, legal adviser to the defendants, a Department of State of the United States of America, administered by commissioners nominated by the President of the United States. They owned a large mercantile fleet which was used for ordinary commercial purposes in pursuance of the United States Shipping Act, 1916, which was passed with the object of creating and developing an auxiliary and naval reserve and a merchant marine to meet the requirements of the commerce of the United States. In October, 1920, the plaintiffs chartered the *Onekama*, a ship owned by the defendants, to carry a full cargo of maize from

Montevideo to ports in Spain. By the bill of lading the freight was payable 50 per cent. on the signing of the bill of lading, and the balance in cash at the current rate of exchange for bankers' sight bills on New York, on the delivery of the cargo. On the arrival of the ship at her port of discharge, questions arose with regard to the rate of exchange, and the plaintiffs, in order to prevent her detention by the weighing of the cargo as it was discharged, agreed to pay freight on the bill of lading quantity on receiving an undertaking that any overpayment of freight should be refunded. By the terms of the charterparty, any dispute as to freight was to be settled by arbitration. The plaintiffs subsequently claimed that they had made overpayments of freight, and alleged (i) that the bill of lading weight exceeded the weight of the cargo actually delivered; and (ii) that they had paid at the wrong rate of exchange. A dispute having arisen, they claimed to refer the matter to arbitration, and on Mar. 23, 1922, they gave the defendants notice that they had appointed a Mr. Fawcett as their arbitrator. The defendants, in reply, notified the plaintiffs that they had appointed a Mr. Newson to act as arbitrator on their behalf. The defendants subsequently refused to proceed with the arbitration, and, on action being brought by the plaintiffs for the return of freight overpaid, they entered a conditional appearance to the writ and applied to the master in chambers to set aside the writ on the ground that they were a sovereign body, being a Department of the Government of the United States of America, and, therefore, could not be sued in the English courts. The master set aside the writ, and his order was affirmed by ROCHE, J., at chambers. The plaintiffs appealed.

Jowitt, *K.C.*, and *Van Breda* for the plaintiffs.

Dunlop, *K.C.*, and *Stenham* for the defendants.

BANKES, L.J.—In my opinion, this appeal fails. The action is brought against the United States Shipping Board to recover a sum of money which is said to have been overpaid in respect of the freight of a vessel called the *Onekama*, which was chartered by the plaintiffs under a charterparty made by J. E. Turner & Co., for and on behalf of the owners. It is said for the plaintiffs that the defendants were the owners of that vessel, and the plaintiffs contend that, in a case where an action is brought in rem against the vessel, and it is not shown that the vessel is the property of some sovereign or sovereign State and was not a public vessel, then the principle that the sovereign or someone acting for the sovereign is immune from proceedings does not apply. But, with submission, when the matter is looked into in this case it does not seem to me that the question arises at all. The question whether the vessel was or was not employed in private trading really does not arise in a case such as this where proceedings are taken in personam, and it is established to the satisfaction of the court that the body against whom the proceedings are taken is a body representing a sovereign State. On that point we have as information the affidavit of Mr. Gregory, who says that

> "The commissioners constituting the United States Shipping Board are, as provided by the said Acts, nominated by the President of the United States by and with the advice and consent of the Senate, and no private interests of any kind are administered by the board which is solely an executive branch of the government of the United States constituted for the purpose of acquiring and controlling a mercantile marine fleet in the interests of the State";

and, in addition to that, we are now furnished with a certificate by the American ambassador, in which he says:

> "The United States Shipping Board is not a corporation or partnership, but is solely a department of the State, and is administered by commissioners nominated by the President of the United States by and with the advice and consent of the Senate as directed by the Acts of Congress hereinbefore mentioned."

The law as applicable to this particular class of action is, I think, stated fully and

correctly and at length by WILLS, J., in *Mighell* v. *Sultan of Johore* (1), where he says this ([1894] 1 Q.B. at p. 153): A

> "To begin with, there is no precedent for saying that an independent sovereign ruler can be sued in our courts. On the contrary, the proposition is opposed to every principle of international law as applied to the persons of sovereigns or those who represent them."

It seems to me, on the evidence before us, that the defendants are just as much a representative of the United States as the ambassador himself. WILLS, J., goes into the question of the ground on which the rule rests, and says (ibid. at p. 154) that B

> "It has been attempted in some cases—in that of *The Charkieh* (2), for instance—to say that a sovereign may lose his immunity and privileges by laying down his character as a sovereign and entering into trading transactions as a private person in another country." C

Then he says that the attention of the court has been called to what SIR ROBERT PHILLIMORE said in *The Charkieh* (2), but he says (ibid.):

> "those dicta were dissented from in the judgment of the Court of Appeal in *The Parlement Belge* (3)." D

When the matter was discussed in this court in *The Porto Alexandre* (4) ([1920] P. at p. 31), HILL, J., said that, in his view,

> "the law as laid down in *The Parlement Belge* (3) was that a sovereign State could not be impleaded either by being served in personam or indirectly by proceedings against its property"; E

and that is the view I took and take of that decision. And when SCRUTTON, L.J., refers (ibid. at p. 37) to Mr. Dunlop's admissions in argument in reference to *The Parlement Belge* (3) that the trading on the part of a sovereign does not subject him to any liability to jurisdiction, I venture to think Mr. Dunlop was quite right, and there is no authority anywhere to be found that the mere fact that a sovereign is engaging in some private trading business subjects him to the processes in the courts of a foreign country. And that is all that is said in reference to these defendants. F

Then it is said that the defendants had waived the immunity by agreeing to arbitration. With submission to that argument, my opinion is that it requires a great deal more than a submission to arbitration to amount to a waiver of immunity of the sovereign when he is sued in a court of law in personam: and I think, as G was pointed out in *The Sultan of Johore's Case* (1), the question of waiver arises when the question of immunity is raised and can be challenged. The fact that the defendants here were willing, at any rate for a time, to proceed to arbitration does not seem to me to touch the question that that waived their immunity from process by their action. For these reasons, I think the appeal should be dismissed with costs. H

WARRINGTON, L.J.—I agree.

EVE, J.—I agree.

Appeal dismissed.

Solicitors: *Richards & Butler*; *Thomas Cooper & Co.* I

[*Reported by* W. C. SANDFORD, ESQ., *Barrister-at-Law.*]

A

LANCASTER *v.* J. F. TURNER & CO.

[Court of Appeal (Bankes, Scrutton and Sargant, L.JJ.), March 6, 24, 1924]

[Reported [1924] 2 K.B. 222; 93 L.J.K.B. 1024; 131 L.T. 525; 29 Com. Cas. 207]

B

Sale of Goods—Non-delivery—Provision in contract for "invoicing back"—London Corn Trade Association contract—Defaulting sellers—Validity of provision—Date at which price to be fixed of goods to be invoiced.

By a contract for the sale of Japanese peas, made in the London Corn Trade Association's form for Chinese and Manchurian cereals, it was provided: "If C the seller defaults in shipping or declaring shipment, the contract shall be closed by invoicing back the goods contracted for at such price, whether higher or lower than the contract price, as the London Corn Trade Association . . . shall determine, such price to be accepted as final and binding by all parties. The association shall, if requested by either party, declare the closing price, and settlement shall be made in accordance with and on the basis of such D price by net cash payment not later than thirty days thereafter." Sellers, having failed to ship or tender any goods under the contract, applied to the association to fix a settling price under the terms of the contract, and notified the buyers accordingly. The market price of the goods having fallen, the association gave a certificate fixing the settling price of the peas, the result of which was to exhibit a difference in price in favour of the sellers, i.e., that the E price certified was lower than the contract price, in respect of which the sellers made a claim against the buyers.

Held: the court was entitled to require clear language before they enforced a contract in favour of a party who had defaulted under it, but (Scrutton, L.J., dissenting) the language of the clause was clear and precise and apt to provide for a claim by a defaulting seller against a buyer as well as the more usual F case of a claim by a buyer against a defaulting seller, and, therefore, the sellers were entitled to the payment to them by the buyers of the difference between the contract price and the certified price.

Held, further, by all the members of the court: the certified price must be that existing on the date on which notice of default by the sellers was received G by the buyers, or a day or two after that date.

Notes. Followed: *Adair & Co.* v. *Birnbaum*, [1938] 4 All E.R. 775. Referred to: *Shell-Mex* v. *Elton Cop Dyeing Co.* (1928), 34 Com. Cas. 39.

As to damages for non-delivery of goods fixed by the contract, see 29 Halsbury's Laws (2nd Edn.) 199; and for cases see 39 Digest 668 et seq.

H Cases referred to:

(1) *Lang* v. *Crude Rubber Washing Co.* (1911), unreported.

(2) *Roth, Schmidt & Co.* v. *Nagase* (1920), 2 Lloyd, L.R. 36, C.A.; 39 Digest 587, *1886*.

(3) *Re Fl. Bourgeois and Wilson, Holgate & Co.* (1920), 25 Com. Cas. 260, C.A.; 39 Digest 661, *2520*.

I (4) *Beck & Co.* v. *Szymanowski & Co.*, [1924] A.C. 43; 93 L.J.K.B. 25; 130 L.T. 387; 29 Com. Cas. 50, H.L.; 39 Digest 467, *925*.

(5) *Wallis, Son & Wells* v. *Pratt and Haynes*, [1911] A.C. 394; 80 L.J.K.B. 1058; 105 L.T. 146; 27 T.L.R. 431; 55 Sol. Jo. 496, H.L.; 39 Digest 477, *996*.

(6) *Chartered Bank of India, Australia and China* v. *British India Steam Navigation Co., Ltd.*, [1909] A.C. 369; 78 L.J.P.C. 111; 100 L.T. 661; 25 T.L.R. 480; 53 Sol. Jo. 446; 11 Asp.M.L.C. 245; 14 Com. Cas. 189, P.C.; 41 Digest 538, *3653*.

(7) *Elderslie Steamship Co.* v. *Borthwick*, [1905] A.C. 93; 74 L.J.K.B. 338; 92 L.T. 274; 53 W.R. 401; 21 T.L.R. 277; 10 Asp.M.L.C. 24; 10 Com. Cas. 109, H.L.; 41 Digest 446, *2800*. A

Appeal by the sellers from an order of ROWLATT, J., made on a Special Case stated by arbitrators.

By a contract in writing, dated July 18, 1922, Messrs. Lancaster & Jones (hereinafter called "the sellers") sold to J. F. Turner & Co., Ltd. (hereinafter B called "the buyers"), on and subject to the printed conditions and rules endorsed on the contract, 50 tons of hand-picked Japanese green peas, 1922 crop, to be shipped by first-class steamer or steamers from a port or ports in Japan, shipment to be made by river and/or ocean-going vessel or vessels and bill or bills of lading to be dated September, October, or November, 1922, at the price of £33 5s. per 2,240 lb., including freight and insurance to Liverpool direct or indirect, payment C net cash in London on arrival of the goods at the port of discharge in exchange for bill or bills of lading and policies of insurance. The contract was in the London Corn Trade Association's form for Chinese and Manchurian cereals, steamer or motor-vessels parcels, London terms, and it provided that all disputes arising thereunder should be referred to arbitration according to the arbitration rule endorsed thereon. The conditions and rules endorsed on the contract included the following: D

"8. Default.—(A) If the seller defaults in shipping or declaring shipment the contract shall be closed by invoicing back the goods contracted for at such price, whether higher or lower than the contract price, as the London Corn Trade Association or persons appointed from time to time by them shall determine, such price to be accepted as final and binding by all parties. The E association shall if requested by either party declare the closing price, and settlement shall be made in accordance with and on the basis of such price by net cash payment not later than thirty days thereafter. (B) If the buyer defaults in the fulfilment of the contract the seller shall have the option of giving notice by letter or telegram (without prejudice to any other rights he may have) of reselling against the buyers who shall make good the loss if any F sustained on such resale on demand. . . . 12. Arbitration.—All disputes arising out of this contract shall be from time to time referred to two arbitrators, one to be appointed by each party in difference, the two arbitrators having power to appoint a third. . . ."

The sellers did not ship or tender any goods under the contract. On Jan. 27, 1923, they wrote to the buyers as follows: G

"We beg to advise you that we have received notice that sellers [that is to say, the original sellers] have defaulted on the above parcel and as the peas were sold on a contract containing the invoicing back clause it will be necessary to apply to the London Corn Trade Association to fix a settling price under the terms of the contract. We are making the necessary application and will notify you immediately on receipt of their decision." H

The London Corn Trade Association, accordingly, gave a certificate fixing the settling price on Dec. 30, 1922, of hand-picked Japanese green peas, 1922 crop, September, October, or November shipment to Liverpool, at £26 17s. 6d. per 2,240 lb. A copy of this certificate was sent to the sellers, and they passed it on to the buyers on Feb. 1, 1923, and on Feb. 9 sent them a debit note for £318 15s., I being the difference between the contract price and the settling price, which sum they claimed as being due to them under cl. 8 (A) of the contract. The buyers having refused to admit liability to pay any such sum, the dispute was referred to arbitration under cl. 12 of the contract. The arbitrators found the following facts: (i) The buyers were merchants engaged in the distributing trade and had entered into sub-contracts which would have given them a small profit on the contract price; (ii) the first intimation they received that the sellers were making default was by their letter of Jan. 27, 1923; (iii) the sellers had bought from another party

who had failed to ship or tender any goods or documents; (iv) no reason was given for this default; (v) the market price steadily fell after July 18, 1922, until early in December, and by Dec. 30 had reached £26 17s. 6d. per ton of 2,240 lb.; at the beginning of February, 1923, it was about £31 per ton; (vi) the voyage from Japan to the United Kingdom takes about two months. On June 22, 1923, the arbitrators, having determined that cl. 8 (A) of the contract applied, made an award in favour of the sellers for the amount claimed, subject to the opinion of the court. On the hearing of the Special Case ROWLATT, J., gave judgment for the buyers upon the ground that cl. 8 (A) did not apply to sellers who were in default. The sellers appealed.

Raeburn, K.C., and *Le Quesne* for the sellers.
Jowitt, K.C., and *Gething* for the buyers.

Cur. adv. vult.

Mar. 24. The following judgments were read.

BANKES, L.J.—This is an appeal from a judgment of ROWLATT, J., upon a Special Case stated by arbitrators, who in paras. 13 and 14 of the Case ask for the opinion of the court in the following terms:

> "13. If in the opinion of the court the invoicing back clause applies, but the date of default is to be taken as at a date other than Dec. 30, 1922, then we award and determine that the buyers shall pay to the sellers such a sum as shall represent the difference between the contract price and the price determined by the London Corn Trade Association on the date so fixed by the court and the costs shall be paid as directed in the last preceding clause. 14. If in the opinion of the court the invoicing back clause does not apply, then in such case we award and direct that the sellers are not entitled to recover anything from the buyers and the buyers are entitled to 1s. (one shilling) damages from the sellers for breach of contract."

The invoicing back clause is cl. 8 of the conditions and rules forming part of the London Corn Trade Association's form of contract known as the Chinese and Manchurian Cereals Contract, steamer or motor-vessel parcels, London terms. The clause is as follows:

> "(A) If the seller defaults in shipping or declaring shipment the contract shall be closed by invoicing back the goods contracted for at such price, whether higher or lower than the contract price, as the London Corn Trade Association or persons appointed from time to time by them shall determine, such price to be accepted as final and binding by all parties. The association shall if requested by either party declare the closing price, and settlement shall be made in accordance with and on the basis of that price by net cash payment not later than thirty days thereafter."

In the present case the contract was for the purchase and sale of 50 tons of hand-picked Japanese green peas, 1922 crop, to be shipped in Japan, and bills of lading to be dated September, October, and/or November, 1922, at the price of £33 5s. including freight and insurance to Liverpool. On Jan. 27, 1923, the sellers intimated to the buyers that as their sellers had defaulted they could not fulfil their contract and intended to apply to the London Corn Trade Association under the invoicing back clause to fix a settling price under the terms of the contract. Application was made and the association was asked to fix the settling price as on Dec. 30, 1922. The price was fixed by the association at £26 17s. 6d. a ton, and on Feb. 9 the sellers sent to the buyers an invoice in the following terms:

> "Messrs. J. F. Turner & Co., Ltd., Liverpool, bought of Lancaster & Jones.
> Terms: net cash. To fifty tons Japanese peas @ 33s. 3d. per cwt. £1,662 10s.
> By fifty tons Japanese peas @ 26s. 10½d. per cwt. £1,343 15s.—£318 15s.
> Default price fixed by the London Corn Trade Association, Ltd."

The buyers refused to acknowledge the claim and the parties proceeded to arbitration.

The somewhat similar rule of the Produce Brokers' Association has been before the court on several occasions. On each occasion counsel for the party objecting to an enforcement of the rule has contended that it is so unreasonable as to be contrary to natural justice, and on each occasion the court has intimated that it is not concerned with the question whether the rule is or is not reasonable. If it is intelligible, and the parties have made it a term of their contract, the court cannot relieve either party from the operation of the rule because it may not consider it reasonable. Speaking for myself, I have already, in one of the decided cases, expressed a view that I did not share in the general condemnation of the rule. When prices are rising the working of the rule is a natural form of machinery by which to assess the damages payable by the seller. When prices are falling then is the time when buyers are tempted to take captious objections. It may well be that those who are acquainted with the particular branches of commerce in which these rules prevail consider that it is better to adopt a rule which will enable a buyer to obtain the commodity which he contracted to buy without paying more for it than he originally agreed to pay, even though it may result in a defaulting seller occasionally receiving part payment for goods which he never delivered, than to allow buyers a free hand in a falling market to endeavour to get out of their contracts. As I have already said, it is no concern of the court to consider whether the rule is reasonable or not. I merely say what I do in order to indicate that I continue to entertain the opinion which I expressed in the *Crude Rubber Washing Co.'s Case* (1) when a member of the Divisional Court which decided that case. I was also a member of this court on both the occasions when the rule of the Produce Brokers' Association was before the court. In *Roth Schmidt & Co.* v. *Nagase* (2), decided in January, 1920, the point in reference to the rule was whether it operated to exclude a claim for damages by a buyer who had properly rejected goods tendered to him under a contract which contained the rule. The second case was *Re Fl. Bourgeois and Wilson, Holgate & Co.* (3), which decided that where a buyer can establish a claim for special damage owing to a default on the part of the seller to deliver the goods, the case is outside the rule altogether, and the seller cannot rely upon the rule to defeat the buyer's claim. The effect of these decisions is that in certain circumstances the rule is not applicable. No circumstances such as those in the cases referred to exist in the present case, and they have no application to it. Some day it may have to be decided what the position is if the default on the sellers' part was a voluntary default or the transaction a mere gaming and wagering contract, or if at the date of the declaration of default the contract goods were not procurable.

The only two questions raised by the case are: (i) Does the invoicing back clause apply? (ii) If it does at what date should the price be paid? On the first point the only question, as it appears to me, open to the buyers is whether the rule is intelligible in the sense that it is so expressed as sufficiently clearly to indicate its meaning. I think that it is. The event on which it is to come into operation is a default on the part of the sellers in shipping or declaring shipment. In that event a notional sale is to take place carried out by buyers invoicing back the goods contracted for at a price to be fixed as provided in the rule. The price so fixed is to be conclusive, and a settlement is then to be made. There being according to the operation of the rule two contracts of sale of the same goods in existence at the same time at different prices, one by sellers to buyers and the other by buyers to sellers, the only possible settlement, as it appears to me, contemplated by the rule is that indicated in the rule—namely, a net cash payment by the party who appears in the transaction to be the debtor to the other. In my opinion, the answer to the inquiry in the Special Case should be that the invoicing back clause does apply. On the question of the date of default it is, I think, clear that Dec. 30 cannot be the correct date, and that the date of default should be a reasonable time after notice of default was given by the sellers, which presumably would be within a few days after Jan. 27, 1923. For the reasons given this appeal must, in my opinion, be allowed with costs here and below.

A **SCRUTTON, L.J.** (read by BANKES, L.J.).—This is an appeal from a judgment of ROWLATT, J., on a Special Case stated by lay arbitrators who hold that in a case where the sellers of goods have made complete default in delivery of the goods sold the result is that the buyers are to pay to the sellers a sum which is in amount the same as if the sellers had tendered the goods for delivery and the buyers on a falling market had wrongfully refused to accept, whereupon the sellers had sold in B the market and claimed the difference between contract price and market price. It is said that the contract the parties have made requires the buyers to pay the same sum to the sellers whether the sellers have made default in delivery, or the buyers in acceptance. Commercial men may make such an extraordinary contract, but the courts are entitled to require clear language before they are convinced that such a contract has been made. As LORD BUCKMASTER says in *Beck & Co.* v. C *Szymanowski & Co.* (4):

> "I agree . . . that in a contract from which the ordinary rights of buyer and seller ensue an attempt to exclude either party from those rights by general terms applicable to all contracts can only be effected by the use of plain language."

D This is only repeating what was said by FLETCHER MOULTON, L.J., and the House of Lords in *Wallis* v. *Pratt* (5) and by LORD MACNAGHTEN in *Chartered Bank of India, Australia and China* v. *British India Steam Navigation Co., Ltd.* (6), repeating his statement in *Elderslie Steamship Co.* v. *Borthwick* (7).

The contract in the present case was to sell c.i.f. 50 tons of green peas shipped in Japan September, October, and/or November, 1922, for Liverpool, payment E against documents on arrival of the goods in Liverpool. The seller did not ship or buy afloat any such goods, but did not till Jan. 27, 1923, say he was not going to deliver. He has got an award that the buyer shall pay him the difference between the contract price and the market price on Dec. 30, 1922, that being apparently the date at which the seller should have delivered a provisional invoice, and did not. This extraordinary result is said to follow from condition 8 (A) of the contract F headed "Default." The system described in that clause of "invoicing back" has given the court great trouble on previous occasions. I do not repeat my judgment in *Re Fl. Bourgeois and Wilson, Holgate & Co.* (3), where it was held that a similar clause did not apply where the buyer was claiming special damage against the defaulting seller; and I only refer to *Roth Schmidt & Co.* v. *Nagase* (2) cited therein, where it was held that a similar clause did not apply where the buyer was G claiming back from a defaulting seller the price paid in advance.

In the present case, where the sellers have delivered no goods and are in default, it is said that, in the words of the contract, "settlement shall be made" by invoicing back from buyers to sellers the goods contracted for at a price determined by the London Corn Trade Association, though it is not stated at what date the price is to be fixed, or in what market. The sellers have not invoiced or delivered any goods H to the buyers, and the buyers are not expected to deliver any goods to the seller; but in substance the contract price is set off against the market price at some unspecified date. If that date on a rising market is when the buyer knows of the breach and ought to buy against the seller, this process will produce the figure of damages to which the buyer is entitled; but it is said that the clause goes further and, if the market has fallen, so that the buyer can buy at less than the contract I price and suffers no damage but makes a gain, he ought to pay his gain to the defaulting seller, who will thus make some money by breaking his contract. I cannot find this startling result in the clause in question. The words "settlement shall be made" seem to me to point to settlement of the default and the claim for damages then being made by the seller, and not clearly or at all to indicate a payment by the buyer who is not in default. Any other construction seems to make the transaction simply a bet, in which the seller bets that the market price will have dropped below the contract price by the notional date of performance, and the buyer bets it will have risen, and the loser pays the amount by which the winner

wins. If the parties have agreed this, there is nothing contrary to natural justice in it, though there may be questions of public policy as to betting; but I require to be satisfied that they have agreed anything so extraordinary, and I do not find any words which compel me to come to that conclusion. This is the ground on which ATKIN, L.J., and I myself declined to give this effect to a similar clause in *Bourgeois' Case* (3), and BANKES, L.J., took the same view in *Roth Schmidt & Co.* v. *Nagase* (2).

The authorities stand in this way. Three previous cases have dealt with a similar rule of the Produce Brokers' Association. In the first, the *Crude Rubber Case* (1), an arbitrator had ordered a buyer to pay to a seller, who had made default in one instalment of a contract, a sum calculated under the rule, and the Divisional Court declined to interfere with the construction of the rule by the arbitrator to whom the parties had agreed to go. I take this explanation of the case from the judgment of BANKES, L.J., in *Bourgeois' Case* (3), he having been, as BANKES, J., a member of the court. I notice that HAMILTON, J., who in the argument had twice taken the same view as I do, that you want very clear words to produce the surprising results supposed to follow from the rule, expressly says that he is not deciding a case where a seller without any excuse whatever simply says he does not choose to perform his contract, but will consider that case when it arises. I also notice that BANKES, J., who used language which appears to cover this case, explains in *Bourgeois' Case* (3) that his language was wider than he intended and that the rule does not give the only remedy of a buyer against a defaulting seller. In *Roth Schmidt & Co.* v. *Nagase* (2) the arbitrators under the same rule allowed the buyer to reject the goods and claim back the price from the defaulting seller, and the Court of Appeal affirmed the decision, holding that it required clear language to exclude a right to reject, and claim repayment of the purchase price, BANKES, L.J., giving the leading judgment and affirming ROCHE, J. ATKIN, L.J., as appears from the extract of his judgment cited in *Bourgeois' Case* (3) (25 Com. Cas. at pp. 278, 279), took a similar view. Lastly, in *Bourgeois' Case* (3), where the buyer under the same clause claimed special damages for loss of a sub-contract, and the seller claimed a sum due on invoicing back under the rule, this court negatived the latter claim, and allowed the former, again taking the view that the language was not clear enough to produce the startling results suggested. I see nothing in these authorities to lead me to alter the view I have already expressed, and I, therefore, agree with the result of ROWLATT, J.'s judgment.

If I am wrong, I do not think the arbitrators' view as to damage can stand. The sellers only declared default on Jan. 27. They then wrote to the association sending them another contract and asking them to fix the price on Dec. 30. No notice was given to the buyers of this. The contract sent was not their contract, and the date, Dec. 30, was not any date relevant to them. I do not understand whether the association take any responsibility for the date, or why they fix prices without any notice to the person affected by them, especially if they are also fixing the date. The arbitrators then made an award on the basis of an invoicing back on Dec. 30. It was admitted by counsel for the sellers that this date could not stand, as on Dec. 30 the buyers knew of no default and could not go into the market to replace it. If there is a liability on the buyers, it must, in my view, arise from an invoicing back about Jan. 29, the date on which the sellers' notice of default was received and on which the arbitrators, from cl. 13 of the award, apparently intend that price to be fixed by the Corn Trade Association, though, perhaps, the parties will take the price which for some reason the arbitrators have found in cl. 11 (5) of £31, which I gather would reduce the award by £206 5s. from £318 15s. to £112 10s. In that event the costs of the arbitration are provided for by the award, and there should be no costs before ROWLATT, J., or in this court. But, as appears above, I think that the appeal should be dismissed, judgment standing for the buyers for 1s. and the sellers paying the costs of the appeal.

SARGANT, L.J.—The first and principal question here is whether cl. 8 (A) of the conditions and rules of the London Corn Trade Association is limited in application to the case of a claim by a buyer against a defaulting seller, or extends also to and provides for a possible claim by a defaulting seller against a buyer. The latter construction is one that at first sight is somewhat improbable if not startling to the legal mind, which is wholly unaccustomed to a claim arising out of contract in favour of the party that has broken the contract. But there may be reasons of business convenience in favour of recognising such claims, particularly in cases like the present, where there may be a whole series of successive and practically interdependent contracts, and default in one of these contracts may involve wholly blameless defaults in others of the series.

There is no doubt that under somewhat similar rules the courts have recognised the possibility of claims being validly made by defaulting sellers against buyers: see *Roth Schmidt & Co.* v. *Nagase* (2) and *Re Fl. Bourgeois and Wilson, Holgate & Co.* (3). It is, therefore, necessary to examine the language of these particular rules with an open mind, though, no doubt, from the point of view that it is for the defaulting seller to make out fairly clearly that they entitle him to claim notwithstanding his default. When this is done the result, in my view, is to establish that cl. 8 (A) on its true construction extends to and provides for a claim by a defaulting seller as well as for the more ordinary case of a claim against a defaulting seller. The words "if a seller defaults in shipping or declaring shipment" are quite general, and the consequence—namely, "the contract shall be closed by invoicing back"—is expressed in the most imperative way, wholly irrespective of any suggestion of blame and in marked contrast to the language of sub-cl. (B), which gives a right or option solely to the contractor who is not in default. Further, the subsequent words, "whether higher or lower than the contract price," seem to clinch the matter, since, while the first alternative points to the more probable and ordinary case of a claim by a buyer who has lost by the non-fulfilment of a contract to deliver at a lower price and has to be compensated for the resulting loss, the second alternative is obviously one where the buyer, so far from being prejudiced by the default, is relieved from having goods tendered to him at a price higher than that at which he could obtain them in the market. The subsequent provisions of sub-cl. (A), such as that the price determined is "to be accepted as final and binding by all parties," and that the association is to declare the closing price "if requested by either party," and that "settlement shall be made . . . on the basis of such closing price," point clearly, and I think unambiguously, to a payment by the seller to the buyer or by the buyer to the seller, as the event may prove, wholly irrespective of the question whether the party to enforce and receive the payment has been in default or not. It is true that the phrase "settlement shall be made" is apt to suggest to a lawyer the settlement or adjustment of an enforceable legal claim, such as would arise against a defaulting party, and could hardly arise in his favour. But here I think that the phrase is used in a commercial rather than a legal sense, and refers to the closing of a transaction, as in the Stock Exchange phrase "settlement day."

Neither of the two authorities already referred to touches the vital question here of the construction of these rules. But *Lang* v. *Crude Rubber Washing Co.* (1), before the Divisional Court in December, 1911, of which a full report has been placed before us, is a clear authority in favour of the sellers. There, as here, the claim was one by defaulting sellers against a buyer, where the market had fallen and the rules were very similar to those here, but apparently somewhat less stringent or imperative. It was held, following apparently a previous decision of the Court of Appeal, that the sellers were entitled against the buyers to the market difference in the sellers' favour. The reasoning of HAMILTON and BANKES, JJ., seems to me particularly important, and has since been approved, at any rate by BANKES, L.J., in the subsequent case of *Re Fl. Bourgeois and Wilson, Holgate & Co.* (3). It is not unimportant to observe that the rules then given effect to had been in use for many years, and that they have been continued to the present day,

though apparently with some slight increase in clearness and stringency, the phrase "the contract shall be closed" being somewhat more imperative than "the seller shall close." In these circumstances I am of opinion that the present rules must to-day be held to be quite sufficiently clear and precise, and that they cover and provide for the present case, and are enforceable in favour of a seller though in default. Incidentally, I can see nothing contrary to natural justice in the rules as so interpreted, though this question is, speaking strictly, not before us.

One or two minor objections on the part of the buyers have still to be considered. It is argued that there was no proper "invoicing back," as provided by the rules. But, in my judgment, there was a case under the rules for invoicing back and there was (apart from the question of date, to be considered later) an ascertainment of price for the purposes of settlement. It is also argued that there was no default in "declaring shipment" since the contract did not provide for any such declaration. But, reading the contract and the rules together, the rendering of a provisional invoice appears to be a declaration of shipment within the meaning of the contract, otherwise an important part of cl. 8 (A) is merely nugatory. Lastly, there is not here any special damage to the buyers either alleged or proved, or anything entitling them to more than nominal damages, and so *Re Fl. Bourgeois and Wilson, Holgate & Co.* (3) does not apply.

In my opinion, therefore, the sellers are entitled to recover against the buyers, but the amount to be recovered depends on the proper date for ascertaining the closing price. The date actually selected as the date of default—namely, Dec. 30, 1922—has not been defended by counsel for the sellers and is wrong. The proper date is Monday, Jan. 29, 1923, when notice of default seems first to have been received by the buyers, or a day or two after that date. This will diminish materially the difference payable by the buyers since the price of the goods had risen after Dec. 31, 1922, though not to the price at which the original contract had been made. I agree with the result arrived at by BANKES, L.J.

Appeal allowed.

Solicitors: *Sharpe, Pritchard & Co.*, for *North, Kirk & Co.*, Liverpool; *Crowder, Oldham & Vizard*, for *H. J. Sharman*, Liverpool.

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

THE CHRISTEL VINNEN

[Court of Appeal (Bankes, Scrutton and Atkin, L.JJ.), June 30, July 15, 1924]

[Reported [1924] P. 208; 93 L.J.P. 138; 132 L.T. 337; 40 T.L.R. 845; 69 Sol. Jo. 89; 30 Com. Cas. 32; 16 Asp.M.L.C. 413]

Shipping—Cargo—Damage—Dominant cause—Unseaworthiness—Leak through rivet hole—Loss increased by negligence of master.

By the terms of a charterparty which was incorporated in bills of lading of which the plaintiffs, cargo-owners, were holders, it was provided: "The steamer shall not be liable for loss or damage occasioned by . . . any latent defects in hull . . . or by other accidents arising in the navigation of the steamer even when occasioned by the negligence, default or error of judgment of the master, mariners or other servants of the shipowner." Water leaking into the hull through a rivet hole from which the rivet had dropped out damaged the cargo. Owing to the failure of the master to take proper soundings, and his neglect, in consequence of such failure, to use the ship's pumps which would have been capable of keeping the water in check, the damage to the plaintiff's cargo was substantially increased. Hill, J., held that approximately half the damage was due to unseaworthiness for which the shipowners were liable, and half to negligence in respect of which they were protected by the exception, and he accordingly gave judgment for the cargo-owners for half the amount claimed. On appeal,

Held: the dominant cause of the damage must be regarded; the dominant cause was the unseaworthiness of the ship, and it was immaterial that another cause, the negligence of the master, increased the damage; and, therefore, the shipowners were liable for the whole of the damage.

Decision of Hill, J., [1924] P. 61, reversed.

P. Samuel & Co., Ltd. v. *Dumas* (1), ante, p. 66, applied

Notes. Referred to: *Tempus Shipping Co.* v. *Louis Dreyfus & Co.* (1930), 144 L.T. 13; *Smith, Hogg & Co.* v. *Black Sea and Baltic General Insurance Co.*, [1940] 3 All E.R. 405.

As to the duty to provide a seaworthy ship, see 30 Halsbury's Laws (2nd Edn.) 330, 463 et seq.; and for cases see 41 Digest 471 et seq., 422–424.

Cases referred to:

(1) *P. Samuel & Co., Ltd.* v. *Dumas*, ante, p. 66; [1924] A.C. 431; 93 L.J.K.B. 415; 130 L.T. 771; 40 T.L.R. 375; 68 Sol. Jo. 439; 16 Asp.M.L.C. 305; 29 Com. Cas. 239, H.L.; 29 Digest 112, *666*.

(2) *Waikato* (*Cargo Owners*) v. *New Zealand Shipping Co.*, [1899] 1 Q.B. 56; 68 L.J.Q.B. 1; 79 L.T. 326; 15 T.L.R. 33; 43 Sol. Jo. 41; 8 Asp.M.L.C. 442; 4 Com. Cas. 10, C.A.; 41 Digest 424, *2658*.

(3) *Cargo ex The Laertes* (1887), 12 P.D. 187; 56 L.J.P. 108; 57 L.T. 502; 36 W.R. 111; 6 Asp.M.L.C. 174; 41 Digest 424, *2656*.

(4) *Leyland Shipping Co.* v. *Norwich Union Fire Insurance Society*, [1918] A.C. 350; 87 L.J.K.B. 395; 118 L.T. 120; 34 T.L.R. 221; 62 Sol. Jo. 307; 14 Asp.M.L.C. 258, H.L.; affg., [1917] 1 K.B. 873, C.A.; 29 Digest 229, *1858*.

(5) *Reischer* v. *Borwick*, [1894] 2 Q.B. 548; 63 L.J.Q.B. 753; 71 L.T. 238; 10 T.L.R. 568; 7 Asp.M.L.C. 493; 9 R. 558, C.A.; 29 Digest 206, *1650*.

Also referred to in argument:

Jackson v. *Mumford* (1904), 52 W.R. 342; 20 T.L.R. 172; 9 Com. Cas. 114, C.A.; 29 Digest 225, *1827*.

Hutchins Bros. v. *Royal Exchange Assurance Corpn.*, [1911] 2 K.B. 398; 80 L.J.K.B. 1169; 105 L.T. 6; 27 T.L.R. 482; 12 Asp.M.L.C. 21; 16 Com. Cas. 242, C.A.; 29 Digest 126, *791*.

The Dimitrios Rallias (1922), 128 L.T. 491; 16 Asp.M.L.C. 62; 13 Lloyd, L.R. 363, C.A.; 41 Digest 423, *2652*.

The Europa, [1908] P. 84; 77 L.J.P. 26; 98 L.T. 246; 24 T.L.R. 151; 11 Asp.M.L.C. 19, D.C.; 41 Digest 480, *3129*.

Kish v. *Taylor*, [1912] A.C. 604; 81 L.J.K.B. 1027; 106 L.T. 900; 28 T.L.R. 425; 56 Sol. Jo. 518; 12 Asp.M.L.C. 217; 17 Com. Cas. 355, H.L.; 41 Digest 485, *3170*.

Steel v. *State Line Steamship Co.* (1877), 3 App. Cas. 72; 37 L.T. 333; 3 Asp.M.L.C. 516, H.L.; 41 Digest 428, *2693*.

Gilroy, Sons & Co. v. *Price & Co.*, [1893] A.C. 56; 68 L.T. 302; 7 Asp.M.L.C. 314; 1 R. 76, H.L.; 41 Digest 479, *3121*.

Hedley v. *Pinkney & Sons Steamship Co.*, [1894] A.C. 222; 63 L.J.Q.B. 419; 70 L.T. 630; 42 W.R. 497; 10 T.L.R. 347; 7 Asp.M.L.C. 483; 6 R. 106, H.L.; 41 Digest 297, *1591*.

Atlantic Shipping and Trading Co. v. *Louis Dreyfus & Co.*, [1922] 2 A.C. 250; 91 L.J.K.B. 513; 127 L.T. 411; 38 T.L.R. 534; 66 Sol. Jo. 437; 27 Com. Cas. 311, H.L.; 16 Digest 116, *150*.

Appeal and **Cross-Appeal** from an order of HILL, J., reported [1924] P. 61.

The plaintiffs were holders of a bill of lading for 2,480,000 kilos of maize shipped at San Nicolas on the defendants' schooner *Christel Vinnen*, which incorporated the terms of the charterparty by which it was provided:

"The steamer shall not be liable for loss or damage occasioned by . . . perils of the sea . . . or any latent defect in hull . . . by collision, stranding or other accidents in the navigation of the steamer, even when occasioned by the negligence, default, or error of judgment of the pilot, master, mariners or other servants of the shipowner. . . ."

The *Christel Vinnen* sailed from San Nicolas for the Azores on Dec. 10, 1922, but on Dec. 20 it was found that she was making water, and she, accordingly, put into Rio Janeiro where her cargo was discharged. It appeared that soundings were at first taken regularly twice a day, but, according to the evidence of the master, when it was found that no water was being made he decided that it was unnecessary to take regular soundings. Soundings were recorded in the log at noon on the 18th. At noon on the 19th, "no water" was recorded in the log, but at 8.50 a.m. on the 20th, 9 ft. of water was discovered in the *Christel Vinnen*. In an action in which the plaintiffs claimed from the defendants damages for damage to the cargo, HILL, J., held that the damage was due in part to the negligence of the master in failing to make proper use of the pumps, and in part to unseaworthiness. In view of the difficulty of determining with accuracy how much damage was respectively attributable to each cause, he gave judgment for the plaintiffs for one-half of the amount claimed, representing approximately the amount of the damage caused by unseaworthiness, against which the defendants were not protected. The defendants appealed and the plaintiffs cross-appealed.

Bateson, K.C., and *G. St. C. Pilcher* for the defendants.

R. A. Wright, K.C., *Stephens, K.C.*, and *Van Breda* for the plaintiffs.

Cur. adv. vult.

July 15. **SCRUTTON, L.J.**, read the judgment of the court.—The *Christel Vinnen*, a steel motor-schooner built by Messrs. Krupps, on her first cargo-carrying voyage, sprang a leak and put back to Rio. Water entering through the leak damaged her cargo of maize, but much less damage would have been done (the judge finds only half the actual damage) had those on board been ordinarily careful in taking soundings. They were negligent and did not discover water in the hold until long after they ought to have been aware of it. The leak was through a rivet hole from which the rivet had dropped out. As there was no sign of straining on any adjacent rivets, I agree with the view of the judge below that the rivet was a defective rivet when the voyage started, and that, therefore, the ship was unseaworthy.

A The shipowner, sued by the cargo-owner for damage to the maize, replies that he is protected by the exceptions

> "damage occasioned by a latent defect in the hull . . . even where occasioned by the negligence of the servants of the shipowner."

It is clear law that exceptions do not apply to protect the shipowner who furnishes B an unseaworthy ship, where the unseaworthiness causes damage, unless the exceptions are so worded as clearly to exclude or vary the implied warranty of seaworthiness. *The Waikato* (*Cargo Owners*) v. *New Zealand Shipping Co.* (2) is an instance of ambiguity defeating the shipowner's probable intention: see the judgment of COLLINS, L.J. In *Cargo ex The Laertes* (3) the words which protected the shipowners were "latent defects in machinery even existing at the time of C shipment." Such words are absent in the present case and latent defects may come into existence during the voyage. In our view, the shipowner here had not clearly excluded or modified the implied warranty of seaworthiness, and, consequently, the exception does not apply to protect him when water entering through unseaworthiness causes the damage, as is undoubtedly the case as to half the damage here. The shipowner's appeal against the judgment below, holding him D liable for half the damage, therefore, fails.

But the judge below has excused the shipowner from liability from the other half of the damage on the ground that this loss was occasioned by the negligence of the shipowner's servants, and, therefore, that the admitted unseaworthiness did not cause the loss. This raises, in my view, a novel point, and unfortunately raises it on a badly-worded exception clause. The negligence exception is fre- E quently a separate exception against loss by negligence; in the present case, it is dependent on separate exceptions as to perils causing loss. The shipowner is protected from loss occasioned by collision, even when the collision is occasioned by negligence. I think this and not "even when the loss is occasioned by negligence" is the true reading of the clause. He is protected against loss caused by perils of the sea even though the peril of the sea is occasioned by negligence. F But in this case the peril of the sea is not occasioned by negligence; if the entry of sea water is the alleged peril, it is occasioned by unseaworthiness. LORD FINLAY says in *P. Samuel & Co., Ltd.* v. *Dumas* (1) (ante at p. 80):

> "The view that the proximate cause of the loss when the vessel has been scuttled is the inrush of sea water, and that is a peril of the sea, is inconsistent G with the well-established rule that it is always open to the underwriter on a time policy to show that the loss arose not from perils of the sea but from the unseaworthy condition in which the vessel sailed: see ARNOULD ON MARINE INSURANCE (10th Edn.), s. 799. When the vessel is unseaworthy and the water consequently gets into the vessel and sinks her, it would never be said that the loss was due to the perils of the sea. It is true that the vessel sank in consequence of the inrush of water, but this inrush was due simply to the H unseaworthiness. The unseaworthiness was the proximate cause of the loss."

The shipowner is trying to read the exception as if it were: "even if the loss consequent on the perils of the sea was occasioned by negligence." Another way of putting the point is that under recent decisions you look at the direct and dominant cause, and it is immaterial that another cause assists it. In *P. Samuel* I *& Co., Ltd.* v. *Dumas* (1) the direct cause was the scuttling; it was immaterial that entry of sea water, usually a peril of the sea, caused the loss. In *Leyland Shipping Co.* v. *Norwich Union Fire Insurance Society* (4) the direct cause was the explosion of the torpedo; it was immaterial in the view of the House of Lords that a subsequent storm, which might or might not have happened, completed or increased the loss. In *Reischer* v. *Borwick* (5) the collision was the direct cause, and subsequent negligence in stopping the hole did not prevent the sinking being caused by the collision. I am aware that these are policy cases, but they are now established by the highest tribunal, and I think their ratio decidendi governs this

case. The water which entered and did the damage entered through unseaworthiness; its effects when in the ship might have been partially remedied by due diligence which the shipowner's servants did not take. But, in my view, the cause of the resulting damage is still unseaworthiness; the shipowner cannot show any exception to protect him from any part of the damage. In the case of tort, no doubt, the plaintiff complaining of damage done cannot recover for any part of that damage which he could have prevented by reasonable care. But here the man who has by his original breach of contract caused the opportunity for damage has by the negligence of his servants increased it. He cannot show any exception to protect him, and cannot show that the dominant cause of the damage was not the unseaworthiness which admitted the water into the ship. In my view, therefore, the cross-appeal must be allowed and the shipowner held liable for all the damage, instead of for half of it.

As the shipowner has broken his contract and is not protected by any exception in the bill of lading, it follows that he cannot recover for any sacrifice or expenditure rendered necessary by his own breach of contract. His counter-claim, therefore, fails and should be dismissed. The appeal of the shipowner should be dismissed with costs, and the appeal of the cargo-owner allowed with costs here and below.

Appeal dismissed; cross-appeal allowed.

Solicitors: *Richards & Butler*; *William A. Crump & Son.*

[*Reported by* G. Hutchinson, Esq., *Barrister-at-Law.*]

LOCH *v.* JOHN BLACKWOOD, LTD.

[Privy Council (Lord Shaw, Lord Phillimore, Lord Carson), June 2, 1924.]

[Reported [1924] A.C. 783; 93 L.J.P.C. 257; 131 L.T. 719; 40 T.L.R. 732; 68 Sol. Jo. 735; [1924] B. & C.R. 209]

Company—Winding-up—"Just and equitable"—Interpretation—Need to prove lack of confidence in directors in regard to company's business due to lack of probity—Companies Act, 1910 (*No.* 10 *of* 1910, *Barbados*), *s.* 127 (*vi*).

Section 127 of the Barbados Companies Act, 1910, which was identical with s. 222 of the Companies Act, 1948, specified six grounds on which a company might be wound-up by the court, the sixth of which was "if the court is of opinion that it is just and equitable that the company should be wound-up."

The words "just and equitable" in this provision are not to be read as ejusdem generis with the preceding words of the section. At the foundation of an application under them for winding-up there must lie a justifiable lack of confidence in the conduct and management of the company's affairs. This lack of confidence must be grounded on conduct of the directors, not in regard to their private lives or affairs, but in regard to the company's business; it must not spring from dissatisfaction at being out-voted on the business affairs or domestic policy of the company, but must rest on a lack of probity in the conduct of the company's affairs. These things being proved, it is just and equitable that the company be wound-up.

The directors of a company who held the majority of the shares failed to observe the statutory conditions as to general meetings, did not submit balance sheets, accounts, and reports as required by the articles, and did not comply

with the provisions under statute and the articles as to audit. They paid no dividend and refused to submit to arbitration the question of the value of the shares so that it was impossible for the minority shareholders to realise the true value of their shares, and sums were voted to the chairman (whose wife owned half the shares in the company) without notice being given to the minority shareholders. Owing to the incidence of the shareholding it was impossible for the minority shareholders to obtain any relief by calling a general meeting. On an application by the minority shareholders for the winding-up of the company,

Held: it was just and equitable that it should be wound-up.

Statute—Construction—Ejusdem generis rule—Application—Link with specific enumeration.

The true rule for determining whether general words are to be confined to things ejusdem generis is that, if the general words are bound up with the enumeration by proper words of relation, then their meaning is confined to the subject-matter indicated in the enumeration, but if the general words are severed from the enumeration of particulars there is no logical reason for interpreting the one by the other.

DICTUM of LORD M'LAREN in *Symington* v. *Symington's Quarries, Ltd.* (1) (1905), 8 F. (Ct. of Sess.) at p. 129, applied.

Notes. Considered: *Davis & Co.* v. *Brunswick (Australia), Ltd., Brunswicke-Balke-Collender Co. and Brunswick Radio Corpn.*, [1936] 1 All E.R. 299; *Re Anglo-Continental Produce Co.*, [1939] 1 All E.R. 99.

As to winding-up on ground that it is just and equitable, see 6 HALSBURY'S LAWS (3rd Edn.) 534, 535; and for cases see 10 DIGEST (Repl.) 856, 857. For Companies Act, 1948, see 3 HALSBURY'S STATUTES (2nd Edn.) 452.

Cases referred to:

(1) *Symington* v. *Symington's Quarries, Ltd.* (1906), 8 F. (Ct. of Sess.) 121; 43 Sc.L.R. 157; 13 S.L.T. 509; 10 Digest (Repl.) 864, **2461.*

(2) *Re Agriculturist Cattle Insurance Co., Ex parte Spackman* (1849), 1 Mac. & G. 170; 1 H. & T.W. 229; 18 L.J.Ch. 261; 13 L.T.O.S. 358; 13 Jur. 415; 41 E.R. 1228, L.C.; 10 Digest (Repl.) 854, *5622.*

(3) *Re Suburban Hotel Co.* (1867), 2 Ch. App. 737; 36 L.J.Ch. 710; 17 L.T. 22; 15 W.R. 1096, L.JJ.; 10 Digest (Repl.) 856, *5639.*

(4) *Re Amalgamated Syndicate*, [1897] 2 Ch. 600; 66 L.J.Ch. 783; 77 L.T. 431; 46 W.R. 75; 42 Sol. Jo. 13; 4 Mans. 308; 10 Digest (Repl.) 856, *5642.*

(5) *Re Irrigation Co. of France, Ex parte Fox* (1871), 6 Ch. App. 176; 40 L.J.Ch. 433; 24 L.T. 336, L.JJ.; 10 Digest (Repl.) 880, *5827.*

(6) *Re Yenidje Tobacco Co., Ltd.*, [1916] 2 Ch. 426; 86 L.J.Ch. 1; 115 L.T. 530; 32 T.L.R. 709; 60 Sol. Jo. 707; [1916] H.B.R. 140, C.A.; 10 Digest (Repl.) 863, *5683.*

(7) *Re Blériot Manufacturing Aircraft Co., Ltd.* (1916), 32 T.L.R. 253; [1917] H.B.R. 279; 10 Digest (Repl.) 860, *5663.*

(8) *Re Newbridge Sanitary Steam Laundry, Ltd.*, [1917] 1 I.R. 67; 10 Digest (Repl.) 857, **2426.*

(9) *Baird* v. *Lees*, 1924 S.C. 83; 10 Digest (Repl.) 866, **2472.*

Also referred to in argument:

Demerara Bauxite Co. v. *Hubbard*, [1923] A.C. 673; 92 L.J.P.C. 148; 129 L.T. 517, P.C.; 42 Digest 82, *737.*

Percival v. *Wright*, [1902] 2 Ch. 421; 71 L.J.Ch. 846; 51 W.R. 31; 18 T.L.R. 697; 46 Sol. Jo. 616; 9 Mans. 443; 9 Digest (Repl.) 487, *3204.*

Appeal from an order of the West Indian Court of Appeal whereby SIR A. LUCIE-SMITH, C.J., of Trinidad, SIR CHARLES MAJOR, C.J., of British Guiana, and W. P. MICHELIN, Acting C.J. of the Leeward Islands, reversed an order of SIR W. H. GREAVES, C.J., of Barbados, sitting in the Court of Common Pleas for Barbados,

ordering that the respondent company, John Blackwood, Ltd., be wound-up by the court.

The winding-up order was made upon the petition of the appellants, who were shareholders, holding or in right of about one-half of the share capital in the respondent company, under s. 127 (vi) of the Barbados Companies Act, 1910. That section was identical in terms with s. 129 of the Companies (Consolidation) Act, 1908 [now re-enacted in s. 222 of the Companies Act, 1948]. The point for decision was whether upon the evidence before him the Chief Justice of Barbados could reasonably be of opinion that it was just and equitable that the respondent company should be wound-up. The Chief Justice of Barbados was of opinion (inter alia) that the directors, by omitting to hold general meetings, submit accounts, and recommend a dividend, had laid themselves open to the suspicion that their object was to keep the appellants in ignorance of the truth and to acquire their shares at an under-value, and that it was just and equitable that the company should be wound-up. The West Indian Court of Appeal reversed that judgment, and the petitioners appealed on the grounds (inter alia) that it was just and equitable that the company should be wound-up by the court; that the West Indian Court of Appeal was wrong in construing s. 127 (vi) of the Barbados Companies Act, 1910, as limited to cases ejusdem generis with those specified in sub-s. (i) to (v) and to cases where the company business cannot be or ought not to be allowed to be carried on, and in deciding that in the circumstances of the case misconduct and irregularities on the part of directors were not a ground on which it was just and equitable to order the winding-up of the company.

Wilton, K.C. (of the Scottish Bar), and *Blanco White* for the appellants.
Clauson, K.C., and *W. Gordon Brown* for the respondents.

June 2. **LORD SHAW.**—This is an appeal from an order dated Mar. 15, 1923, of the West Indian Court of Appeal. The appellants are petitioners for an order by the court for the winding-up. The petition is presented under s. 127 of the Barbados Companies Act, 1910. That section is in terms identical with those of s. 222 of the Companies Act, 1948. The subsection particularly founded upon is sub-s. (vi) which declares that a company may be wound-up by the court "if the court is of opinion that it is just and equitable that the company be wound-up."

A good many years ago Mr. John Blackwood established an engineering business in Barbados and carried it on until his death in January, 1904. Under the provisions of his will his estate fell to be divided one-half to Mrs. Rebecca Thomson McLaren, the wife of Mr. William McLaren, and one-quarter each to his niece, Mrs. Loch, and to his nephew (Mrs. Loch's brother), James Blackwood Rodger lately deceased; the shares to be paid to Mrs. Loch and Mr. Rodger when they reached the age of thirty. Authority was given to his trustees to convert his business into a company, with powers to his trustees to act as directors and to Mr. McLaren to have the supreme control and management of matters connected with the business. The trustees were James Murphy (who died in 1911, and never acted in the trusts), Mr. William McLaren (the testator's sister's husband), and Mr. McLaren's clerk, Henry Allen Yearwood. A company was, accordingly, formed on Jan. 2, 1905. In the year 1916 Mrs. Loch and James Blackwood Rodger had both attained the age of thirty. The latter died in December, 1919. The board of directors now consists of Mr. McLaren, his wife Mrs. McLaren, who was appointed in 1913, and Mr. Yearwood. Under this directorate the business of the company appears to have been energetically managed and to have amassed considerable profits. The arrangement of the capital was this. The total amount was £40,000 in £1 shares; 20,000 of these were allotted to Mrs. McLaren; of the remaining 20,000, 10,000 should have gone to Mrs. Loch and 10,000 to Mr. Rodger. Mrs. Loch, however, was allotted 9,999; Mr. Rodger, 9,998; and the three shares left over were allotted one to Mr. McLaren and one each to Mr. Yearwood and Mr. King (Mrs. McLaren's nominees, the first being Mr. McLaren's clerk, and the second his solicitor). This was quite a natural and proper arrangement; but,

of course, in the event of a division of opinion in the family between what may be called the McLaren interest, on the one hand, and the interest of the nephew and niece on the other, the preponderance of voting power lay with the former. It is thus seen that, although taking the form of a public company, the concern was practically a domestic and family concern. This consideration is important, as also is the preponderance of voting power just mentioned.

In the petition for winding-up eight different reasons are assigned therefor. The first is that the statutory conditions as to general meetings have not been observed; the second, that balance sheets, profit and loss accounts and reports have not been submitted in terms of the articles of the company; and the third is that the conditions under the statute and articles as to audit have not been complied with. All these allegations are true, and it seems naturally to follow, from the preponderance already referred to, that there is at least considerable force in the fifth reason that it is impossible for the petitioners to obtain any relief by calling a general meeting of the company. There are further submissions, namely, that the company and the managing director, Mr. McLaren, have refused to submit the value of the shares to arbitration, and that, without winding-up, it is impossible for the petitioners to realise the true value of their shares. But the principal ground of the petitioners is that, in the circumstances to be laid before the court, it is just and equitable that the company should be ordered to be wound-up. This last ground was affirmed by the Court of Common Pleas.

With regard to the first three submissions made in the petition, it was strenuously argued on behalf of the company, which practically means the directorate or the McLaren interest, that however true it might be that, owing to the informal way in which the books of the company had been kept, it appeared as if both the statute and the articles of association had been violated in various particulars, and that no general meetings of the company had been held, and no auditors properly appointed, and it was certain that no balance sheets, profit and loss accounts and reports had been submitted for the critical years 1919 and 1920, still these were no grounds for winding-up. Other applications, it was said, might competently be made to the court to compel the statute and articles to be properly complied with. It may be doubtful whether such a course of conduct, lasting in several particulars since its inception until now, would be insufficient as a ground for winding the company up, but their Lordships think it unnecessary to give any separate decision upon such a point. In their opinion, however, elements of that character in the history of the company, together with the fact that a calling of a meeting of shareholders would lead admittedly to failure and be unavailable as a remedy, cannot be excluded from the point of view of the court in a consideration of the justice and equity of pronouncing an order for winding-up. Such a consideration, in their Lordships' view, ought to proceed upon a sound induction of all the facts of the case, and should not exclude, but should include, circumstances which bear upon the problem of continuing or stopping courses of conduct which substantially impair those rights and protections to which shareholders, both under statute or contract, are entitled. It is undoubtedly true that at the foundation of applications for winding-up, on the "just and equitable" rule, there must lie a justifiable lack of confidence in the conduct and management of the company's affairs. But this lack of confidence must be grounded on conduct of the directors, not in regard to their private life or affairs, but in regard to the company's business. Furthermore, the lack of confidence must spring not from dissatisfaction at being outvoted on the business affairs, or on what is called the domestic policy, of the company. On the other hand, wherever the lack of confidence is rested on a lack of probity in the conduct of the company's affairs, then the former is justified by the latter, and it is, under the statute, just and equitable that the company be wound-up.

The judgment of the court below appears to have proceeded upon the view that this statutory prescription for winding-up under the sixth sub-section—namely, when the court is of opinion that it is just and equitable that this should be done

is restricted to cases ejusdem generis with those enumerated in s. 127 (i–v) of the Barbados Companies Act. The Board, having fully considered the authorities, the judgment and the arguments, are of opinion that this is not the law. The alleged principle of restriction, as applicable to enumerated causes for the winding-up of companies may be said to have taken its origin in a sentence used in the judgment of LORD COTTENHAM, L.C., in *Ex parte Spackman* (2) (1 Mac. & G. at p. 174). The sentence is:

> "This clause was, no doubt, thus worded in order to include all cases not before mentioned; but of course it cannot mean that it should be interpreted otherwise than in reference to matters ejusdem generis, as to those in the previous clauses."

But it is apt to be forgotten that the very next sentence is:

> "There must be something in the management and conduct of the company which shows the court that it should be no longer allowed to continue, and that the concern ought to be wound-up."

Whether these two sentences could stand together may be a question, but it is quite plain that the first ought not to be read alone without the second; and, if the second be taken in the ordinary and natural meaning of the words used, it may be left to the speculator to conjecture whether there is anything in the application to this section of the Companies Acts of the ejusdem generis doctrine considered restrictively.

LORD COTTENHAM'S words are quoted somewhat guardedly by LORD CAIRNS, L.C., in *Re Suburban Hotel Co.* (3), and his definite proposition is as follows (2 Ch. App. at p. 769):

> "But what I am prepared to hold is this, that this court, and the winding-up process of the court, cannot be used, and ought not to be used, as the means of evoking a judicial decision as to the probable success or non-success of a company as a commercial speculation."

The cases set forth in sub-s. (i) to (v) separately are: (i) if the company has by special resolution resolved that the company be wound-up by the court; (ii) if default is made in filing the statutory report or in holding the statutory meeting; (iii) if the company does not commence its business within a year from its incorporation, or suspends its business for a whole year; (iv) if the number of members is reduced below seven; and (v) if the company is unable to pay its debts. It seems plain enough that, beyond these cases, there is the whole category of fraudulent administration under which a company's property might be imperilled or transferred into the pockets of its directors, when the case for winding-up would be of supreme urgency. Yet if the argument as to ejusdem generis were sound, it would logically exclude such a case from the grounds for winding-up, which is absurd. It has been long stated that the element of fraud could not be so dealt with.

The cases need not be further referred to in detail, but in the opinion of the Board it is in accordance with the laws of England, of Scotland, and of Ireland that the ejusdem generis doctrine—as supposed to have been laid down by LORD COTTENHAM—does not operate so as to confine the cases of winding-up to those strictly analogous to the first five instances in s. 129 of the British Act. It so happens, however, that, in several instances, there have occurred circumstances analogous to those of the present in regard to the two other points noted above—namely, the domestic nature of the company, and the permanent preponderance of voting power, and, accordingly, one or two of such cases may be cited.

In *Re Amalgamated Syndicate* (4), VAUGHAN WILLIAMS, J., put the matter thus ([1897] 2 Ch. at p. 606):

> "MR. BUCKLEY, at p. 245 of the 7th Edn. of BUCKLEY ON THE COMPANIES ACT, says:

A 'So where a company is proceeding to do something which is ultra vires, a shareholder has a right in an action, on behalf of himself and all other shareholders, to restrain the company, though every shareholder but himself be acquiescent; but has no right to come for a winding-up order under the "just and equitable" clause';

B and he cites *Ex parte Fox* (5) as an authority. But it is plain that the passage is a mere illustration of a previous passage on the same page, in which he says:

'There is no doubt that the "just and equitable" clause gives the court power to wind-up a company in cases not coming under any of the first four heads of s. 79 [of the Companies Act, 1862], but there must be a strong ground for exercising the power, at any rate, at the instance of a shareholder.'

C Without going into details, I repeat what I said during the argument, that the stringency of the ejusdem generis rule has been considerably relaxed of late."

Circumstances analogous to those of the present case occurred with regard to the composition of a company which was private—see *Re Yenidje Tobacco Co.* (6)—and Lord Cozens-Hardy, M.R., in expressing the opinion that the company should not be allowed to continue, said ([1916] 2 Ch. at pp. 431, 432):

D "I have treated it as a partnership, and under the Partnership Act of course the application for a dissolution would take the form of an action; but this is not a partnership strictly, it is not a case in which it can be dissolved by action. But ought not precisely the same principles to apply to a case like this where in substance it is a partnership in the form of the guise of a private company? . . . I think that in a case like this we are bound to say that circumstances which would justify the winding-up of a partnership between these two by action are circumstances which should induce the court to exercise its jurisdiction under the just and equitable clause and to wind-up the company."

E The Board specially refers to the accurate and careful opinion of Warrington, L.J., in that case.

F In *Re Blériot Manufacturing Aircraft Co., Ltd.* (7), Neville, J., made an order for winding-up on the ground that the substratum of the company was gone, and upon a further ground of proved misconduct by the directors. His observations upon the latter point are apt in the present case (32 T.L.R. at p. 255):

"But there is another ground. Here the company has considerable capital, and it is alleged that there is misconduct by the directors. It is truly said by Mr. G Russell that the 'mere fact of misconduct is no ground for winding-up.' The words 'just and equitable' are words of the widest significance, and do not limit the jurisdiction of the court to any case. It is a question of fact, and each case must depend on its own circumstances. I think the moneys of the company have been misapplied, and that the company is so constituted that it is deprived of its usual remedies. This is again sufficient for a winding-up."

H A passage was read from 5 Halsbury's Laws (1st Edn.), p. 397, s. 659, the authorship of which was acknowledged to be that of the late Master of the Rolls, Lord Swinfen. It is as follows:

"The words as to its being 'just and equitable' to wind-up are not to be read as being ejusdem generis with the preceding words of the enactment" [see I vol. 6 (3rd Edn.), p. 534].

It may be doubtful if the authorities referred to there are all precisely in point, but as to the view of the law there expressed, their Lordships agree with it.

This law is fully accepted in Ireland, and their Lordships refer to the judgment and the analysis of the authorities in *Re Newbridge Sanitary Steam Laundry, Ltd.* (8) by the Lord Chancellor (Sir Ignatius O'Brien). In Scotland the point has been most carefully canvassed in two leading cases in company law. The one is *Symington* v. *Symington's Quarries, Ltd.* (1), and their Lordships think it not inexpedient to quote the following passages from that eminent judge and

commentator, LORD M'LAREN. It expresses, in their view, the correct principle of interpretation (8 F. (Ct. of Sess.) at pp. 129, 130): A

"I apprehend that the true rule for determining whether general words are to be confined to things ejusdem generis is this, that if the general words are bound up with the enumeration by proper words of relation, then their meaning is confined to the subject-matter indicated in the enumeration, but if the general words are severed from the enumeration of particulars there is no logical reason for interpreting the one by the other. . . . In this Act of Parliament the general words have reference to the discretion and judgment of the court. The case put is, 'whenever the court shall be of opinion that it is just and equitable that the company should be wound-up.' That introduces a different order of ideas altogether from the conditions which precede, because these are not conditions referred to the judgment of the court, but are defined in the Act itself, and the function of the court is only to say whether the facts of the case come within one or other of the categories. I have made these observations because, while I find in the English decisions that not much weight is now attached to the ejusdem generis rule of construction for this clause, yet I think it desirable, at least, for my own satisfaction, to see upon what grounds the true construction can be maintained and defended." B C D

As applying aptly to the circumstances of the present case, the following further sentences may be cited:

"But this is not a company that is formed by appeal to the public. It is what, for want of a better name, I may call a domestic company. The only real partners are the three brothers of a family, the other shareholders having only a nominal interest for the purpose of complying with the provisions of the Act. In such a case it is quite obvious that all the reasons that apply to the dissolution of private companies, on the grounds of incompatibility between the views or methods of the partners, would be applicable in terms to the division amongst the shareholders of this company, and I agree with your Lordship that this is a case in which it would be just and equitable that this company should be wound-up, and the partners allowed to take out their money and trade separately if they please." E F

The present Lord President of the Court of Session (LORD CLYDE), in *Baird* v. *Lees* (9), discusses the section and the ejusdem generis doctrine in exactly the same spirit. His words are as follows (1924 S.C. at p. 92): G

"I have no intention of attempting a definition of the circumstances which amount to a 'just and equitable' cause. But I think I may say this. A shareholder puts his money into a company on certain conditions. The first of them is that the business in which he invests shall be limited to certain definite objects. The second is that it shall be carried on by certain persons elected in a specified way. And the third is that the business shall be conducted in accordance with certain principles of commercial administration defined in the statute, which provide some guarantee of commercial probity and efficiency. If shareholders find that these conditions or some of them are deliberately and consistently violated and set aside by the action of a member and official of the company who wields an overwhelming voting power, and if the result of that is that, for the extrication of their rights as shareholders, they are deprived of the ordinary facilities, which compliance with the Companies Acts would provide them with, then there does arise, in my opinion, a situation in which it may be just and equitable for the court to wind-up the company." H I

It only remains to apply the doctrines thus expressed to the circumstances of the present case. Their Lordships forgo unnecessary details. They are of opinion that GREAVES, C.J., is correct when he says that:

"The directors in control since the death of Blackwood Rodger have, I think, laid themselves open to the suspicion that by omitting to hold general meet-

A ings, submit accounts, and recommend a dividend, their object was to keep the petitioners in ignorance of the truth and acquire their shares at an undervalue."

The Board agrees with these views. In the opinion which they have formed, Mr. McLaren, for reasons not unnatural, had come to be of opinion that the business B owed much of its value and prosperity to himself. But he appears to have proceeded to the further stage of feeling that, in these circumstances, he could manage the business as if it were his own. Had Mrs. Loch and Mr. Rodger, or after his death Mr. Rodger's executor, obtained a dividend which year by year represented in any reasonable measure a just declaration out of the undoubted profits of the concern, they might, no doubt, have been content to allow this state of matters to C go on, but, although on one or two occasions Mr. McLaren paid trifling and fragmentary sums to Mrs. Loch, neither she nor the Rodger family have ever obtained any dividend at all; and it is not to be wondered at that, in the transaction now about to be mentioned, they completely lost confidence in Mr. McLaren, and had only too great justification for doing so. It appears that Mr. McLaren viewed with the highest disrelish the testamentary arrangements made by Mr. J. B. Rodger, D who died in December, 1919, and he expresses his opinion upon that subject in a somewhat extraordinary letter of Feb. 24, 1920, going so far as to suggest that another and prior will of Mr. Rodger ought to be substituted for his last will. It is difficult to understand what he conceived this had to do with the management of the business, or the distribution of profits therein. But it is certain that Mr. McLaren then proceeded with much urgency and vigour to attempt to acquire the E shares of Mrs. Loch and of Mr. Rodger's executor for himself, thereby consolidating the entire concern in himself and his wife.

The substantial fact which their Lordships think to be proved is that in 1920 the assets of that business, apart from any allowance for goodwill, very substantially exceeded the £40,000 of the company's nominal capital. A skilled accountant, called in after the proceedings commenced, placed the amount some- F where about £80,000, but it is sufficient to take the facts simply as their Lordships have just put them. This most satisfactory state of the company's finances was fully realised by Mr. and Mrs. McLaren. Upon May 1, 1920, Mr. McLaren, Mr. Yearwood, and Mrs. McLaren, at a directors' meeting agreed:

"That the financial position of the firm was such that the directors unanimously agreed that they could with every confidence partly discharge the chairman's G deferred salary; to meet this it was agreed that the £12,500 5 per cent. war loan stock be transferred to his name and become his property absolutely including the six months' interest now due. . . . It was further agreed that the chairman's salary be increased from £1,100 to £2,000 per annum from Jan. 1, 1920."

H (It may be noted that the company's own minutes form the most important evidence in the case, and that, owing probably to the view of the statute taken as already mentioned, they are not referred to in the judgment in the Court of Appeal.) No notice was given to the respondents, as shareholders, of this piece of business being contemplated, and no notice was given of what had been done. Four days after this extraordinary transaction, Mr. McLaren wrote to Mrs. Loch's husband a letter dated May 5, 1920, proposing to her that £10,000 should be given by him I as the cumulative value of Mrs. Loch's shares and Mr. J. B. Rodger's executor's shares. These shares in all amounted to one-half of the capital of the company—namely, £20,000, and as already mentioned, it is evident that the true value of assets much exceeded this amount. The proposal was to buy Mrs. Loch and the Rodger family out for £10,000. But a further suggestion, which in some way seems to have been mixed with the umbrage felt by Mr. McLaren in regard to the contents of Mr. Rodger's will, was made, and that was that Mrs. Loch should be a participant in a scheme whereby the £10,000 to be paid should be distributed—£8,000 to herself, and only £2,000 to the Rodger family.

Their Lordships do not desire to characterise these suggestions in the language which perhaps they fully deserve. The Rodger family, entitled to one-fourth of the holding in the company, nominally £10,000, but in reality of a much higher value, were to be bought off for £2,000, and Mrs. Loch was to be the agent in this scheme. No confidence in the directorate could survive such a proposal. To crown all this, as was afterwards discovered, the £10,000 could be comfortably paid by Mr. McLaren out of the £12,500 which, four days before, he and his wife and clerk had voted to himself out of the funds of the company. Their Lordships express no surprise at the instant repudiation of Mr. McLaren's proposals by Mrs. Loch—a repudiation which is creditable to her—and at the application for a winding-up of the company being made. Upon the principles already set forth in this judgment that application must succeed. The broad ground is that confidence in its management was, and is, and that most justifiably at an end. A further narrative of the facts is unnecessary, although some of them are grave. It must, however, be said in justice to Mr. McLaren that, after the parties were at arm's length, the £12,500 was refunded and the minute rescinded. Further, being advised that the increase of salary from £1,100 to £2,000 was wrong, he abandoned the same from February 1922, and at their Lordship's Bar, he being present, an assurance was given that the two years' increase already drawn—namely, £1,800, would forthwith be paid to the company. Their Lordships will humbly advise His Majesty that the appeal should be allowed with costs, and the order of Court of Common Pleas of Barbados restored with costs in both courts below.

Appeal allowed.

Solicitors: *E. Leslie Harris*; *Thomas M. Webb.*

[*Reported by* W. C. Sandford, Esq., *Barrister-at-Law.*]

P. PHIPPS & CO. (NORTHAMPTON AND TOWCESTER BREWERIES), LTD. *v.* ROGERS

[Court of Appeal (Bankes, Scrutton and Atkin, L.JJ.), June 30, July 15, 1924]

[Reported [1925] 1 K.B. 14; 93 L.J.K.B. 1009; 132 L.T. 240; 89 J.P. 1; 40 T.L.R. 849; 69 Sol. Jo. 50]

Landlord and Tenant—Notice to quit—Need to be clear and unambiguous—Legal questions left for determination by tenant.

Time—"Month"—Meaning in tenancy agreement—Common law rule.

By an agreement, dated May 29, 1908, the plaintiffs let to the defendant a hotel from May 25, 1908, on a yearly tenancy. The tenancy thereby created was determinable by three months' notice to be given by either party, to expire "on any one of the days appointed as special transfer sessions by the justices for the district in which the premises are situate after the expiration of six months from the date when the licence was or is transferred to the tenant." On Oct. 12, 1923, the plaintiffs gave to the defendant a notice to quit which was worded as follows: "We do hereby give you notice to quit and deliver up to us (or such other person as we may appoint) on the earliest day your tenancy can legally be terminated by valid notice to quit given to you by us at the date of the service hereof," the premises in question. At their annual general meeting on Feb. 1, 1923, the justices fixed the dates for special transfer sessions for the ensuing twelve months, the last being Jan. 8, 1924. At the

annual general meeting on Feb. 7, 1924, dates were fixed for the ensuing twelve months, the first of these dates being April 8, 1924. The defendant refused to leave the premises. In an action by the plaintiffs claiming that they were entitled to possession on Jan. 8,

Held: (i) the rule of the common law was that in a contract "month" meant lunar month unless the contrary was indicated by the context, by statutory provision, or by recognised customary exception, and, therefore, the notice terminated on Jan. 4, 1924, and, if valid, would become effective on Jan. 8; but (ii) a notice to quit must be clear and unambiguous either expressly or by the application of the maxim id certum est quod certum reddi potest, and (SCRUTTON, L.J., dissenting) this notice required the tenant to ascertain the date when it would be effective by determining two questions of law, namely, the earliest day on which the tenancy could legally be determined and the validity of the notice itself, and, therefore, the notice was not clear and unambiguous, and the landlords were not entitled to possession.

May v. *Borup* (1), [1915] 1 K.B. 830, not approved.

Notes. In contracts coming into operation after Dec. 31, 1925, unless the context otherwise requires, "month" means calendar month: see 32 HALSBURY'S LAWS (2nd Edn.) 121 and Law of Property Act, 1925 (20 HALSBURY'S STATUTES (2nd Edn.) 427), s. 61 (a), but this case is applicable to instruments becoming effective before that date.

Considered: *Winchester Court, Ltd.* v. *Holmes*, [1941] 2 All E.R. 542; *Dagger* v. *Shepherd*, [1946] 1 All E.R. 133. Distinguished: *Addis* v. *Burrows*, [1948] 1 All E.R. 177. Referred to: *Re Kendrick's Agreement*, *Colwill* v. *Barrington*, [1948] 2 All E.R. 101; *Wilbraham* v. *Colclough*, [1952] 1 All E.R. 979; *Cowan* v. *Wrayford*, [1953] 2 All E.R. 1138.

As to notice to quit, see 23 HALSBURY'S LAWS (3rd Edn.) 516 et seq.; and for cases see 31 Digest (Repl.) 493 et seq.

Cases referred to:

(1) *May* v. *Borup*, [1915] 1 K.B. 830; 84 L.J.K.B. 823; 113 L.T. 694, D.C.; 31 Digest (Repl.) 494, *6199*.

(2) *Bruner* v. *Moore*, [1904] 1 Ch. 305; 73 L.J.Ch. 377; 89 L.T. 738; 52 W.R. 295; 20 T.L.R. 125; 48 Sol. Jo. 131; 42 Digest 931, *31*.

(3) *Hirst* v. *Horn* (1840), 6 M. & W. 393; 151 E.R. 464; 31 Digest (Repl.) 496, *6214*.

(4) *Doe d. Gorst* v. *Timothy* (1847), 2 Car. & Kir. 351; 31 Digest (Repl.) 496, *6218*.

(5) *Gardner* v. *Ingram* (1889), 61 L.T. 729; 54 J.P. 311; 6 T.L.R. 75, D.C.; 31 Digest (Repl.) 494, *6202*.

Action tried by LUSH, J., without a jury.

The plaintiffs claimed to recover possession of the Abington Park Hotel, Northampton, alleging that the defendant's tenancy had been duly determined by notice to quit expiring on Jan. 8, 1924.

The premises in question were let to the defendant by an agreement dated May 29, 1908, from May 25, 1908, on a yearly tenancy at a yearly rent of £200, to be paid quarterly. The defendant agreed (inter alia) (a) to purchase from the landlords and from no other person all the malt liquors, wines, spirits, and cordials sold on the premises. The agreement further contained the following clause:

"Either party shall be at liberty to determine the tenancy hereby created upon giving to the other three months' previous notice in writing of his or their intention so to do, expiring on any one of the days appointed as special transfer sessions by the justices for the district in which the premises are situate after the expiration of six months from the date when the licence was or is transferred to the tenant."

On Oct. 12, 1923, the plaintiffs gave to the defendant a notice to quit in the following terms: A

> "We do hereby give you notice to quit and deliver up to us (or such other person as we may appoint) on the earliest day your tenancy can legally be determined by valid notice to quit given to you by us at the date of the service hereof,"

B

possession of the hotel. The defendant having refused to give up possession, the plaintiffs began this action on Feb. 8, 1924, claiming possession of the hotel on the ground that the agreement had been duly determined by a notice to quit expiring on Jan. 8, 1924. The dates of special transfer sessions were fixed by the justices at their annual general meeting in February in each year. At their annual general meeting on Feb. 1, 1923, the justices fixed Jan. 8, 1924, as a date for special C transfer sessions, and at the annual general meeting on Feb. 7, 1924, they fixed April 8 for the same purpose. If, therefore, the words "three months' previous notice" in the clause in the agreement providing for the termination of the tenancy meant three lunar months, that period would end on Jan. 4, 1924, and the notice would become effective on Jan. 8. If calendar months were meant the first date on which a transfer could be effected was Feb. 7. But if the words D "special transfer sessions" did not include the annual general meeting the date on which the notice to quit would expire would be April 8.

LUSH, J., read a judgment in which he said: The notice to quit in this case gives no date. It does not indicate it with any reasonable clearness. It leaves the date in complete obscurity. It would be impossible for the tenant who received such a notice as this to be sure when he had to vacate the premises. If he took advice E it could not be certainly right. The landlord, on the other hand, could adapt the date on which he demanded possession to the circumstances as they best suited him, and could contend that it meant this or that according to those circumstances. A notice to quit which is subject to these uncertainties is, in my opinion, bad in law.

Although it is perhaps unnecessary, I will state my views on the other question F that was raised. I think that the notice to quit did not expire in fact on Jan. 8, and that if it were a good notice, it would expire on April 8, so that the writ had been issued too soon. "Months," no doubt in legal documents which are not business or commercial documents, primâ facie are "lunar months." But even there the context may show that the parties meant "calendar months" or the circumstances which existed at the time the agreement was made may show it: *Bruner* v. G *Moore* (2). Slight evidence is, in my opinion, sufficient to show that the parties to an agreement when they speak of so many "months" mean what the word now means in every Act of Parliament, namely, "calendar months." I think that the context in the present case does show that "calendar months" were intended in this agreement. The rent was payable quarterly; the tenancy could only be determined after the expiration of six months from the date when the licence was H transferred; and three months' notice had to be given. I think that the true inference is that the parties were referring to periods of six calendar months and three calendar months and not to so many weeks.

The plaintiffs, the landlords, appealed.

J. B. Matthews, K.C., and *Geoffrey Howard* (*Sandlands* with them) for the landlords. I

Sir Malcolm Macnaghten, K.C., and *Morle* for the tenant.

Cur. adv. vult.

July 15. The following judgments were read.

BANKES, L.J.—This appeal raises the question of the validity of a notice to quit given by landlords to their tenant. The landlords are brewers and the tenancy was of licensed premises. The tenancy agreement was in writing and dated May 29, 1908, and it contained this clause:

A "Either party shall be at liberty to determine the tenancy hereby created upon giving to the other three months' previous notice in writing of his or their intention so to do expiring on any one of the days appointed as special transfer sessions by the justices of the district in which the said premises are situate after the expiration of six months from the date when the licence was or is transferred to the tenant."

B Notice to quit was given dated Oct. 12, 1923, in the following terms:

"We do hereby give you notice to quit and deliver up to us (or such other person as we may appoint) on the earliest day your tenancy can legally be terminated by valid notice to quit given to you by us at the date of the service hereof the possession of [the premises]."

C The date of the service of the notice is endorsed on the back of the document as having been made on Oct. 12. The premises are situate in the county of Northampton. At the date the agreement of tenancy was entered into the holding of special transfer sessions was authorised, and the dates on which they should be held was prescribed by s. 4 of the Alehouse Act, 1828, which provided for the appointment by the justices at the annual licensing meeting assembled of not less than four nor D more than eight special sessions to be held in the next ensuing year. The statute also contains provisions for the giving of public notice of the dates so fixed for the holding of the special sessions and requires that a copy of the notice shall be left at the dwelling-house of every person keeping an inn within the district. The Alehouse Act, 1828, was repealed by the Licensing (Consolidation) Act, 1910, but as the material provisions of the former Act are practically repeated in the latter, E no question arises out of the fact that the tenancy agreement was entered into when the Alehouse Act, 1828, was still in force. The general annual licensing meeting for the county borough of Northampton for the year 1923 was held on Feb. 1, 1923, and one of the dates fixed at that meeting for the holding of special transfer sessions for the ensuing year was Jan. 8, 1924. Feb. 7, 1924, was the date fixed for the general annual licensing meeting of that year, and at that meeting F April 8, 1924, was the first date fixed for the holding of a special transfer sessions. At the time the notice to quit was given, and for some time afterwards, the landlords were under the belief that the notice did not expire until Feb. 7, 1924, and they continued to supply beer to the respondent as their tied tenant after Jan. 8, 1924. It is, perhaps, significant that the landlords themselves were so hazy as to the legal effect of their notice, but as that fact and a supply of beer under a mis- G apprehension have, in my opinion, no legal effect upon the position of the parties, I say nothing further upon the point.

I do not feel any difficulty on the question whether the reference in the agreement to the necessity of a three months' notice is to be construed as lunar or calendar months. The rule requiring the expression to be construed as meaning lunar months is too clear and too well established, however worn out it may appear H to be, to be got round or got over in a case such as the present, except by some clear expression of the intention of the parties derived either from the context or from surrounding circumstances that they were referring to calendar and not lunar months. With deference to the view expressed by the learned judge who tried the action, I cannot agree with him in thinking that any such intention is manifested in the present case.

I A much more difficult question, to my mind, is the question whether the notice to quit offends against the rule that a notice to be a good notice must be clear and unambiguous. It is not necessary that a notice should be clear and unambiguous in its expressed terms provided it can be rendered clear and unambiguous by the application of the maxim id certum est quod certum reddi potest. There are many decided cases in the books where the court have imputed to the tenant knowledge which when applied to the notice to quit served upon him renders clear what without that knowledge would have been neither clear nor unambiguous. In the case of a yearly tenant a notice to quit on a named date or on such other

day as the tenancy shall expire next after the expiration of a year from the receipt of this notice has been held to be good upon the ground that the tenant must know or be assumed to know the date when the tenancy commenced. A

The case which has gone furthest in this direction appears to be *May* v. *Borup* (1), where the agreement provided that the tenancy might be determined by six months' notice on either side to be given on Mar. 1 or Sept. 1 in any year. On Dec. 23, 1913, a notice was given to quit at the earliest possible moment. The B court held the notice to be a good one. This can only have been because the special terms of the tenancy agreement in the opinion of the court enabled the tenant, by comparing the date of the notice with the terms of his agreement, to realise that Aug. 31, 1914, was the earliest date on which he could be required to quit. This decision must, I think, be considered as a decision upon the particular facts of that case, and cannot possibly be regarded as an authority that a C notice to quit at the earliest possible moment is a good notice. Each case must depend upon its own facts and circumstances, and I do not think that the court should attribute to either landlord or tenant a greater knowledge of fact or of law than has already in the decided cases been attributed to them, or extend the maxim I have referred to, so as to embrace a wider class of cases than have already been brought within its influence. D

In the present case, had the notice been for the first date fixed for the holding of special transfer sessions next ensuing after the expiration of three lunar months from the date of this notice, I should be of opinion that the notice was a good notice, having regard to the knowledge which must, I think, be imputed to the particular tenant of the dates fixed for the holding of these sessions. Had the notice omitted any reference to lunar months, I should have hesitated before hold- E ing that any of the decided cases went so far as to compel me to impute to the tenant such a knowledge of the law as would enable him to decide without doubt a question of construction upon which judges may differ, as they do in the present case. When, as here, the landlord is not content with placing the tenant under the necessity of solving one difficult question of law before he can know the date when he is required to give up possession, but puts him in the position of having F to decide not only the earliest day when the tenancy can legally be determined, but also whether the notice to quit is a valid one, the time has come, in my opinion, when the court must say that such a notice is certainly not clear and unambiguous in its expressed terms, and that it requires a degree of knowledge on the part of the tenant to make it clear and unambiguous which the court will not impute to him. For these reasons the appeal, in my opinion, fails and must be dismissed, G with costs.

SCRUTTON, L.J.—The defendant was tenant of a public house on the terms that his landlord could determine the tenancy thereby created by giving to the tenant "three months'" notice, expiring on any one of the days appointed as special transfer sessions by the justices of the district. The lease was made in H 1908 in what was then the landlord's ordinary form. Some years later the landlords altered their ordinary form for agreements made after that date to "three calendar months' notice." On Oct. 12, 1923, the landlords gave the tenant a notice to quit "on the earliest day your tenancy can be legally determined by valid notice to quit." The next special transfer sessions were on Jan. 8, 1924, and if "three months" meant three lunar months expiring on Jan. 4, the notice to quit I was in time for that date. I think there is no doubt, however, if the evidence is admissible, that the landlord thought the months must be calendar months, and that the notice was good for Feb. 7, the date of the annual licensing meeting for which date the landlord served the tenant with forms of transfer of the licences. It is agreed, however, that the annual licensing meeting was not a special transfer sessions. The next special transfer sessions was on April 8, but the writ for possession was issued on Feb. 8, alleging a determination of tenancy on Jan. 8. The agreement contains a covenant by the tenant to purchase from the landlord

A all beer to be brought on the premises to be consumed at prices usually charged by the landlords to their tenants. After Jan. 8 the tenant ordered, and the landlord, who was under the impression that the tenancy continued till Feb. 7, supplied, beer presumably on these terms. What is the result of this? It is said for the landlord (i) that "months" at common law mean lunar months unless the case can be brought within certain exceptions, none of which applies here: (ii) that a B valid notice to quit may be given "for the expiration of the tenancy" without specifying any date, even though the landlord does not know what the real date is; (iii) that conduct after the tenancy has expired at the utmost creates a new tenancy at will, which is determined by issuing the writ.

First, as to the meaning of "month." There is no doubt of the common law rule that primâ facie month means "lunar month." It is stated in COKE and BLACKC STONE; a large number of authorities for it are referred to in NORTON ON DEEDS. A recent instance of its application is found in the judgment of FARWELL, J., in *Bruner* v. *Moore* (2). There are statutory exceptions, exceptions in the case of ecclesiastical documents, exceptions by custom, mercantile or otherwise, as in the case of notice to domestic servants. The relations of landlord and tenant have never been held to come within these exceptions. There may be an exception if D the context or the surrounding circumstances at the time of making the contract show a contrary intention. I can find nothing in the context here to show any intention of the parties; this is not a contract for a year, but is determinable on any special sessions day. I do not see how conduct after the contract has been made can show a meaning in the original contract. The parties may have misunderstood the meaning which may give rise to estoppel, but cannot alter the true E construction of the contract. Parliament may alter any common law rule it likes, there are several it might usefully alter, but I do not see how the Court of Appeal can alter a common law rule because it thinks from its general knowledge that the meaning of "month" is changing. I think, therefore, the term "months" in this agreement meant lunar months.

The next question is whether the notice to quit is sufficient. The courts might F well have said that the notice must name a day to quit and the right day, but they have not. They have, in my view, treated both landlord and tenant as both knowing the law, and have assumed that the tenant must know the necessary facts. They have allowed the landlord to give a notice for a named day, or for the later day (unnamed) on which the tenancy actually expired. PARKE, B., and LORD ABINGER, C.B., justify this in *Hirst* v. *Horn* (3) (6 M. & W. at p. 395), in the case G of yearly tenants where the landlord is not sure on what day the year ends. But the cases go beyond this. In *Doe d. Gorst* v. *Timothy* (4), ROLFE, B., held a notice to quit "at the expiration of the present year's tenancy," without stating what length of notice it was, good in the absence of proof that less than the right notice was given. This appears to be substantially the same as LORD TREVETHIN'S decision in *May* v. *Borup* (1) to "quit at the earliest possible moment," which, however, H does not expressly mention the terms of the agreement, but assumes the parties know them. The present agreement mentions specific days on which the tenancy can be determined, days which are public days, which all citizens concerned with public houses may be assumed to know, and of which under the Licensing Acts the tenant would have notice served on him, and the notice to quit determines the tenancy on the first of those days on which it can legally be determined. Whatever I I might think if there were no authorities, I do not feel able to depart from a long settled line of authorities on the faith of which many transactions have been concluded.

Lastly, does the conduct of the landlord alter the matter? I do not see how the fact that at some period during the tenancy he thought or said the tenancy terminated on another day is relevant. This was so in a number of yearly tenancy cases, but did not there avail the tenant. The ordering of beer and acceptance of the order is after the date when the tenancy in fact determined. It seems to me it has only the effect, as there has been no receipt of rent, of creating a tenancy

at will determinable by the issue of the writ. In my view, I am bound by old-established principles, which I have no power to refuse to apply except in circumstances which do not exist here, to hold that the landlord has a good claim for possession. Even if in the absence of authority I might have come to a different decision, I do not particularly regret the result in the case of this tenant, who, as is the way with the modern tenant, has expressed his intention not to go out until he is chucked out. In my view, the appeal should be allowed, and judgment entered for the landlord for possession, with costs here and below.

ATKIN, L.J.—This is an action by the plaintiffs, a brewery company, to recover possession of licensed premises from the defendant, who by an agreement of tenancy dated May 29, 1908, became tenant to the plaintiffs of the Abington Park Hotel, Northampton. It was a term of the tenancy that either party might determine the tenancy by three months' previous notice in writing of his intention so to do, expiring on any one of the days appointed as special transfer sessions by the justices of the district in which the said premises are situate, after the expiration of six months from the date when the house was or is transferred to the tenant. The plaintiffs allege, and the defendant denies, that the tenancy had been determined by a notice to quit expiring before that date. Th material dates are: Oct. 12, 1923, notice to quit given—the form must be examined hereafter; Jan. 4, 1924, three lunar months from notice to quit expire; Jan. 8, first special transfer sessions held after Jan. 4; Jan. 12, three calendar months from notice expire; Feb. 3, annual licensing meeting; Feb. 8, writ. It is beyond dispute that the plaintiffs intended to give three calendar months' notice. They thought that the defendant held under their form of agreement, which since 1913 has stipulated for three calendar months' notice. They also thought that the annual licensing meeting was a special transfer sessions. The result was that after Jan. 8 they continued to supply defendant with liquor as a tied tenant; and on Jan. 21 required him to give a fortnight's notice of transfer for the annual licensing meeting, and on his refusal intimated that on the expiration of his notice to quit they would issue writ. In spite of these two mistakes they now say that the notice was good as a three lunar months' notice, that Jan. 8 was the first special transfer sessions after that date and that the tenancy terminated on Jan. 8. The notice to quit is in the terms which have been read. Three objections, among others, are taken by the tenant. First, that the notice to quit must be a three calendar months' notice, and that no special transfer sessions had been held before the writ to which the notice could be applicable. Secondly, that the notice to quit is bad as being uncertain and ambiguous. Thirdly, that the notice to quit was waived by reason of the plaintiffs subsequently treating the defendant as tenant.

On the first point I think that the landlords are right. According to the rule of the common law a month means lunar month, unless the contrary is indicated by the context, by statutory provision, or by recognised exceptions. What the origin of the common law rule is I have not been able to discover. Lord Coke merely states the rule. Blackstone says (2 Bl. Com. at p. 141): "Not only because it is always an uniform period, but because it falls naturally into a quarterly division by weeks." He proceeds to say, therefore, a lease for "twelve months" is only for forty-eight weeks, but if it be for "a twelve-month" it is good for the whole year. The reason appears inadequate. The result is to adopt a meaning which is nearly always contrary to the intention of the parties. The rule is fortunately almost destroyed by exceptions. It does not apply to mercantile documents, or to statutes, or to mortgages, or to cases where the context requires the meaning of calendar months. It never did apply in ecclesiastical law. In the residue of cases, however, it clearly does apply, as is established by a series of authorities which we cannot overrule. I am clearly of opinion that it is a public disadvantage that the rule should continue; and it is worth the consideration of the legislature whether the primâ facie construction of calendar month enacted by the Interpretation Act should not be applied to all transactions. In the mean-

A time the rule prevails. I am unable to find anything in the context which is any way inconsistent with the common law use, or tends to show that calendar month was intended. I think, therefore, that the tenancy agreement must be construed as though three months meant three lunar months.

This still leaves the question whether the notice as given is a valid notice. A notice to quit may be the subject of express agreement; it may be required by law B in the absence of agreement, as in the case of a weekly, monthly, or yearly tenancy. However the necessity arises, I think, that the principle expressed by LORD COLERIDGE in *Gardner* v. *Ingram* (5) (61 L.T. at p. 730) is correct:

> "Although no particular form need be followed, there must be plain unambiguous words claiming to determine the existing tenancy at a certain time."

C

BOWEN, J., in the same case uses language to the same effect. The date of determination must be the right date. It may, however, be given alternatively, and it is sufficient if one of the alternatives, without expressing the actual date, denotes it in terms which enable the person receiving it to make it certain. Thus notice for a fixed day or "at the expiration of the year of your tenancy which shall expire D next after the end of one half-year from the date of this notice" is sufficient. It is to be noted that in such a case the legal or agreed period of notice is mentioned; and the date of the expiration of the tenancy is a question of fact which the tenant knows, or can properly be deemed to know. It is possible that, if the notice is given sufficiently long before the expiration of the tenancy for the full period of notice required, the actual period need not be mentioned. But it appears E to me to defeat the whole object of notice to leave the date to be ascertained by the tenant as a problem not of fact but of law. In the present form of notice the legal requisites are invoked twice over, "the earliest day your tenancy can legally be determined by valid notice to quit given at the date of service hereof." A tenant receiving such a notice might have to consult his solicitor, who might have to consult counsel, who might have to advise an application to the court for F a declaration by action or summons.

What would be the effect of such a notice given to or by a tenant where there was a question whether the holding was an agricultural holding or not? Surely the risk, if there is a risk, of fixing the true legal term should fall on the person giving the notice. Again, what would be the effect of such a notice upon the ordinary class of weekly tenant? It has quite recently been the subject of dis- G cussion in the courts, with some difference of judicial opinion, whether on such a tenancy the notice must be a week's notice or a reasonable notice; and in any case whether it must terminate at the end of a current week of the tenancy. In the present case the tenant is left to determine for himself whether three months means lunar or calendar months, and a lawyer of LUSH, J.'s great reputation might have advised him calendar months. He might then have to determine whether H the annual licensing meeting could or could not be a special transfer sessions, and then he has to find out when the special transfer sessions in fact are going to be held. That the law should impute to every person knowledge of its provisions is one thing, but that a notice between landlord and tenant which presumes such knowledge is certain and unambiguous seems to me to be quite a different proposition. The value of the presumption so far as it bears on certainty is illustrated by I the fact that the landlords themselves took an erroneous view of the meaning of special transfer sessions. It appears to me that this notice fails in the first essential of a notice—"certainty," and is invalid. I think that the above reasoning leads to the conclusion that *May* v. *Borup* (1) was wrongly decided, and I so hold. The notice in that case was to leave "at the earliest possible moment." If this form is correct I cannot see why anyone adopts any other. It is simplicity itself. It is also, in my view, so uncertain as to be invalid—short, simple, and wrong.

It becomes unnecessary to consider the third point of waiver. I may say, however, that waiver of notice to quit is constituted by conduct indicating that the

landlord treats the former tenant as still his tenant, notwithstanding the determination of the term by a valid notice to quit; in other words, it is evidence of a new tenancy after the old would have expired. I cannot see how this inference can be drawn from conduct of the landlord which does not assume that the old tenancy has expired but assumes that it is still continuing and that the period of the notice has not yet come to an end. In such a case the tenant, as it appears to me, would have to rely upon estoppel, and I am not clear that the elements of estoppel in this case exist. It is, however, unnecessary to decide this. I think that the appeal should be dismissed with costs.

Solicitors: *Sharpe, Pritchard & Co.*, for *Becke, Green & Stops*, Northampton; *James, Mellor & Coleman*, for *Phipps & Troup*, Northampton.

[*Reported by* E. J. M. Chaplin, Esq., *Barrister-at-Law.*]

LOCKETT *v.* NORMAN-WRIGHT

[Chancery Division (Tomlin, J.), October 28, 1924]

[Reported [1925] Ch. 56; 94 L.J.Ch. 123; 132 L.T. 532; 69 Sol. Jo. 125]

Contract—Condition—Performance "subject to suitable agreements being arranged between your solicitor and mine"—Fulfilment of condition—Execution of formal agreement.

The words "subject to suitable agreements being arranged between your solicitors and mine" are indistinguishable in their effect from such words as "subject to formal contract," "subject to contract," or "subject to proper contract to be prepared by the vendors' solicitor," and do not import a binding agreement between the parties.

In a letter to the plaintiff the defendant wrote: "Subject to suitable agreements being arranged between your solicitor and mine, I am prepared to take" a flat for a specified period and at a specified rent. In due course a draft lease was approved by the respective solicitors, but the defendant then refused to go through with the transaction, and the plaintiff began an action for specific performance of an alleged agreement by the defendant to take the flat on the terms mentioned.

Held: on the true construction of the letter the execution of a suitable agreement in a form approved by the solicitors on both sides was a condition of any concluded bargain; there had been no execution of a formal agreement; and, therefore, the plaintiff was not entitled to succeed.

Solicitor—Agent of client—Need of specific authority.

Per Tomlin, J.: In the absence of specific authority a solicitor is not an agent of his client to conclude a contract for him.

Notes. Considered: *Spottiswoode, Ballantyne & Co.* v. *Doreen Appliances, Ltd.*, [1942] 2 All E.R. 65.

As to conditions of acceptance of an offer to conclude a contract, see 8 Halsbury's Laws (3rd Edn.) 76, 77; and for cases see 12 Digest (Repl.) 92 et seq.

Cases referred to:

(1) *Rossdale* v. *Denny*, [1921] 1 Ch. 57; 90 L.J.Ch. 204; 124 L.T. 294; 37 T.L.R. 45; 65 Sol. Jo. 59, C.A.; 12 Digest (Repl.) 98, *582*.

(2) *Coope* v. *Ridout*, [1921] 1 Ch. 291; 90 L.J.Ch. 61; 124 L.T. 402; 65 Sol. Jo. 114, C.A.; 12 Digest (Repl.) 97, *576*.

(3) *Chillingworth* v. *Esche*, [1924] 1 Ch. 97; 93 L.J.Ch. 129; 129 L.T. 808; 40 T.L.R. 23; 68 Sol. Jo. 80, C.A.; 12 Digest (Repl.) 98, *584*.

Witness Action in which the plaintiff, a dental surgeon practising at Henford House, Park Street, London, claimed specific performance of a contract by which, he alleged, the defendant agreed to lease from him a flat on the fourth floor of the building.

At all material times the plaintiff was lessee of the second, third, and fourth floors of Henford House. At two interviews, the first taking place on Feb. 19, 1924, between the plaintiff and the defendant's wife and daughter, and the second taking place on Feb. 26, 1924, between the plaintiff and the defendants' wife and daughter, the plaintiff expressed his willingness to let the flat for a term of eight years at a rent of £300 per annum and to execute at his own expense certain alterations and other work, particulars of which were approved by the defendant and his wife, including the conversion into a kitchen of a particular room. It did not appear that any date was mentioned from which the term and rent were to run. It was not suggested that at those interviews any concluded bargain was arrived at, but later in the day of Feb. 26, 1924, the defendant telephoned to the plaintiff that he would take the flat on the terms arranged and had posted the plaintiff a letter. On the following day the plaintiff received from the defendant a letter dated Feb. 26, 1924, in the following terms:

> "Confirming my conversation over the telephone this afternoon, subject to suitable agreements being arranged between your solicitors and mine, and subject to your carrying out the decorations of the top flat at your house, 117, Park Street, W.1, and the enclosing of the flat from the staircase and the lift, I am prepared to take the flat for a period of eight years, at an inclusive rental of £300 per annum, including all rates, taxes, &c. . . . My solicitor is H. Pinder Brown, Esq., 240, High Holborn, W.C., with whom I would be glad if your solicitors would communicate regarding the agreement."

The plaintiff answered on the same day as follows:

> "Many thanks for your letter. I have sent it on to my solicitor and we are applying to-day for permission to make the necessary alterations."

The plaintiff instructed his solicitors and they took the matter up with the defendant's solicitor, and, ultimately, by Mar. 31, 1924, a draft lease had been approved by the respective solicitors, the term being expressed in the draft to run from Mar. 25. A note was appended to the draft by the plaintiff's solicitor in these terms:

> "If the premises are not ready for occupation and use by Mar. 25, the landlord will hand over a letter to the effect that the rent is not to commence until the premises are ready for occupation";

and at the foot of this note the defendant's solicitor wrote:

> "I observe. It is of course agreed that the alterations arranged will be carried out to the tenant's reasonable satisfaction."

On Mar. 17, the work in the flat was begun and was completed on April 19. On Mar. 25, as the result of a telephone message from the defendant to the builder, the plaintiff agreed that a gas boiler should be put in in lieu of a coal boiler as originally intended. On April 3 the defendant through his solicitor, whom he saw on that day, protested against the fixing of a geyser in the bathroom. The next day the plaintiff's solicitors wrote to the defendant's solicitor that the geyser should be removed, and stated:

> "We are ready to exchange lease and counterpart, and our client has signed a letter which we will hand to you on completion agreeing to complete the work and that the rent shall not commence to run until the premises are ready for occupation and use."

On April 9 the defendant's wife called at the premises and protested to the plaintiff that another specified room should have been made the kitchen. According to the plaintiff's evidence which is uncontradicted and which I accept, the plaintiff satisfied her that she had herself at the earlier interviews chosen the room which had been converted into a kitchen in spite of the plaintiff's recommendation to the contrary. On the same day the defendant's wife chose papers for the decoration of the rooms at Messrs. Arthur Sanderson & Sons in Berners Street, caused each paper to be marked with the description of the room in which it was to be hung, and had such papers forwarded to the builders doing the work. The papers were hung in accordance with the wishes of the defendant's wife as so communicated to the builders. On April 11 the defendant's solicitor wrote to the plaintiff's solicitor the following letter:

"Referring to your conversation with me to-day on the telephone, my client writes me as follows: 'In reference to the flat at 117, Park Street. My wife visited the flat yesterday and found that the kitchen had been built next to her bedroom, whereas it should have been built on the other side of the lift in the biggest of the two rooms on that side. Further to this, the boxing-in of the lift near the staircase is not at all what was promised. The kitchen arrangements, such as the sink, &c., are too small; no maid could use them. In any case we most certainly could not have the kitchen next to the only good bedroom in the flat. Moreover, so much time has been wasted, we were told that we should be able to enter into the flat on the 25th of last month, that I must decline to go any further in the matter.' I naturally regret the present position, but from the communication I have received from my client relative to the matter he seems very determined not to entertain the flat further for the reasons herein mentioned."

Some further correspondence took place but the defendant adhered to his decision not to proceed and on May 9, 1924, the plaintiff issued the writ in this action claiming specific performance of the alleged contract by the defendant to take the lease.

Galbraith, K.C., and *G. D. Johnston* for the plaintiff.
Sutton-Nelthorpe for the defendant.

Cur. adv. vult.

Oct. 28. **TOMLIN, J.,** read the following judgment.—This is an action to enforce specific performance of an alleged agreement for the grant by the plaintiff to the defendant of a lease for eight years at a rent of £300 per annum of the fourth floor of Henford House, No. 117, Park Street, in the county of London. No evidence was called by the defendant, and upon the oral and other evidence adduced by the plaintiff I find the facts to be as follows. [His Lordship stated the facts as set out above.] The plaintiff, in his statement of claim, alleges (i) an agreement constituted by the verbal message on the telephone of Feb. 26, and the defendant's letter of the same date; and (ii) alternatively, an agreement by the defendant by his solicitor constituted by the letter of Feb. 26, the correspondence between the solicitors, the approved draft lease and the notes thereon. The defendant pleads no agreement and the Statute of Frauds.

It is no part of my duty to pronounce whether or not the conduct of any of the parties concerned in this matter is open to censure. All I have to do is to determine whether there is or is not a concluded contract between the plaintiff and defendant which the plaintiff can enforce. I am satisfied that, apart from the letter of Feb. 26, and what occurred subsequently thereto, there was no concluded bargain. The telephone message of Feb. 26, whatever its precise form, cannot, I think, be regarded apart from the letter of Feb. 26. The letter of Feb. 26 is conditional in form, and it is urged on behalf of the defendant that the phrase "subject to suitable agreements being arranged between your solicitors and mine," brings the case within the principle of such decisions as *Rossdale* v. *Denny* (1), *Coope* v. *Ridout* (2), and *Chillingworth* v. *Esche* (3). The question is one primarily of

construction. Is there any real distinction between the language used here, and such phrases as "subject to a formal contract," "subject to contract," "subject to a proper contract to be prepared by the vendor's solicitor." The plaintiff urges that the phrase here means: "I agree to take a lease at the rent and for the term mentioned in the letter, and upon such other terms as the solicitors of the parties may settle between themselves"; and that when once the draft lease had been approved by the solicitors, the condition was fulfilled and thus was an absolute contract. I do not think I can place any such construction upon the language. I think the natural meaning of the language is that the execution of a suitable agreement or suitable agreements in a form approved by the solicitors on both sides is a condition of any concluded bargain. The construction suggested on behalf of the plaintiff is artificial, and I do not think that the court should place an artificial meaning on the language employed merely in order to make a contract of that which would otherwise be no contract. Solicitors are not, in the absence of specific authority, agents of their clients to conclude a contract for them, and I do not think that I can read this letter as making the solicitors agents to conclude the bargain or arbitrators to settle its terms. I may add it is plain from the letter of the plaintiff's solicitors of April 4 that there were other matters besides the form of the draft lease to be agreed. Further, the letter of Feb. 26 cannot be treated as an unconditional acceptance of any previous verbal offer, and, if it is an offer in itself, the plaintiff's answer is not in terms an acceptance but only an intimation that he has sent it to his solicitor, and that he is applying for permission to make the alterations. I think, therefore, that I must read this letter in the way I have indicated, and that the principle of the decisions cited to me apply, and I think there was no contract at this stage.

There remains the plaintiff's alternative plea. I do not think this plea can be made good. There is no evidence that the defendant's solicitor was ever authorised to enter into a contract in his behalf, and I do not think any such authority can be implied from the circumstances of the case. Further, as I have already indicated, there were matters apart from the form of the lease (see the letter of the plaintiff's solicitors of April 4) for which no agreed provision had been made before the defendant's refusal to proceed. In the view I take of the case it becomes unnecessary to consider the question as to the Statute of Frauds and part performance which were raised and discussed in the course of the hearing. I come to the conclusion that the action fails and must be dismissed with costs.

Solicitors: *Templeton & Holloway*; *H. Pinder-Brown.*

[*Reported by* L. MORGAN MAY, ESQ., *Barrister-at-Law.*]

A

LAMB *v.* WRIGHT & CO.

[KING'S BENCH DIVISION (McCardie, J.), January 24, 1924]

[Reported [1924] 1 K.B. 857; 93 L.J.K.B. 366; 130 L.T. 703; 40 T.L.R. 290; 68 Sol. Jo. 479; [1924] B. & C.R. 97.] B

Bankruptcy—Reputed ownership—Need to prove consent or permission of owner to use of goods in trade or business—Need to prove acquirement and use of goods for business—Bankruptcy Act, 1914 (4 & 5 *Geo.* 5, *c.* 59), *s.* 38 (c).

By s. 38 of the Bankruptcy Act, 1914: "The property of the bankrupt divisible amongst his creditors . . . shall comprise the following particulars . . . (c) All goods being, at the commencement of the bankruptcy, in the possession, order or disposition of the bankrupt, in his trade or business, by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof. . . ." C

The plaintiff claimed to recover from the defendants a motor car as his property, or its value, and damages for its conversion. The defendants, who represented the trustee in bankruptcy of a bankrupt, pleaded that the motor-car was the property of the bankrupt divisible among his creditors under s. 38 (c) of the Bankruptcy Act, 1914, and they claimed that the trustee was entitled to the possession of it. The car had been delivered by the plaintiff to one P., under a hire-purchase agreement which provided that if P. failed to pay the instalments, or if a receiving order was made against him, the plaintiff could re-take possession, and that no alteration should be made to the car without the consent of the plaintiff. It was found as a fact that the car was in its structure a pleasure car. P. used the car mainly for pleasure purposes, but also to some extent for business purposes. The plaintiff always assumed that the car was being employed as a pleasure car, and did not know that it was being used for the purposes of P.'s business. The car was never altered in any way to make it convenient for use in the business. After having paid only two instalments under the hire-purchase agreement, a receiving order was made against P. He was eventually adjudicated bankrupt, and a trustee in bankruptcy was appointed. Meanwhile, the defendants took possession of the car on behalf of the creditors, and the trustee in bankruptcy afterwards ratified this action on their part. D E F G

Held: in order that s. 38 (c) of the Act of 1914 should apply the consent and permission of the true owner must be given, not only to the goods being in the possession, order or disposition of the bankrupt, but also to their use in his trade or business: dicta of JAMES, L.J., in *Re Florence* (1) (1879), 10 Ch.D. at p. 594, and of VAUGHAN WILLIAMS, L.J., in *Re Watson & Co.* (2), [1904] 2 K.B. at p. 757, applied; further, in order that the goods might be in the possession, order or disposition of the bankrupt in his trade or business within the meaning of s. 38 (c), they must be not merely visibly employed in his trade or business but acquired and used for the purposes of the business: dicta of COTTON, L.J., and LUMLEY, L.J., in *Colonial Bank* v. *Whinney* (3) (1885), 30 Ch.D. at pp. 274, 281, applied; and, therefore, s. 38 (c) did not apply to the car, and the plaintiff was entitled to recover possession. H I

Notes. As to goods in the possession, order or disposition of a bankrupt, see 2 HALSBURY'S LAWS (3rd Edn.) 438 et seq.; and for cases see 5 DIGEST 743 et seq.

For the Bankruptcy Act, 1914, s. 38, see 2 HALSBURY'S STATUTES (2nd Edn.) 373.

Cases referred to:

(1) *Re Florence, Ex parte Wingfield* (1879), 10 Ch.D. 591; 40 L.T. 15; 27 W.R. 346, C.A.; 5 Digest 806, *6885*.

(2) *Re Watson & Co., Ex parte Atkin Bros.*, [1904] 2 K.B. 753; 73 L.J.K.B. 854; 91 L.T. 709; 20 T.L.R. 727; 48 Sol. Jo. 673; 11 Mans. 256, C.A.; 5 Digest 787, *6746*.

(3) *Colonial Bank* v. *Whinney* (1885) 30 Ch.D. 261; 55 L.J.Ch. 585; 53 L.T. 272; 33 W.R. 852; 2 Morrell 234; reversed (1886) 11 App. Cas. 426; 56 L.J.Ch. 43; 55 L.T. 362; 34 W.R. 705; 2 T.L.R. 747; 3 Morrell 207; 5 Digest 787, *6745*.

(4) *Helby* v. *Matthews*, [1895] A.C. 471; 64 L.J.Q.B. 465; 72 L.T. 841; 60 J.P. 20; 43 W.R. 561; 11 T.L.R. 446; 11 R. 232, H.L.; revsg. [1894] 2 Q.B. 262, C.A.; 3 Digest 93, *245*.

(5) *Load* v. *Green* (1846), 15 M. & W. 216; 15 L.J.Ex. 113; 7 L.T.O.S. 114; 10 Jur. 163; 153 E.R. 828; 5 Digest 795, *6794*.

(6) *Smith* v. *Hudson* (1865), 6 B. & S. 431; 6 New Rep. 103; 34 L.J.Q.B. 145; 12 L.T. 377; 11 Jur.N.S. 622; 13 W.R. 683; 122 E.R. 1254; 5 Digest 795, *6798*.

(7) *Hamilton* v. *Bell* (1854), 10 Exch. 545; 24 L.J.Ex. 45; 24 L.T.O.S. 118; 18 Jur. 1109; 3 W.R. 62; 3 C.L.R. 308; 156 E.R. 554; 5 Digest 798, *6824*.

(8) *Gibson* v. *Bray* (1817), 8 Taunt. 76; 1 Moore, C.P. 519; 129 E.R. 311; 5 Digest 758, *6525*.

(9) *Re Smith, Ex parte Bright* (1879), 10 Ch.D. 566; 48 L.J.Bcy. 81; 39 L.T. 649; 27 W.R. 385, C.A.; 5 Digest 798, *6818*.

(10) *Sharman* v. *Mason*, [1899] 2 Q.B. 679; 69 L.J.Q.B. 3; 81 L.T. 485; 48 W.R. 142; 16 T.L.R. 11; 44 Sol. Jo. 26; 7 Mans. 19, D.C.; 5 Digest 787, *6744*.

(11) *Re Murrell, Ex parte Lovering* (1883), 24 Ch.D. 31; 52 L.J.Ch. 951; 49 L.T. 242; 32 W.R. 217, C.A.; 5 Digest 786, *6742*.

Action tried by McCardie, J., at Leeds Assizes.

The facts are set out in the judgment.

C. J. Frankland for the plaintiff.

Waugh, K.C., and *Richard Watson* for the defendants.

Cur. adv. vult.

Jan. 24. **McCARDIE, J.**, read the following judgment.—This action was tried before me in December, 1923, at the Leeds Assizes. The points at issue were ably argued by counsel on both sides. The plaintiff claimed the return of a motor-car or its value. It was agreed by counsel that, in substance, the defendants were defending the action on behalf of the trustee in bankruptcy of one Leonard Pinchin. The questions of law turned on the true construction of s. 38 (c) of the Bankruptcy Act, 1914. The questions of fact will hereafter appear. Section 38 provides, so far as material, that

> "The property of the bankrupt divisible amongst his creditors . . . shall comprise the following particulars . . . (c) All goods being, at the commencement of the bankruptcy, in the possession, order or disposition of the bankrupt, in his trade or business, by the consent or permission of the true owner, under such circumstances that he is the reputed owner thereof. . . ."

The main facts are these: In May, 1923, the plaintiff delivered to Leonard Pinchin a two-seater "Jowett" motor car, subject to a hire-purchase agreement. The agreement, which contained many detailed clauses, was, in substance, in the *Helby* v. *Matthews* (4) form. It provided (inter alia) that, if Pinchin failed to pay the instalments, or if a receiving order was made against him, the vendor (the plaintiff) could retake possession. It also provided (cl. 4) that no alteration to the car should be made without the previous consent in writing of the owner. The property did not pass to Pinchin until full pavment of the price of £268. Pinchin was a grocer and fruiterer. He carried on his business and also resided at 20, Amberley Street, Bradford. After obtaining the car from the plaintiff, Pinchin used it (a) for pleasure purposes, and (b) also to some extent—as I shall state hereafter—for the purposes of his business. At the end of July, 1923, Pinchin

absconded. He had paid two instalments of the price of the car. He was heavily in debt to many creditors. On Aug. 10 a petition was presented against him, and a receiving order was made. Then he was adjudicated bankrupt and a trustee was appointed. The defendants meanwhile had taken possession of the car to preserve it for creditors. The trustee ratified their act, and hence they defend this case by his authority. The plaintiff duly demanded back his car. The defendants refused delivery. The trustee claims that he is entitled to it under s. 38 of the Bankruptcy Act, 1914. Unless that section applies, the plaintiff must obtain judgment. Such are the undisputed facts. No question was raised as to trade custom with respect to the hire or hire-purchase of motor-cars. On the other facts and circumstances a considerable amount of testimony was given. I have weighed the evidence and I find the following to be the facts: The car in dispute was, in its make and structure, a pleasure car. It was a two-seater, 7 h.p. car with a dickey seat behind. It was sold as a pleasure car by the plaintiff and purchased as such by Pinchin, although the hire-purchase agreement did not so describe it. That agreement provided, as I have said, that no alteration should be made without the consent of the plaintiff. Pinchin had told the plaintiff that he was purchasing the car for use as a pleasure car. It was insured by Pinchin as a pleasure car, and when the insurance agent saw Pinchin on several occasions using it as a business car he protested. The plaintiff himself, who had sold it as a pleasure car, assumed that it was used as such. He was never aware that Pinchin used it for business purposes. As to the extent of the business user, the facts I find to be these: Pinchin had another shop, in addition to the one at 20, Amberley Street, Bradford. He had a number of customers in connection with both shops, to whose houses he delivered the goods ordered by them. Pinchin got a portion of his supplies from the wholesale market, and would himself carry by his own vehicles a part of those supplies to one or other of the shops. After he got possession of the car in dispute, Pinchin used it from time to time (a) for the purpose of delivering goods to the houses of his customers, and (b) for the purpose of getting supplies from the wholesale market. The extent to which the car was used for those purposes was much in dispute before me. In my view, the truth of the matter is that the car was used on two or three days in the week either for taking goods to customers or for visits to the wholesale market. The user on such days was for a small part of the day only and not for the whole day. The car was employed somewhat beyond a mere emergency car. But, in my opinion, its main function or principal use with Pinchin was that of a pleasure car. He used it regularly as such, both at week-ends and on other days. No name or advertisement was ever placed on it, and it was never altered in any way so as to be convenient for employment as a commercial vehicle.

Such are the facts. Do they support the claim of the trustee under s. 38? This depends to a large degree on the proper construction of that section. It is plain that the car was, at the commencement of the bankruptcy, in the possession of the bankrupt. It is equally plain that possession was with the consent and permission of the true owner. It is clear, too, that the car was used with considerable frequency in the trade or business of the bankrupt. Does the section require, ere a trustee can claim, that the consent and permission of the true owner of goods be given not only to the possession by the bankrupt but also to their user in his trade or business? If this full measure of consent be required, then the defendants here, on behalf of the trustee, fail in their defence; for it is plain that the plaintiff not only did not consent to the car being used in the bankrupt's trade or business, but that he was not aware that it was so used. Counsel for the plaintiff submits that the section requires the full consent. In my opinion he is right. The section is limited in its operation to goods "in the trade or business of the bankrupt." It does not apply to the domestic articles of furniture in a bankrupt's private dwelling. If a man consents to the user of his goods in the trade or business of another, he knows, or ought to know, that he runs a risk of losing those goods by the operation of s. 38. But if he only consents to the user of goods for private and non-business

purposes, then he is not exposed, in my opinion, to the confiscatory provisions of s. 38 merely because the bankrupt, without his knowledge or consent, has used those goods in and for his trade and business. A man, of course, cannot be said to consent to what he does not know.

I have stated my own view of the meaning of s. 38. There appears to be no direct decision on the point, but the cases seem substantially to support my opinion in principle and in reasoning. Thus, in *Re Florence, Ex parte Wingfield* (1), James, L.J., when dealing with a point which, though not the same as the one before me, is somewhat similar, said (referring to s. 15 of the Bankruptcy Act, 1869) (10 Ch.D. at p. 594):

> "It has always been construed as meaning this: that if goods are in a man's possession, order, or disposition, under such circumstances as to enable him by means of them to obtain false credit, then the owner of the goods who has permitted him to obtain that false credit is to suffer the penalty of losing his goods for the benefit of those who have given the credit."

Those words seem applicable in principle to the present case, where the plaintiff never knew that the bankrupt was employing the car in his trade or business, and, therefore, did not permit it. They are fully consistent also with the earlier cases of *Load* v. *Green* (5) and *Smith* v. *Hudson* (6).

In *Re Watson & Co., Ex parte Atkin Brothers* (2), Vaughan Williams, L.J., in giving the judgment of the Court of Appeal, reviewed several decisions and summarised them by saying ([1904] 2 K.B. at p. 757) that "the true owner must have unconscientiously permitted the goods to remain in the order or disposition of the bankrupt." He added:

> "This does not mean, as we understand it, that he must have intended that false credit should be obtained by the bankrupt's apparent possession of the goods, but it does at least mean that the true owner of the goods must have consented to a state of things from which he must have known, if he had considered the matter, that the inference of ownership by the bankrupt must (observe, not might or might not) arise: see *Hamilton* v. *Bell* (7); *Gibson* v. *Bray* (8); *Re Smith, Ex parte Bright* (9). The question for us then is, Did Messrs. Atkin consent to the possession by the bankrupts, Messrs. Watson, under such circumstances that customers were entitled to assume that Messrs. Watson were the owners of the goods in their trade or business?"

In my opinion, these words of Vaughan Williams, L.J., amply support the view I have expressed as to the meaning of s. 38. I find that the plaintiff in the case now before me did not consent or permit that Pinchin should have or employ the car in his trade or business. It therefore follows that s. 38 does not apply to the facts and the trustee fails in his claim.

There is another aspect of the case which also excludes, in my opinion, the operation of s. 38. The words I refer to are,

> "being, at the commencement of the bankruptcy, in the possession, order or disposition of the bankrupt, in his trade or business."

What is meant by the words "being . . . in his trade or business"? These words were considered by the Court of Appeal in *Colonial Bank* v. *Whinney* (3). It is true that the decision of the Court of Appeal was reversed by the House of Lords, but the reversal does not impair, I think, the opinion of the Court of Appeal on the point I am now dealing with: see Williams on Bankruptcy (12th Edn.), p. 255. Cotton, L.J., said (30 Ch.D. at p. 274):

> "I think the true construction is that the goods must be in his order or disposition for the purposes of, or purposes connected with, his trade or business."

Lumley, L.J. (ibid. at p. 281) says:

"The language 'in his trade or business' means . . . not merely visibly employed in his trade or business, but acquired for the purposes of the business and used for those purposes."

It would seem to follow from these dicta that if a motor-car be acquired (as here) for private use, and be primarily employed (as here) for private purposes, then it cannot, I think, be said to be a car "in the trade or business of the bankrupt." The facts in *Sharman* v. *Mason* (10) were very different from those in this case, and *Sharman* v. *Mason* (10), moreover, must always be read subject to *Re Watson & Co., Ex parte Atkin Bros.* (2). I may add that *Re Murrell, Ex parte Lovering* (11) is not devoid of interest on the matters here in question.

The plaintiff, therefore, succeeds. I assess the value of the car at £200, and the damages for detention at £5. There must, therefore, be judgment for the plaintiff for the return of the car or for £200, its value, and for £5 damages. The plaintiff is entitled to costs.

Judgment for plaintiff.

Solicitors: *Fielder, Jones & Harrison*, for *C. A. Payne*, Bradford; *F. B. Brook*, for *A. V. Hammond & Co.*, Bradford.

[*Reported by* T. W. Morgan, Esq., *Barrister-at-Law.*]

EVANS *v.* E. HULTON & CO. LTD., AND ANOTHER

[Chancery Division (Tomlin, J.), March 14, 18, 19, 1924]

[Reported 131 L.T. 534; 40 T.L.R. 489; 68 Sol. Jo. 616]

Copyright—Infringement—Authorising publication of literary work—Authorisation to person other than agent or servant of owner of copyright—Copyright Act, 1911 (1 & 2 *Geo.* 5, *c.* 46), *s.* 1 (2).

A person other than the author of a literary work and owner of the copyright therein without his permission sold the right to publish the work to the proprietors of periodicals.

Held: an authorisation of the publication of a work within s. 1 (2) of the Copyright Act, 1911, was not confined to authorisation given by the owner of the copyright to his servant or agent, and the person in question was guilty of infringement of copyright.

Notes. The Copyright Act, 1911, was repealed by the Copyright Act, 1956 (36 Halsbury's Statutes (2nd Edn.) 70), of which see now s. 1 (2).

Approved: *Falcon* v. *Famous Players Film Co.*, [1926] 2 K.B. 474; *Donoghue* v. *Allied Newspapers, Ltd.*, [1937] 3 All E.R. 503. Referred to: *Ash* v. *Hutchinson & Co. (Publishers), Ltd.*, [1936] 2 All E.R. 1496.

As to infringement of copyright, see 8 Halsbury's Laws (3rd Edn.) 424 and Supp.; and for cases see 13 Digest (Repl.) 104 et seq.

Cases referred to:

(1) *Performing Right Society* v. *Ciryl Theatrical Syndicate*, [1924] 1 K.B. 1; 92 L.J.K.B. 811; 129 L.T. 653; 39 T.L.R. 460; 68 Sol. Jo. 83, C.A.; 13 Digest (Repl.) 115, *571*.

(2) *Performing Right Society* v. *Mitchell and Booker (Palais de Danse), Ltd.*, [1924] 1 K.B. 762; 93 L.J.K.B. 306; 131 L.T. 243; 40 T.L.R. 308; 68 Sol. Jo. 539; 13 Digest (Repl.) 115, *572*.

(3) *Monckton* v. *Pathé Frères Pathephone, Ltd.*, [1914] 1 K.B. 395; 83 L.J.K.B. 1234; 109 L.T. 881; 30 T.L.R. 123; 58 Sol. Jo. 172, C.A.; 13 Digest (Repl.) 96, *374*.

Witness Action in which the plaintiff claimed a declaration that he was the owner of the copyright in a literary work, and an injunction.

The defendant Zeitun was an Arab, and by an agreement contained in letters dated Feb. 10, 1921, it was agreed that the plaintiff should write an account of his experiences under the title of "A Free Lance Detective—Life of H. L. Zeitun," and that they would share the profits equally. Difficulties in disposing of the work arose, and on April 30, 1921, the plaintiff wrote to the defendant Zeitun that he should "never sell the stuff," so he could do nothing further in the matter. It was found, as a fact, that at an interview between the plaintiff and Zeitun, the plaintiff told Zeitun that he had put the stories in the hands of his literary agents. Shortly afterwards Zeitun obtained from the plaintiff a copy of the manuscript to show to two editors, and in 1923 he offered it, through agents, to the defendants, E. Hulton & Co., Ltd. E. Hulton & Co., Ltd., admitted that they had learned that the stories were written by the plaintiff, but assumed that Zeitun's agent had obtained the necessary consent from the plaintiff. E. Hulton & Co., Ltd., agreed to buy the serial rights from Zeitun, and the stories started to appear in one of their publications. The plaintiff, when he learned of this, started his action against E. Hulton & Co., Ltd., and Zeitun for a declaration that he was the owner of the copyright in the stories and an injunction to restrain the defendants and each of them from printing, publishing, selling, or distributing or otherwise disposing of any copy or copies of the work or any substantial part thereof, or from authorising any such acts, or from otherwise infringing the plaintiff's copyright, and for damages. Zeitun denied that he had authorised the publication within the meaning of s. 1 (2) of the Copyright Act, 1911.

Greene, K.C., and *Macgillivray* for the plaintiff.
Rolt, K.C., and *Theobald Mathew* for the defendants, E. Hulton & Co., Ltd.
Henn Collins for the defendant, Zeitun.

TOMLIN, J. [after stating the facts].—It is argued that the defendant Zeitun did not authorise the printing and publishing of the stories within the meaning of s. 1 (2) of the Copyright Act, 1911, and that the action against this defendant, therefore, fails. My attention has been called in support of this contention to the observations of SCRUTTON, L.J., in *Performing Right Society* v. *Ciryl Theatrical Syndicate* (1), and of MCCARDIE, J., in *Performing Right Society* v. *Mitchell and Booker (Palais de Danse), Ltd.* (2). These observations are admittedly dicta, but if directly in point they naturally have great influence. I am, however, disposed to think that they do not afford much assistance and are not really an adjudication on the meaning of the word "authorise" in this subsection, and that I am not only entitled, but bound, for the purpose of my decision, to form my own opinion as to its meaning. It may very well be that both SCRUTTON, L.J., and MCCARDIE, J., are correct in the view that they expressed, that the words "to authorise any such acts as aforesaid" in the subsection are superfluous and add nothing to the definition of copyright contained in the subsection, but that does not necessarily involve any expression of an opinion as to the meaning of "to authorise." It has been ingeniously argued that in the subsection "to authorise any such acts" means to sanction their being done by the servant or agent of the person affecting to give the authority on his behalf, and that there is no infringement of a copyright when that person to whom authority is given is not the servant or agent of the person affecting to give it. In my judgment, this is to put too narrow a meaning on the word, which is defined in the Oxford Dictionary as meaning, in connection with the authorisation of acts, "to give formal approval to, to sanction, approve, countenance." In my opinion, where a man sells the rights in relation to a manuscript to another with the view to its production, and it is in fact produced, both the English language and common sense requires it to be held that that man "authorised"

the printing and publication. This view is assisted by the observations of BUCKLEY, L.J., in *Monckton* v. *Pathé Frères Pathephone, Ltd.* (3), that "the seller of a record authorises the use of the record, and such use will be a performance of the musical work." The action, therefore, succeeds against this defendant also.

Solicitors: *Field, Roscoe & Co.*; *Theodore Goddard & Co.*; *Ashurst, Morris, Crisp & Co.*

[*Reported by* L. MORGAN MAY, ESQ., *Barrister-at-Law.*]

ANGLO-BALTIC AND MEDITERRANEAN BANK *v.* BARBER & CO.

[COURT OF APPEAL (Scrutton and Atkin, L.JJ.), May 27, 1924]

[Reported [1924] 2 K.B. 410; 93 L.J.K.B. 1135; 132 L.T. 1; [1924] B. & C.R. 224]

Company—Winding-up—Voluntary winding-up—Judgment against company—Stay of execution—Money payable to company by third parties by way of indemnity.

In 1920 the plaintiffs sued the defendants to recover money due on bills of exchange which the defendants' manager, fraudulently and without authority, had accepted in the defendants' name. In 1921 the defendants sued the B. bank for damages, alleging neglect on the part of the B. bank to make proper inquiries about the authority of the defendants' manager to deal with the bills, the proceeds of which he had paid into his private account with the B. bank. After the commencement of the actions, the defendants went into voluntary liquidation. The liquidator consented to judgment for the plaintiffs in their action against the defendants. In 1924 the defendants' action against the B. bank was settled on payment to them by the bank of a sum of money. The plaintiffs sought to attach this money under a garnishee order. On an application by the defendants for a stay of execution of the plaintiffs' judgment,

Held: where a judgment was recovered against a company which was in voluntary liquidation it was the invariable practice of the court to stay execution of the judgment unless there were very special circumstances to the contrary, and the fact that the defendants' only right to recover the money claimed by them from the B. bank was founded on the defendants' liability to the plaintiffs was not such a special circumstance as to take the case out of the general rule.

Notes. Considered: *Gerard* v. *Worth of Paris, Ltd.*, [1936] 2 All E.R. 905. Applied: *The Zafiro*, [1952] 2 All E.R. 537.

As to staying and restraining proceedings after the voluntary winding-up of a company, see 6 HALSBURY'S LAWS (3rd Edn.) 754; and for cases see 10 DIGEST (Repl.) 1078 et seq.

Cases referred to:

(1) *Armorduct Manufacturing Co., Ltd.* v. *General Incandescent Co., Ltd.*, [1911] 2 K.B. 143; 80 L.J.K.B. 1005; 104 L.T. 805; 18 Mans. 292, C.A.; 10 Digest (Repl.) 1081, *7483*.

(2) *Re Richardson, Ex parte St. Thomas's Hospital (Governors)*, [1911] 2 K.B. 705; 80 L.J.K.B. 1232; 105 L.T. 226; 18 Mans. 327, C.A.; 5 Digest 673, *5958*.

(3) *Re Law Guarantee Trust & Accident Society, Ltd., Liverpool Mortgage Insurance Co.'s Case*, [1914] 2 Ch. 617; 84 L.J.Ch. 1; 111 L.T. 817; 30 T.L.R. 616; 58 Sol. Jo. 704, C.A.; 26 Digest 11, *13*.

(4) *Ashdown* v. *Ingamells* (1880), 5 Ex.D. 280; 50 L.J.Q.B. 109; 43 L.T. 424, C.A.; 5 Digest 982, *8033*.

Appeal from an order of SWIFT, J., at chambers.

The plaintiffs, Anglo-Baltic and Mediterranean Bank, brought two actions to recover the sum of £24,000 due on two bills of exchange, for £10,000 and £14,000 respectively, drawn by one E. F. Lamb, accepted by the defendants, Barber & Co., and discounted by the plaintiffs. The two actions were consolidated on Oct. 18, 1920. The bills in question had been accepted in the name of the defendants, fraudulently and without their authority, by one Tremain, the defendants' manager. Tremain had also, in fraud of the defendants, accepted in their name and without their authority seven other bills for the aggregate amount of £32,500, which were discounted by other persons. The defendants paid the last-mentioned bills to the holders at maturity. At the time that the said bills were accepted Tremain had a private account with Barclays Bank, and the defendants, on Mar. 2, 1921, commenced an action against that bank, in which they alleged that Lamb, the drawer of the bills, also had an account with Barclays Bank; that Lamb's account was overdrawn; that a Mr. Davis, the manager of Barclays Bank, in order to secure the payment of the overdraft, fraudulently conspired with Tremain and Lamb, that Tremain should accept bills drawn by Lamb on the defendants, and should use a sufficient portion of the proceeds of the bills to secure Lamb's account; that in pursuance of the conspiracy Tremain accepted the whole of the nine bills in question, amounting in all to £56,500, and paid the proceeds into his own account, applying a portion for the purpose of securing Lamb's account as agreed. Alternatively, the defendants claimed that at the time when Davis placed the proceeds of the bills to Tremain's account he was negligent, inasmuch as he knew that Tremain was the manager of the defendants, and omitted to make any inquiries whether he had authority to accept bills on their behalf. Under these circumstances, the defendants claimed to recover from Barclays Bank the whole of the £56,500. On Mar. 8, 1921, the defendants passed a resolution for a voluntary winding-up. On July 28, 1921, the liquidator consented to judgment for the plaintiffs for the £24,000 claimed from the defendants. On Mar. 25, 1924, the defendants' action against Barclays Bank was settled on the terms of the bank paying to the defendants the sum of £9,730, all charges of fraud and negligence against Davis being withdrawn. On April 11, 1924, the plaintiffs obtained a garnishee order nisi against Barclays Bank, under which they sought to attach a sum of £4,150, being a portion of the £9,730 payable by Barclays Bank to the defendants under the above settlement. The liquidator thereupon took out a summons to stay the execution of the plaintiffs' judgment. The master discharged the garnishee order nisi, on the ground that the defendants were being wound-up. On appeal, SWIFT, J., ordered the stay of execution to be removed, on the ground that the money payable by Barclays Bank was in the nature of an indemnity for a payment which the defendants were under a liability to make to the plaintiffs, and could not properly be regarded as part of the assets divisible among the creditors of the company. The liquidator appealed.

Cunliffe, *K.C.*, *Jowitt*, *K.C.*, and *Cyril Asquith* for the defendants.
Stuart Bevan, *K.C.*, and *O'Hagan* for the plaintiffs.

SCRUTTON, L.J.—The defendants, Messrs. Barber & Co., had a manager, named Tremain, who fraudulently put his employers' name to a large number of bills of exchange for which the defendants received no consideration. Two of those bills, amounting together to £24,000, had been discounted by the plaintiff bank, who sued the defendants on them. While that action was proceeding, on Mar. 8, 1921, the defendants went into voluntary liquidation. The effect of that was that, by s. 186 of the Companies (Consolidation) Act, 1908, the assets of the company became divisible equally among the creditors pari passu, and the result of that statutory provision has been that the powers of the court to stay actions against a

company in compulsory liquidation have been extended in practice to companies in voluntary liquidation, and it is now the almost invariable practice, when a company is in voluntary liquidation, to stay proceedings in an action against it, because the effect of allowing a judgment creditor to proceed to execution might be that, instead of the assets being divided among the creditors pari passu, the judgment creditor, by enforcing his judgment, would obtain an advantage over the other creditors. The liquidation of the defendants having taken place with this action pending, the liquidator considered the question of defending it, and eventually, on July 28, 1921, he submitted to judgment for the amount claimed. The next thing that happened was that the defendants, who had been compelled to pay to the holders at maturity a number of other bills, amounting to £32,500, which Tremain had fraudulently accepted in their name without their authority, brought an action against Barclays Bank to recover the amount of both sets of bills. The nature of the claim against Barclays Bank was that Tremain had an account with that bank, and that the manager of the bank, with knowledge of Tremain's fraud, procured him to pay the proceeds of the bills into that account for the benefit of the bank, or at all events did so negligently in that, knowing him to be the manager of the defendants, he received the money and credited it to Tremain's account without making any inquiry of Tremain's employers as to the extent of his authority to deal with the proceeds of the bills which bore their name. That action proceeded for a considerable time, and ultimately, on Mar. 25, 1924, an agreement was arrived at by which the action was settled on the terms of Barclays Bank, whilst denying liability, paying the sum of £9,730, and the defendants withdrawing all charges of fraud and negligence against Barclays Bank and their manager. Thereupon the plaintiffs, having an unsatisfied judgment against the defendants, obtained a garnishee order nisi attaching the money payable by Barclays Bank under the settlement. Garnishee proceedings are, of course, only a form of execution of a judgment, so when the liquidator received notice of that order he applied for a stay of execution of the judgment, that is of the garnishee order, under the general jurisdiction of the court to stay the enforcement of a judgment against a company in voluntary liquidation. The master ordered the execution to be stayed, and discharged the garnishee order. On appeal, SWIFT, J., reversed the master's order. The liquidator has appealed to this court.

It is said that the court is not obliged to stay execution where the defendant company is in voluntary liquidation, but has a discretion to allow the execution to proceed, and that, the order of SWIFT, J., having been made in the exercise of that discretion, this court will not interfere. In support of that proposition *Armorduct Manufacturing Co., Ltd.* v. *General Incandescent Co., Ltd.* (1) was cited. But that case turned on very exceptional facts. The judgment creditor there, if he had been left alone, would have obtained execution of his judgment, but was induced by a false pretext on the part of the company to postpone the execution, and then the company, taking advantage of that postponement, went into voluntary liquidation, and asked the court to stay execution of the judgment because they were being wound-up. Under those circumstances, the court felt justified in allowing the execution to proceed. But it is only in very special circumstances such as those that the court will depart from its general practice of staying execution when the company is in voluntary liquidation, for the reason that the execution, if allowed, would necessarily interfere with the distribution of the assets pari passu. Then are there any special facts in the present case which would justify the court in departing from the almost universal rule? It is said that, the plaintiffs having got judgment against the defendants on certain bills, Barclays Bank are under an obligation to indemnify the defendants against that liability, and that the money payable by Barclays Bank is in some way earmarked to satisfy the plaintiffs' claim under that indemnity. I am quite unable to see any foundation for that contention. The claim by the defendants against Barclays Bank was for damages for fraud and negligence. How such damages when recovered can belong to the plaintiffs I am unable to understand. It was suggested that the plaintiffs' contention was only an

application of the principle stated by the Court of Appeal in *Re Richardson* (2). I had occasion to consider the meaning of that decision when sitting in the Court of Appeal in the *Liverpool Mortgage Insurance Co.'s Case* (3), and expressed the opinion that it turned on very special and peculiar facts, and was not intended by COZENS-HARDY, M.R., to lay down any rule of general application. I also pointed out ([1914] 2 Ch. at p. 651) that the very general statements as to common law right of indemnity made by FLETCHER MOULTON, L.J., were inconsistent with the rules laid down by the Court of Appeal in *Ashdown* v. *Ingamells* (4). Where a plaintiff sues a defendant in contract, and the result of his recovering judgment is to give the defendant a claim in damages against somebody else, there is no legal or equitable principle that I can see on which the plaintiff can be entitled to claim those damages.

The result in this case is that the damages recoverable by the liquidator under the agreement of compromise with Barclays Bank must be divided rateably among the defendants' creditors, and the master's order staying the proceedings under the garnishee order must be restored.

ATKIN, L.J.—I agree. It appears to me that the master's order in this case gave effect to the well-established practice in voluntary winding-up not to permit a creditor after the commencement of the winding-up to issue execution against the property of the company. There are exceptions to that general rule, as, for instance, where the judgment creditor has been induced to postpone the execution until after the winding-up resolution by some fraud or sharp practice on the part of the company; but with that exception, and possibly some others, the rule of practice is well settled. It is founded on the principle expressed in s. 186 of the Companies (Consolidation) Act, 1908, that on a voluntary winding-up the property of the company is to be applied in satisfaction of its liabilities pari passu, a principle which is obviously violated if a creditor of the company is entitled to seize the company's assets for the purpose of paying its debts to him. The only ground on which leave to issue execution in this case could be justified would be on the supposition that the judgment creditor had some right in equity over the debt which he seeks to take in execution under the garnishee proceedings. On that, all I can say is that I share with my brother the difficulty of seeing any conceivable right, either in law or equity, that the judgment creditor can have to that money. The judgment debtors, the defendants, had incurred liability on certain bills to the plaintiffs and also on certain other bills to other parties, which latter liability they had already satisfied by payment, and they claimed as against Barclays Bank that their liability in respect of both sets of bills was brought about by the fraud or negligence of the bank's manager, for which the bank was responsible. That claim was compromised by Barclays Bank agreeing to pay a sum of £9,730 to cover the claim both in respect of the bills on which the defendants were indebted to the plaintiffs, and also those which they had already paid to the other parties. As regard their right to attach any portion of that sum, the judgment creditors drew a distinction between the garnishees' liabilities on the two sets of bills, and, while admitting that they had no right to attach the portion referable to the bills which the defendants had paid to the third parties, limited their claim under the garnishee order to £4,150, being the portion referable to the bills on which the defendants were liable to them. But that distinction does not seem to me to affect the position. The judgment creditors have, in my opinion, no more title to one portion of the money payable to Barclays Bank than they have to the other, and *Re Richardson* (2), where the bankrupt's right was to an indemnity and not to compensation in damages, appears to me to afford no support to any contention to the contrary. The appeal must be allowed, and the order of the master restored.

Appeal allowed.

Solicitors: *Metcalfe, Hussey & Hulbert*; *Nicholson, Graham & Jones.*

[*Reported by* W. C. SANDFORD, ESQ., *Barrister-at-Law.*]

A

A. L. UNDERWOOD, LTD. *v.* BANK OF LIVERPOOL AND MARTINS, SAME *v.* BARCLAYS BANK

[COURT OF APPEAL (Bankes, Scrutton and Atkin, L.JJ.), January 30, 1924]

B

[Reported [1924] 1 K.B. 775; 93 L.J.K.B. 690; 131 L.T. 271; 40 T.L.R. 302; 68 Sol. Jo. 716; 29 Com. Cas. 182]

Bank—Negligence—Cheque—Conversion—Cheque made payable to company—Payment into director's private account—No inquiry by bank—Sole director of one-man company—Apparent authority—When bank holder for value of cheque paid in by customer—Agreement that customer may draw against cheque before clearance—Bills of Exchange Act, 1882 (45 & 46 *Vict.*, *c.* 61), *s.* 82.

C

Conversion—Deprivation of owner of chattel of dominion over it.

U. converted his business into a limited company of which he became sole director, holding all the shares except one. The company's account was kept at K. & Co.'s Bank, and U. had private accounts with the defendant banks. After the formation of the company, U. paid cheques, payable to the company and endorsed by himself as sole director on behalf of the company, into his private accounts with the defendant banks, which, without making any inquiry, collected the amounts due upon the cheques and credited U. with the proceeds. It was found as a fact that U. was acting in fraud of the company. U. having died, in an action against the banks by the company at the instance of a debenture holder for damages for the conversion of the cheques,

D

E

Held: (i) the banks had so disposed of the cheques as to deprive both themselves and the true owner of the cheques of the dominion over them, and so were primâ facie guilty of conversion.

(ii) in asking the banks to collect and pay the proceeds of the cheques into his private accounts U. was not purporting to act as agent of the company or to create privity between the company and the banks, but was purporting to act for himself as principal, and, therefore, the banks could not rely on the defence that he was acting within his apparent authority, in which case the fact that he was using that authority for his own benefit would have been immaterial.

F

(iii) where an official of a company paid cheques made payable to the company into his private account it was the duty of the receiving bank to make inquiries and consult the company; that duty existed where the official was the sole director of a one-man company just as much as it did in the case of companies with a number of directors and many shareholders; and, therefore, the defendant banks had been guilty of negligence and could not avail themselves of the protection afforded by s. 82 of the Bills of Exchange Act, 1882.

G

Per SCRUTTON, L.J.: When a cheque is paid into the account of a person who is not the payee the bank is put on inquiry, especially when he is a servant of the payee.

H

(iv) for a bank to become the holder for value of a cheque the proceeds of which it collects for a customer there must be an agreement, express or implied, between the bank and the customer that the customer may draw against the cheque before it is cleared; in the present case there was no such agreement and none of the cheques was drawn against before clearance; and, therefore, the banks were not holders for value in good faith and without notice of defect of title so as to have a good title to the cheques.

I

Notes. Section 82 of the Bills of Exchange Act, 1882, has been replaced by ss. 4 and 5 of the Cheques Act, 1957 (see 37 HALSBURY'S STATUTES (2nd Edn.) 54, 55), s. 4 extending to uncrossed cheques the protection previously given by s. 82 to crossed cheques.

Applied and Considered: *London and Montrose Shipbuilding and Repairing Co.* v. *Barclays Bank* (1925), 31 Com. Cas. 67. Applied: *Liggett (Liverpool)* v. *Barclays Bank*, [1927] All E.R.Rep. 451. Considered: *Auchteroni* v. *Midland Bank*, [1928] All E.R.Rep. 627. Applied: *Lloyds Bank v. Chartered Bank of India, Australia and China*, [1928] All E.R.Rep. 285. Considered: *Baker* v. *Barclays Bank, Ltd.*, [1955] 2 All E.R. 571. Referred to: *Robinson* v. *Midland Bank* (1925), 41 T.L.R. 402; *Kreditbank Cassel G.m.b.H.* v. *Schenkers*, [1926] 2 K.B. 450; *Houghton* v. *Northard, Lowe & Wills*, [1927] 1 K.B. 246; *Reckitt* v. *Barnett, Pembroke & Slater*, [1928] All E.R.Rep. 1; *Fenton Textile Association* v. *Thomas* (1929), 45 T.L.R. 264; *Banco de Portugal* v. *Waterlow & Sons, Ltd.* (1931), 100 L.J.K.B. 465; *Slingsby* v. *District Bank, Ltd.*, [1931] All E.R.Rep. 143; *Slingsby* v. *Westminster Bank, Ltd.*, [1931] 2 K.B. 583; *Midland Bank, Ltd.* v. *Reckitt*, [1932] All E.R.Rep. 90; *Lloyds Bank, Ltd.* v. *Savory & Co.*, [1932] All E.R.Rep. 106; *Carpenters Co.* v. *British Mutual Banking Co.*, [1937] 3 All E.R. 811; *E.B.M. Co.* v. *Dominion Bank*, [1937] 3 All E.R. 555; *Kanssen* v. *Rialto (West End), Ltd.*, [1944] 1 All E.R. 751.

As to the duty of bankers in relation to the collection of cheques for customers, see 2 Halsbury's Laws (3rd Edn.) 176–186, and for cases see 3 Digest 189, 190, 237 et seq.

Cases referred to:

(1) *Arnold* v. *Cheque Bank*, *Arnold* v. *City Bank* (1876), 1 C.P.D. 578; 45 L.J.Q.B. 562; 34 L.T. 729; 40 J.P. 711; 24 W.R. 759; 3 Digest 236, *662*.

(2) *Fine Art Society, Ltd.* v. *Union Bank of London, Ltd.* (1886), 17 Q.B.D. 705; 56 L.J.Q.B. 70; 55 L.T. 536; 51 J.P. 69; 35 W.R. 114; 2 T.L.R. 883, C.A.; 3 Digest 213, *528*.

(3) *Morison* v. *London County and Westminster Bank, Ltd.*, [1914] 3 K.B. 356; 83 L.J.K.B. 1202; 111 L.T. 114; 30 T.L.R. 481; 58 Sol. Jo. 453; 19 Com. Cas. 273, C.A.; 3 Digest 242, *690*.

(4) *Bissell & Co.* v. *Fox Bros. & Co.* (1885), 53 L.T. 193; 1 T.L.R. 452, C.A.; 3 Digest 238, *666*.

(5) *Royal British Bank* v. *Turquand* (1856), 6 E. & B. 327; 25 L.J.Q.B. 317; 2 Jur.N.S. 663; 119 E.R. 886, Ex.Ch.; 10 Digest (Repl.) 759, *4935*.

(6) *Mahony* v. *East Holyford Mining Co. Ltd.* (1875), L.R. 7 H.L. 869; 33 L.T. 383, H.L.; 3 Digest 216, *544*.

(7) *Biggerstaff* v. *Rowatt's Wharf, Ltd.*, *Howard* v. *Rowatt's Wharf, Ltd.*, [1896] 2 Ch. 93; 65 L.J.Ch. 536; 74 L.T. 473; 44 W.R. 536, C.A.; 10 Digest (Repl.) 782, *5081*.

(8) *County of Gloucester Bank* v. *Rudry Merthyr Steam and House Coal Colliery Co.*, [1895] 1 Ch. 629; 64 L.J.Ch. 451; 72 L.T. 375; 43 W.R. 486; 39 Sol. Jo. 331; 2 Mans. 223; 12 R. 183, C.A.; 10 Digest (Repl.) 760, *4937*.

(9) *Re Alms Corn Charity, Charity Comrs.* v. *Bode*, [1901] 2 Ch. 750; 71 L.J.Ch. 76; 85 L.T. 533; 45 Sol. Jo. 163, 723; 8 Digest (Repl.) 470, *1726*.

(10) *Jones* v. *Smith* (1841), 1 Hare, 43; 11 L.J.Ch. 83; 6 Jur. 8; 66 E.R. 943; 36 Digest (Repl.) 8, *22*.

(11) *Hollins* v. *Fowler* (1875), L.R. 7 H.L. 757; 44 L.J.Q.B. 169; 33 L.T. 73; 40 J.P. 53, H.L.; 3 Digest 66, *91*.

(12) *Consolidated Co.* v. *Curtis & Son*, [1892] 1 Q.B. 495; 61 L.J.Q.B. 325; 56 J.P. 565; 40 W.R. 426; 8 T.L.R. 403; 36 Sol. Jo. 328; 3 Digest 47, *326*.

(13) *National Mercantile Bank* v. *Rymill* (1881), 44 L.T. 767, C.A.; 3 Digest 46, *324*.

(14) *Kleinwort, Sons & Co.* v. *Comptoir National D'Escompte de Paris*, [1894] 2 Q.B. 157; 63 L.J.Q.B. 674; 10 T.L.R. 424; 10 R. 259; 3 Digest 242, *691*.

(15) *Bryant, Powis & Bryant, Ltd.* v. *La Banque du Peuple*, *Same* v. *Quebec Bank*, [1893] A.C. 170; 62 L.J.P.C. 68; 68 L.T. 546; 41 W.R. 600; 9 T.L.R. 322; 1 R. 336, P.C.; 1 Digest 303, *281*.

(16) *Hambro* v. *Burnand*, [1904] 2 K.B. 10; 73 L.J.K.B. 669; 90 L.T. 803; 52 W.R. 583; 20 T.L.R. 398; 48 Sol. Jo. 369; 9 Com. Cas. 251; 29 Digest 87, *459*.

(17) *Lloyd* v. *Grace, Smith & Co.*, [1912] A.C. 716; 81 L.J.K.B. 1140; 107 L.T. 531; 28 T.L.R. 547; 56 Sol. Jo. 723, H.L.; 34 Digest 129, *991*.

(18) *Taxation Comrs.* v. *English, Scottish and Australian Bank*, [1920] A.C. 683; 89 L.J.P.C. 181; 123 L.T. 34; 36 T.L.R. 305, P.C.; Digest Supp.

(19) *Hannan's Lake View Central, Ltd.* v. *Armstrong & Co.* (1900), 16 T.L.R. 236; 5 Com. Cas. 188; 3 Digest 242, *687*.

(20) *Ross* v. *London County Westminster & Parr's Bank*, [1919] 1 K.B. 678; 88 L.J.K.B. 927; 120 L.T. 636; 35 T.L.R. 315; 63 Sol. Jo. 44; 6 Digest 35, *242*.

(21) *House Property Co. of London* v. *London County and Westminster Bank* (1915), 84 L.J.K.B. 1846; 113 L.T. 817; 31 T.L.R. 479; 3 Digest 241, *685*.

(22) *Edmondson* v. *Nuttall* (1864), 17 C.B.N.S. 280; 4 New Rep. 366; 34 L.J.C.P. 102; 13 W.R. 53; 144 E.R. 113; 43 Digest 521, *586*.

(23) *Plevin* v. *Henshall* (1833), 10 Bing. 24; 2 Dowl. 743; 3 Moo. & S. 403; 2 L.J.C.P. 253; 131 E.R. 814; 43 Digest 524, *612*.

(24) *Bannatyne* v. *MacIver*, [1906] 1 K.B. 103; 75 L.J.K.B. 120; 94 L.T. 150; 54 W.R. 293, C.A.; 1 Digest 318, *387*.

(25) *Reid* v. *Rigby & Co.*, [1894] 2 Q.B. 40; 63 L.J.Q.B. 451; 10 T.L.R. 418; 10 R. 280; 1 Digest 318, *386*.

(26) *Capital and Counties Bank, Ltd.* v. *Gordon, London City and Midland Bank Ltd.* v. *Gordon*, [1903] A.C. 240; 72 L.J.K.B. 451; 88 L.T. 574; 51 W.R. 671; 19 T.L.R. 462; 8 Com. Cas. 221, H.L.; 3 Digest 239, *670*.

Appeals by the defendant banks, Bank of Liverpool and Martins and Barclays Bank, from an order of ROCHE, J., in an action in which the plaintiff company claimed damages for the conversion of certain cheques by the banks.

By Bills of Exchange Act, 1882, s. 82:

"Where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment."

Maugham, K.C., *Stuart Bevan, K.C.*, and *J. Forster* for the defendants, the Bank of Liverpool and Martin's.

Schiller, K.C., and *St. J. G. Micklethwait* for the defendants, Barclays Bank.

Upjohn, K.C., *J. B. Matthews, K.C.*, and *J. H. Stranger* for the plaintiff.

Cur. adv. vult.

Jan. 30. The following judgments were read.

A. L. UNDERWOOD, LTD. *v.* BANK OF LIVERPOOL AND MARTIN'S.

BANKES, L.J.—The facts in this case are not seriously in dispute. The real issue between the parties is as to the true inferences to be drawn from those facts, and the fate of this appeal depends, in my opinion, upon what the true inferences are. The material facts are as follows. Underwood, whose dealings with a number of cheques are what has given rise to the action, carried on business as an engineering and machinery merchant. He had at least two banking accounts, one with Messrs. King & Co., and the other with these defendants. His account with Messrs. King was heavily overdrawn in July, 1919, when, to use a colloquial expression, he converted himself into a limited company. This company was incorporated July 11, 1919, under the name of A. L. Underwood, Ltd., with a capital of £12,000 divided into 12,000 shares of £1 each. The subscribers to the memorandum of association were Underwood and a Mr. Callow, for one share each. By the articles, Underwood was appointed sole director, and at a meeting of the company held on July 15, 1919, at which Underwood was the only person present, the two shares subscribed for as above were allotted, as well as 10,000 fully paid shares

A to Underwood, being the consideration for the sale of his business to the company. No other shares in the company were ever allotted, and Callow's share was, in June, 1921, transferred to Underwood's wife. Upon the formation of the company, a debenture in the form of a floating charge over the assets of the company was issued to King & Co. as security for the overdraft, and the company's account was kept at Messrs. King's. Underwood continued to keep his private account with B the defendant bank, where he was well known and had been a customer for many years. Within a few months after the formation of the company, Underwood commenced to pay the company's cheques into his private account with the defendants, and they collected the amounts due upon the cheques and credited Underwood with the proceeds. The cheques so dealt with between Dec. 20, 1919, and February, 1922, were forty-five in number, for amounts totalling in all £8,502 4s. C It was for a conversion of these cheques that the action was brought. Underwood died in November, 1922. A receiver and manager of the company was appointed by the debenture holders, and he caused an investigation of the books of the company by a firm of chartered accountants. The result of their investigation satisfied the learned judge who tried this action that the true inference in reference to the action of Underwood in dealing with these cheques in the way in which he did was D that he was acting as between himself and his company in fraud of the company. I see no reason to question the correctness of the inference so drawn by the learned judge.

An analysis of the cheques gives the following result. Two are missing. Three are uncrossed. One is uncrossed, but marked "Act. payee." One is uncrossed but marked "Not negotiable: act. payee." Twenty-four are crossed without any E special marking; four are crossed and marked "Not negotiable: act. payee;" one is crossed and marked "Act. payee." All the cheques were drawn in favour of the company and were the undoubted property of the company. All the cheques were endorsed by Underwood in a form which indicated that he was endorsing them for the company as sole director. He clearly had the right so to endorse them. One defence relied upon by the bank was that on these facts there was no evidence F of any conversion of the cheques. Unless the bank can justify their action upon one or other of the defences upon which they rely, they appear to me quite clearly to have been guilty of a conversion of all the cheques—so clearly that it does not seem necessary to discuss the decisions in *Arnold* v. *Cheque Bank* (1), *Fine Art Society, Ltd.* v. *Union Bank of London* (2), *Morison* v. *London County and Westminster Bank* (3), and *Bissell & Co.* v. *Fox Bros. & Co.* (4), to which we were G referred.

One of the two other defences related only to the crossed cheques. The bank said that they were protected with regard to these cheques by s. 82 of the Bills of Exchange Act, 1882, because they received payment for these cheques in good faith and without negligence. The bank's good faith is not challenged, but it is H said, and the learned judge accepted the view, that they failed to make good their contention, that they acted without negligence. In this view of the facts I entirely agree, and I will refer to the facts relevant to this point when dealing with the remaining defence of the bank, which is the only one which, in my opinion, admits of serious discussion. That defence is founded on the rule laid down in *Royal British Bank* v. *Turquand* (5) and *Mahony* v. *East Holyford Mining Co., Ltd.* (6), I conveniently stated by LINDLEY and KAY, L.JJ., in *Biggerstaff* v. *Rowatt's Wharf, Ltd.* (7) ([1896] 2 Ch. at p. 102). LINDLEY, L.J., says:

> "Now, what is the law as to this point? What must persons look to when they deal with directors. They must see whether according to the constitution of the company the directors could have the powers which they are purporting to exercise. Here the articles enabled the directors to give to the managing director all the powers of the directors except as to drawing, accepting, or indorsing bills of exchange and promissory notes. The persons dealing with him must look to the articles, and see that the managing director might have

power to do what he purports to do, and that is enough for a person dealing with him bona fide. It is settled by a long string of authorities that, where directors give a security which according to the articles they might have power to give, the person taking it is entitled to assume that they had the power."

KAY, L.J., says ([1896] 2 Ch. at p. 106):

"Mr. Davey, therefore, did nothing ultra vires of a managing director; and it would be extraordinary if a person dealing bona fide with the managing director of the company were bound to inquire whether the powers which the articles authorised the directors to give him had been formally delegated to him. There is a long string of cases showing that a person so dealing with an officer of a company has a right to presume that all has been done regularly."

If this was the whole of the rule, I think, there is a good deal to be said for the contention put forward on behalf of the bank that Underwood, in doing what he did, was not acting outside the apparent scope of his authority, as conferred upon him as sole director by the memorandum and articles of his company. Strange as it might appear that he should act as he did, it appears to be conceivably possible that in so acting he should have been acting honestly and in the interests of his company in the carrying on of their business. The fact that the company were overdrawn at their bankers, with the result that the proceeds of the cheques, if collected by them, would not have been available for current expenses, or for some particular purchase, might be a legitimate reason for paying the cheques into some other than the company's account. It does not appear material on this point that Underwood was, in fact, acting in fraud of his company. The strangeness of his conduct, however, is material, not only on the issue of negligence, but also because it brings into operation what appears to be an undoubted branch of the rule of law on which this defence of the bank rests.

In *Mahony* v. *East Holyford Mining Co., Ltd.* (6) LORD HATHERLY states the rule thus (L.R. 7 H.L. at p. 894):

"And the bankers must also be taken to have had knowledge, from the articles, of the duties of the directors, and the mode in which the directors were to be appointed. But, after that, when there are persons conducting the affairs of the company in a manner which appears to be perfectly consonant with the articles of association, then those dealing with them, externally, are not to be affected by any irregularities which may take place in the internal management of the company. They are entitled to presume that that of which only they can have knowledge, namely, the external acts, are rightly done when those external acts purport to be performed in the mode in which they ought to be performed. For instance, when a cheque is signed by three directors, they are entitled to assume that those directors are persons properly appointed for the purpose of performing that function, and have properly performed the function for which they have been appointed. Of course, the case is open to any observation arising from gross negligence or fraud. I pass that by as not entering into the consideration of the question at the present time. Outside persons, when they find that there is an act done by a company, will, of course, be bound in the exercise of ordinary care and precaution to know whether or not that company is actually carrying on and transacting business, or whether it is a company which has been stopped and wound up, and which has parted with its assets, and the like. All those ordinary inquiries which mercantile men would in the course of their business make, I apprehend, would have to be made on the part of the persons dealing with the company."

To the same effect is the passage in the judgment of LINDLEY, L.J., in *County of Gloucester Bank* v. *Rudry Merthyr Steam and Home Coal Colliery Co.* (8) where he says ([1895] 1 Ch. at p. 636):

A "Here the directors may make any quorum they like—it may be two, or it may be three. They did, apparently, appoint three. The mortgage in question is under the seal of the company, signed by two directors and counter-signed by the secretary. Now, what could anybody think of that? What is there to put them upon inquiry? What is there to give them notice of anything irregular, if there was anything irregular?

B Applying LORD HATHERLEY'S language to the facts of this case, I ask myself what are the ordinary inquiries which mercantile men would in the course of their business have made on presentation of these cheques for collection. On the assumption that the bank's cashiers were acting in entire good faith in taking in these cheques without any inquiry whatever, the conclusion seems to me almost irresistible that for some reason or another they considered that they were still C dealing with Underwood, the old customer, the principal, and not with a new Underwood, an agent. As the bank are relying on a rule of law applicable only to dealings with an agent, they must take the rule as they find it, and if they have omitted, as I am clearly of opinion they have omitted, to make an ordinary inquiry, they must take the consequences. What are the facts? The cheques were plainly on the face of them the property of the company. They were en- D dorsed by Underwood as sole director, a fact which, instead of absolving the cashiers from inquiry, appears to me to demand the exercise of greater caution on their part, having regard to the fact that the cheques were being paid into Underwood's private account. Many of the cheques were marked in a way which, of itself, ought to have put the cashiers on inquiry. I entirely accept the view of the learned judge with regard to the conduct of the cashiers, and I think that his E conclusion establishes not only negligence on their part, but such an absence of ordinary inquiry as to disentitle the bank from relying on a defence founded on the ostensible authority of Underwood. I feel satisfied that the obvious inquiry whether the company had not got its own banking account would have put a stop to the fraudulent system adopted by Underwood, and I do not think that it lies in the mouth of the bank to say that an inquiry would have been useless. In *Re Alms* F *Corn Charity* (9) ([1901] 2 Ch. at p. 762) STIRLING, L.J., quotes a decision of LORD ROMILLY, M.R., with approval, in which he said:

"With respect to the argument that it was unnecessary to make any inquiry because it would have led to no result, I think it impossible to admit the validity of this excuse. I concur in the doctrine of *Jones* v. *Smith* (10) (1 Hare at p. 55) that a false answer, or a reasonable answer given to an inquiry made, G may dispense with the necessity of further inquiry, but I think it impossible, beforehand, to come to the conclusion that a false answer would have been given which would have precluded the necessity of further inquiry. A more dangerous doctrine could not be laid down, nor one involving a more unsatisfactory inquiry—viz., a hypothetical inquiry as to what A. would have said if B. had said something other than what he did say."

H For these reasons I think that the appeal fails, and must be dismissed with costs.

SCRUTTON, L.J.—This action was brought nominally by A. L. Underwood, Ltd., substantially by Lloyds Bank, a holder of debentures issued by that company, against the Bank of Liverpool and Martin's for converting certain cheques, the property of the plaintiff company. The connection of the defendant bank with I these cheques was that A. L. Underwood, who was the sole director of the plaintiff company, paid them into his private account at the defendant bank for collection, having, as sole director of the company, endorsed them "A. L. Underwood, Ltd., A. L. Underwood, Sole Director." The defendant bank collected them, paid the proceeds into A. L. Underwood's account, and honoured cheques drawn against them. A. L. Underwood owned 10,001 shares of the 10,002 into which the capital of the company was divided, his wife owning the remaining share. The plaintiff company had issued debentures to a substantial amount to the predecessors of Lloyds Bank, with whom they had a large overdraft. While there were questions

whether A. L. Underwood had not applied all or part of the proceeds of those cheques in meeting liabilities of his company to third parties, and what the legal effect of such a transaction was, and while there may be questions whether as to some cheques he was paying himself a debt which the company owed him, there is, I think, no doubt that, as between the plaintiff company and Underwood as a general rule, Underwood was defrauding the plaintiff company, for he made no entries in the company's books which would reveal the nature of his dealings with the property of the company, or show for what purpose he was paying cheques made payable to the company into his private account, and the only motive for these omissions must have been the desire to conceal transactions he knew to be improper.

If, as appears to be the fact, A. L. Underwood converted the cheques of the company, I think the authorities show that the defendant bank, by collecting those cheques and placing the proceeds to A. L. Underwood's private account, converted them as against the plaintiff company. There is, no doubt, considerable difficulty in defining the limits of conversion, where servants or agents do ministerial acts in relation to the goods converted in good faith and on behalf of the apparent owner. The different statements of the law by BLACKBURN and BRETT, JJ., in addressing the House of Lords in *Hollins* v. *Fowler* (11) are proof of this, while it is difficult to reconcile *Consolidated Co.* v. *Curtis & Sons* (12), where the auctioneers who in good faith sold certain property on the instructions of the apparent owner and delivered it to the purchasers were held to have converted that property, with *National Mercantile Bank* v. *Rymill* (13), where auctioneers, who, after the apparent owner had placed goods on their premises for sale, but had himself sold them to a purchaser, received the price from such purchaser and gave him a delivery order for the goods, were held not to have converted the goods. LORD CHELMSFORD, however, in *Hollins* v. *Fowler* (11), states the position thus (L.R. 7 H.L. at p. 759):

> "Any person who, however innocently, obtains possession of the goods of a person who has been fraudulently deprived of them, and disposes of them, whether for his own benefit or that of any other person, is guilty of a conversion."

Bankers, who collect, borrow from their customers the proceeds when collected, and in collecting exhaust the operation of the cheque. These operations have been held to be conversion in such cases as *Kleinwort, Sons & Co.* v. *Comptoir National D'Escompte de Paris* (14), *Arnold* v. *Cheque Bank* (1), *Fine Art Society*, v. *Union Bank of London, Ltd.* (2), and by LORD READING in this court in *Morison* v. *London County and Westminster Bank, Ltd.* (3). Unless, therefore, the defendant bank can show some excuse in law, they are guilty of conversion. Their first line of defence was that, as Underwood was acting within his apparent authority, the fact that he was using that authority for his own benefit was immaterial; "the apparent authority was the real authority", see per LORD MACNAGHTEN in *Bryant, Powis and Bryant, Ltd.* v. *Quebec Bank* (15) ([1893] A.C. at p. 180), and for this purpose they relied on such cases as *Hambro* v. *Burnand* (16) and *Lloyd* v. *Grace, Smith & Co.* (17). In my view, the distinction between these cases and the present is that, in the cases cited, the apparent agent was purporting to create privity between the plaintiff and his principal by doing an act which it was within his apparent authority to do, and the fact that he did it for his own benefit, which he had no actual authority to do, was immaterial as against the plaintiff who purported to contract with the alleged principal on the faith of the agent's apparent authority. If an agent, with a general authority in writing to sell houses, sells, as agent, his principal's house to third party after production of his authority, it would be useless for the principal to assert that his agent was really selling on his own behalf intending to put the money in his own pocket. "The apparent authority is the real authority." So in the present case, if the bank were purchasing the cheque for value, apart from any question of the Bills of Exchange

A Act, 1882, on finding from the company's documents that the sole director had authority to endorse cheques on their behalf, it would be immaterial whether he was using that power for his own benefit, and privity would be created between the alleged principal and the bank, so that the property would pass. But in the present case A. L. Underwood, in asking the bank to collect and pay the proceeds into his private account, was not purporting, in this transaction, to act as agent B for his company, or to create privity between them and the bank, he was acting and purporting to act for himself as principal. Just as you cannot ratify the act of an agent who did not profess to act for you, so, in my view, you cannot rely on the apparent authority of an agent who did not profess, in dealing with you, to act as agent. This line of defence, in my opinion, fails.

The next line of defence was under s. 82 of the Bills of Exchange Act, 1882, C which protects bankers, who, in good faith and without negligence, collect crossed cheques for a customer who has no title to them. This defence does not avail the bank for those cheques which are not crossed, nor for those documents which, though in form cheques, are not unconditional promises to pay because the order to pay is conditional on a receipt on the cheque being signed by the payee. It is not disputed that the defendant bank acted in good faith, but it is said, and the judge D has found, that they acted negligently, because they received for collection on behalf of a servant of a company, for his own personal account, cheques made payable to the company. The test of the standard of duty in such cases is stated by LORD DUNEDIN in *Taxation Comrs.* v. *English, Scottish and Australian Bank* (18) ([1920] A.C. at p. 689) to be "the ordinary practice of bankers." On this the learned judge in the present case had the evidence of Mr. Bromley Martin, who was E the London manager of the defendant bank, and who appears to have given his evidence with great frankness and fairness. He admitted that in all ordinary cases where an official of a company was paying cheques made payable to the company into his private account, the bank would make inquiries and consult the employer, but he said that where the official was a sole director of a one-man company, and himself the one man, it would not be necessary, partly, I think, because he treated F such a director as the same as his company, partly because he thought that inquiry of such an employer would give no good result, for it would be answered by the official whose conduct was inquired into. I cannot take this view. The defendant bank did not know that there were no independent shareholders, and there was, in fact, an independent debenture holder whose interests would be affected; and inquiries of Mr. Underwood himself as to whether the company had its own bank- G ing account might easily have had considerable effect. If banks, for fear of offending their customers, will not make inquiries into unusual circumstances, they must take with the benefit of not annoying their customers, the risk of liability because they do not inquire. I agree with ROCHE, J.'s view that the bank were guilty of negligence, and I refer to the similar view taken, in similar circumstances, by KENNEDY, J., in *Hannan's Lake View Central, Ltd.* v. *Armstrong & Co.* (19) and H by BAILHACHE, J., in *Ross* v. *London County Westminster and Parr's Bank*, (20). A further item in the finding of negligence is that some of the cheques were crossed "Account of payee," one with the addition to the word "only." While this addition does not affect the negotiability of an order or bearer cheque, I agree with the view of ROWLATT, J., in *House Property Co. of London* v. *London County and Westminster Bank* (21) that, when such a cheque is paid into the account of a I person who is not the payee, the bank is put on an inquiry, especially when he is a servant of the payee. In the present case, no inquiry was made by the bank or its cashiers. The general defences to liability for conversion therefore fail.

There remains the question of the form of the inquiry. The bank decided to say (i) that as to some of the cheques the sole director had used them to pay himself debts due from the company to him; (ii) as to some of the cheques, the sole director had used the proceeds to pay liabilities of the company, and that they ought to have credit for these matters in reduction of damages. It was argued for the plaintiffs that the measure of damages in conversion was always the face value

of the cheque, and that what happened afterwards was immaterial unless it amounted to accord and satisfaction. I am not disposed to decide this in the absence of knowledge of the particular facts. WILLES, J., in *Edmondson* v. *Nuttall* (22) (see also *Plevin* v. *Henshall* (23)), states the measure of damages to be that the plaintiff recovers all he has lost by the defendant's wrongful act. If there is a conversion and re-delivery, the re-delivery goes in mitigation of damages. BYLES, J., in *Edmondson* v. *Nuttall* (22), thought that you could not mitigate damages for conversion of a bag of money by showing that the plaintiff had, out of the bag of money converted, paid the debt of the plaintiff. But I am not sure that the learned judge had in his mind the equitable doctrine under which a person who had in fact paid the debts of another without authority was allowed the advantage of his payments: see *Bannatyne* v. *MacIver* (24) and *Reid* v. *Rigby & Co.* (25). To see whether these principles are applicable, it is desirable that the exact facts should be ascertained. Unfortunately, the judgment as drawn does not clearly provide for this. I think the inquiry should be to report (i) whether any of the cheques claimed for were endorsed in order to repay debts due from the company to A. L. Underwood; (ii) whether the proceeds of any of the cheques converted were used to discharge liabilities of the company, and, if so, under what circumstances. The court will then be in a better position to see whether there are any facts which can be used to reduce liability or damages. The order must be varied to this effect. As, however, the bank have substantially failed, the appeal, subject to this variation, must be dismissed, with costs.

ATKIN, L.J.—I agree that this appeal should be dismissed, and substantially for the reasons given by the learned judge below. It is unnecessary to recapitulate the facts. The story, unfortunately, is not uncommon. An official of a limited company has fraudulently taken cheques belonging to the company, which he had authority to indorse, paid them into his own bank and converted the proceeds. The cheques were drawn in favour of the company, some were not crossed, some were crossed, and some marked "Not negotiable." The bank are sued by the company for the conversion of the cheques, and, in my opinion, are liable. The question seems to turn upon whether A. L. Underwood, the official in question, the sole director of the company, had authority, actual or ostensible, to deal with the cheques as he did. I treat the contention that in the absence of authority in Underwood, what was done by the bank did not amount to a conversion, as unarguable. The bank so disposed of the chattels—the cheques—as to deprive both themselves and the true owners of the dominion over them and in exchange for the pieces of paper constituted themselves the debtors of the customer. I cannot imagine a plainer case of conversion.

The first question is: Had Underwood actual authority to deal with the cheques as he did? The judge has found that he was pursuing a general course of fraudulent dealing with all the accompaniments of fraud, concealment, and falsification of books. He was, in fact, defrauding the company's bankers, who had granted an overdraft on the security of a floating charge which covered the assets represented by the cheques. He was using the proceeds of the cheques in question to pay his own private debts. In ordinary circumstances actual authority appears to be clearly negatived. Nevertheless, it was contended that the fact that Underwood was the sole director, and practically the sole shareholder, gave him, in pursuance of the articles, actual authority. He was entrusted with all the powers of the company; the company can only act through its directors, and the directors, or director, if only one, could do what they willed with the company's assets. If this means anything, it means that a board of directors, acting as such, have actual authority to defraud the company by using the company's assets to pay debts due to butchers or moneylenders by the individual directors. Such an act is quite outside the class of acts—management of the company's business—authorised to be done by the board. The directors, whether collectively or singly, have not actual authority to steal the company's goods.

If, then, there was no actual authority, the question remains whether Underwood was acting within the scope of his apparent authority in such circumstances that the company would be precluded from setting up lack of actual authority. I think he was not. The bank's case upon this point was destroyed by the result of the cross-examination of the London manager of the defendant bank by the leading counsel for the company, one of the most effective examples of the art which I have read, though no doubt assisted by the transparent candour of the witness. I will read two passages. He was asked:

> "In the ordinary course of business the manual possession by a manager or secretary, or managing director of a cheque or such like document, belonging to a company, is an agent of and on behalf of the company. (A.) In an ordinarily constituted company, yes. (Q.) No. I am not putting to you an ordinarily constituted company, but in ordinary circumstances? (A.) Well, yes, I agree in ordinary circumstances. (Q.) And in ordinary circumstances, if a managing director or secretary uses, or attempts to use, such a cheque as I have put to you for his own purposes by paying it into his own private account, that is wrong? (A.) Certainly. (Q.) A wrong towards the company? (A.) Certainly."

Later, the witness was asked this:

> "It would be negligence on the part of the bank to collect for a customer's private account cheques made payable to his principal. Do you agree with that? (A.) Yes—without asking the principal first; without referring to the principal. (Q.) You qualify it by 'without referring to the principal'? (A.) Yes. (Q.) This is another branch of the same rule, that it would be negligence on the part of a bank to take a cheque made payable to a limited company for the credit of the private account of one of the company's officials? (A.) My answer to that is exactly the same as the last—yes, it would be negligence without referring to the principal. (Q.) Without referring to the company? (A.) Without referring to the company. (ROCHE, J.) He agrees entirely with your rule, and he comes back to his first statement that he treats this as an exception. (Mr. Upjohn) Yes. (To the witness) No doubt there is a business reason for that, is there not? (A.) An obvious one. (Q.) Because there is so great a risk that the official of the company having, by virtue of his position, control over the cheques or bills, or whatever it may be, belonging to the company, is using it for a wrong purpose when he pays it to his private account? (A.) He may be using it for a wrong purpose. (Q.) I put it that there is a risk that he is, or may be, doing wrong? (A.) Yes. (Q.) I think that you will agree with me that at all events such a transaction, that is to say, the payment to the private account of the official of the company of a cheque which, on the face of it, is made payable to the company, is out of the ordinary course of business? (A.) Yes."

These admissions, fortified by the whole facts of the case, appear to demonstrate that in disposing of the cheques as he did Underwood was not acting within the ordinary scope of his authority, but was doing something unusual which ought to have attracted the attention of the bank's servants. It was said that if enquiries had been made Underwood could easily have made a lying explanation which would have set at rest any doubts. I agree with the judge that, even if well founded, this would be an insufficient answer, but I think it more than doubtful whether Underwood could have given a satisfactory answer to the obvious question: Has not the company a banking account, and, if so, why are not these cheques paid into that account? Even if the first transaction, so investigated, went through, it is unlikely that similar disposition of the cheques would have been repeated. It is further to be noticed that the bank cannot rely upon any apparent authority of Underwood to deal with the cheques on behalf of the company, for he neither purported to do so, nor did the bank ever suppose that they were dealing with the company. The transaction on both sides was treated, as in fact it was, as a

dealing for Underwood's private account. Had it been otherwise the lack of actual authority founded on fraud was not apparent, for the bank undoubtedly acted throughout honestly, and the case would more nearly have approached the circumstances of *Hambro* v. *Burnand* (16). In that case, however, the defendants had not seen, or asked to see, the actual authority of the agent which was in writing, but, as the act done would have been within the apparent authority given in the document, they were held to be protected. In the present case the bank must be taken to have seen the authority, inasmuch as it is contained in the memorandum and articles of association with which they are bound to be acquainted. The effective distinction is that in the present case the act done was not within the apparent authority given by the articles. The true conclusion seems to be, therefore, that the bank converted the cheques in question, unless they are protected in the case of the crossed cheques by the provision of s. 82 of the Bills of Exchange Act, 1882. On this point, I have nothing to add to what was said by the learned judge. On the admitted facts it seems to me impossible to find that he was wrong in coming to the conclusion that the bank had not satisfied him that they had not dealt with the cheques without negligence.

The only remaining question is as to the scope of the inquiry directed by the learned judge. As drawn, the order is too narrow to adjust satisfactorily the rights of the parties. The order is limited to the state of account between Underwood and the company at the date of the payment into the bank account of each of the cheques in question, and was drawn in that form for the purpose of enabling the judge to decide whether or not it could be said that Underwood had implied actual authority so to deal with the particular cheque. If he had, there would be no conversion of that cheque. I say nothing as to what inference should be drawn if at the time of paying any cheque into the bank account the balance of account, as between Underwood and the company, should be in favour of the company. That will be determined by the learned judge after report. But the defendants are also entitled to have it determined whether any part of the proceeds of the converted cheques was applied by Underwood in the payment of liabilities of the company. To the extent to which the proceeds were so applied, it appears to me at present, without formally deciding the point, that the primâ facie measure of damage, the face value of the cheques, must be reduced. I agree with the order proposed.

A. L. Underwood, Ltd. *v.* Barclays Bank

BANKES, L.J., said that the one issue which was peculiar to the Barclays Bank case was that the bank set up the case that they were holders for value of the cheques. Roche, J., had decided on the facts that they failed to make out that case. He (Bankes, L.J.) agreed with the learned judge's view and with the reasons given by Scrutton and Atkin, L.JJ., in support of that view. The appeal must be dismissed.

SCRUTTON, L.J.—The defendants here raise a point which was not raised in the *Bank of Liverpool* case. They say that by crediting the cheques in their account with Underwood before the cheques were cleared, they became holders for value, in good faith and without notice, of the cheques as against Underwood and the true owner, and have, therefore, good title to the cheques. This defence does not apply to two cheques crossed "Not negotiable," which cover £1,540 of the total claim of £2,241 17s. The cases where an agent for collection becomes a holder for value must turn on an express or implied agreement between the bank and customer that the latter may draw against the cheques before they are cleared. Roche, J., has not been satisfied that there was any such agreement, and I do not differ from him. There was certainly no express agreement. Though the cheques were in fact credited to the customer's account before they were cleared, the customer was not informed of this, and I can see nothing to prevent the bank from declining to honour the cheque if the payment in, against which it was drawn, had not been cleared. The bank cashiers did in fact use their discretion,

varying with each customer, whether they would, or would not, anticipate clearance in paying; but I can see no evidence from which to infer a binding agreement with the customer on the subject. None of these cheques was drawn against before clearance. In fact, after Barclays had absorbed the London and Provincial Bank, with whom Underwood had at first his account, there appears in the Barclay form of paying-in slip the note:

> "The bank reserves the right, at its discretion, to postpone payment of cheques drawn against uncleared effects which may have been credited to the account."

This date is before the paying-in of the last cheques claimed for in this case. I cannot, therefore, interfere with the refusal of ROCHE, J., to find that the defendants were holders for value, and it is unnecessary to consider whether the form of endorsement gives them notice, so as to put them on inquiry as to defects.

ATKIN, L.J.—In this case, the facts and issues are substantially the same as in the previous case with the exception that Barclays Bank contend that they were holders for value of the cheques paid into their account inasmuch as the amount of the cheques were credited to the customer's account on the day on which they were paid in. If holders for value, they say that the plaintiffs have not established that the bank took the cheques with notice of the defect of title. It is unnecessary to consider the question as to notice of a defect of title, for, in my opinion, the bank fail to show that they were holders for value. It is sufficient to say that the mere fact that the bank, in their books, enter the value of the cheques on the credit side of the account on the day on which they receive the cheques for collection, does not, without more, constitute the bank a holder for value. To constitute value there must be in such a case a contract between banker and customer, express or implied, that the bank will, before receipt of the proceeds, honour cheques of the customer drawn against the cheques. Such a contract can be established by course of business and may be established by entry in the customer's pass book, communicated to the customer and acted upon by him. Here there is no evidence of any such contract. No cheque paid in was ever drawn upon until cleared; and the form of paying-in slip in respect of some of the later cheques seems to indicate that the bank assumed that they had not entered into any such contract. That the course of banking business requires entries to be made forthwith in the ordinary course of business is well known, and no doubt led to the passing of the Bills of Exchange (Crossed Cheques) Act, 1906, enacted in consequence of the decision in *Capital and Counties Bank, Ltd.* v. *Gordon* (26). But neither that decision, nor the statute, lays down the rule, judicial or statutory, that if a bank credits a cheque at once in its books, that fact, without more, make the bank a holder for value. The present case cannot be distinguished from the case against the Bank of Liverpool and Martin's, and the same result must follow.

Appeals dismissed.

Solicitors: *Linklaters & Paines*; *Durrant, Cooper & Hambling*; *John Bartlett & Son.*

[*Reported by* W. C. SANDFORD, ESQ., *Barrister-at-Law.*]

A

Re G. STANLEY & CO., LTD.

[CHANCERY DIVISION (Eve, J.), July 15, 16, 30, December 2, 1924]

[Reported [1925] Ch. 148; 94 L.J.Ch. 187; 133 L.T. 37; 69 Sol. Jo. 36; [1925] B. & C.R. 1] B

Company—Winding-up—Fraudulent preference—Payment to principal creditor with intent to prefer guarantor—Right of liquidator to recover from guarantor—Bankruptcy Act, 1914 (4 *& 5 Geo.* 5, *c.* 59), *s.* 44 (1)—*Companies (Consolidation) Act*, 1908 (8 *Edw.* 7, *c.* 69), *s.* 210.

Where a payment has been made to a principal creditor with intent to prefer a guarantor of the debt, s. 44 (1) of the Bankruptcy Act, 1914, enables the trustee in bankruptcy or the liquidator in the compulsory winding-up of a company to recover the payment from the guarantor, the person actually preferred. C

Notes. Considered: *Re Lyons, Ex parte Barclays Bank, Ltd.* v. *Trustee*, [1934] All E.R.Rep. 124; *Re Conley, Ex parte Trustee* v. *Barclays Bank, Ltd.*, [1938] 2 All E.R. 127. Referred to: *Re Singer & Co. (Hat Manufacturers), Ltd.*, [1943] 4 All E.R. 225. D

As to fraudulent preference in a winding-up, see 6 HALSBURY'S LAWS (3rd Edn.) 682–685; and for cases see 10 DIGEST (Repl.) 1029–1034. For Companies Acts, 1947 and 1948, see 3 HALSBURY'S STATUTES (2nd Edn.) 444, 452.

Cases referred to: E

(1) *Re Mills, Ex parte Official Receiver* (1888), 58 L.T. 871; 4 T.L.R. 284; 5 Morr. 55, C.A.; 5 Digest 893, *7359*.

(2) *Re Warren, Ex parte Trustee,* [1900] 2 Q.B. 138; 82 L.T. 502; 48 W.R. 523; 44 Sol. Jo. 329, D.C.; 5 Digest 893, *7360*.

Also referred to in argument: F

Re Blackpool Motor Car Co., Ltd., Hamilton v. *Blackpool Motor Car Co., Ltd.*, [1901] 1 Ch. 77; 70 L.J.Ch. 61; 49 W.R. 124; 45 Sol. Jo. 60; 8 Mans. 193; 10 Digest (Repl.) 1032, *7137*.

Re Paine, Ex parte Read, [1897] 1 Q.B. 122; 66 L.J.Q.B. 71; 75 L.T. 316; 45 W.R. 190; 13 T.L.R. 13; 41 Sol. Jo. 30; 3 Mans. 309; 5 Digest 856, *7181*.

Re Bean, Ex parte Chief Official Receiver (1886), 3 Morr. 129; 5 Digest 894, *7364*. G

Adjourned Summons by which the liquidator in the compulsory winding-up of G. Stanley & Co., Ltd., asked for a declaration that (i) two sums of £250 paid to Simon Sherwinter, a director, and another two sums amounting together to £1,503 18s. paid to Lloyd's Bank between August, 1922, and the date of the winding-up order so as to relieve the said Sherwinter of his liability under a guarantee to the bank, H were made with a view of giving him a fraudulent preference over the other creditors of the company, and were fraudulent and void as against the applicant; and (ii) that the said Sherwinter might be ordered to pay these sums to the liquidator.

The company was incorporated in 1919, the capital being £3,000 in 3,000 £1 shares, with the object of carrying on business as manufacturers and dealers in furniture. There were only two directors, namely, the respondent, S. Sherwinter, I and his son, who was the managing director. For the purpose of carrying on the business the company obtained an overdraft at the local branch of Lloyds Bank, which was guaranteed by the respondent. Two payments of £250 were made by the company to the respondent in August and September, 1922, respectively, in order to cover payments made by him on behalf of the company. Further sums which had been obtained by the company about the same time, partly by business transactions and partly by loan and amounting together to £1,503 18s., had been placed to the credit of the company at the bank. All these payments were alleged

to be fraudulent preferences of the company's creditors within s. 210 of the Companies (Consolidation) Act, 1908, under which the summons was taken out. That section provided:

> "(1) Any . . . payment . . . or other act relating to property which would, if made or done by or against an individual, be deemed in his bankruptcy a fraudulent preference, shall, if made or done by or against a company, be deemed in the event of its being wound-up, a fraudulent preference of its creditors and be invalid accordingly."

In November, 1922, a petition was presented to the court asking that the company might be wound-up compulsorily, an order was made accordingly, and the applicant was appointed liquidator.

Clayton, K.C., and *Tindale Davis* for the liquidator.

Bennett, K.C., and *G. W. H. Jones*, for the respondent, raised a preliminary objection that such an order as was asked for on this summons could not go against their client as a guarantor.

Cur. adv. vult.

July 30. **EVE, J.,** read the following judgment.—By this summons the liquidator of G. Stanley & Co., Ltd., asks in substance for a declaration that the payments to the respondent, Simon Sherwinter, of two sums of £250 each and the payment to the credit of the company's account with Lloyds Bank of various other sums amounting to £1,503 18s. were made when the company was insolvent and within three months of the winding-up with a view of giving the respondent a preference over the other creditors of the company, and ought to be deemed fraudulent and void as against the liquidator, and for payment by the respondent of the said sums of £250, £250, and £1,503 18s. The respondent does not dispute that the payments were made within the three months and that the company was insolvent, but he denies that any of them were made with a view of giving him a preference over the other creditors, and he argues that in any event the liquidator is not in the circumstances entitled to any order against him for payment of the moneys paid to the company's credit at the bank. Upon the evidence it was made clear that no case of undue preference could be established in respect of either of the two sums of £250. They were paid to the respondent to recoup him moneys disbursed by him to take up acceptances for the accommodation of the company, the proceeds of which, less discount, had previously been paid to the company.

The facts relating to the moneys paid to the bank are quite distinct. The respondent and his son were the sole shareholders and only directors of the company, and the respondent had guaranteed the company's overdraft at Lloyds Bank to the extent of £1,500. It is proved that by recourse to a registered moneylender and by selling for cash at less than cost price goods obtained on credit sums amounting to £1,503 18s. were raised and paid to the bank, and it is alleged that such payments were made with intent to benefit the respondent by reducing his liability under the guarantee and so amount to a fraudulent preference. The respondent was in fact called upon to pay the bank £420 and upwards under the guarantee, and is, therefore, a creditor of the company in respect of that payment. It is to be observed that the proceedings are not framed as a misfeasance summons seeking to make the respondent liable as a director, but are based expressly on s. 210 of the Companies (Consolidation Act, 1908 [see now s. 320 of Companies Act, 1948]. In these circumstances counsel on behalf of the respondent submitted at the close of the applicant's evidence that there was no case made out in respect of the two sums of £250, and that, even if the court came to the conclusion that the payments to the bank were made with a view to giving the respondent a preference, it could only declare the payments fraudulent and void and could not give effect to the declaration by ordering the respondent to pay the amounts to the applicant.

In order to appreciate this submission it is necessary to read s. 44 (1) of the Bankruptcy Act, 1914. It is in these terms:

"Every conveyance or transfer of property, or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own money in favour of any creditor, or of any person in trust for any creditor, with a view of giving such creditor, or any surety or guarantor for the debt due to such creditor, a preference over the other creditors, shall, if the person making, taking, paying or suffering the same is adjudged bankrupt on a bankruptcy petition presented within three months [now six months: see s. 115 (3) of Companies Act, 1947] after the date of making, taking, paying or suffering the same, be deemed fraudulent and void as against the trustee in the bankruptcy."

Now the creditor to whom the payments were made in this case was the bank; the creditor to prefer whom the payments are alleged to have been made was the respondent, he being guarantor for the debt due to the bank. It is common ground that the words "or any surety or guarantor for the debt due to such creditor" were inserted in the subsection I have just read in consequence of the decisions in *Re Mills* (1) and *Re Warren* (2). In the former of these cases an attempt to make the creditor to whom the payment was in fact made refund, on the ground that the payment had been made with intent to prefer the guarantor of the debt, failed because the person sought to be made liable, although he had received the money, was not the person whom it was intended to prefer. It was intended to prefer another person, namely, the surety for the debt thus paid. In the second case the application was made against the surety, but this also failed because the payment, having been made to the principal creditor, was held not to have been a payment to or in favour of the surety. The effect of the two decisions, therefore, was that a payment made to a person whom it was not sought to prefer, could not be recovered from him because there was no fraudulent preference so far as he was concerned, nor from the person whom it was sought to prefer, because the payment was not made to him. The result was that a payment to the principal creditor with the intent to prefer the guarantor of the debt so paid could not be recovered either from the principal creditor or the guarantor, and it was to remedy this anomaly that the words I have already quoted were introduced into the Act. At the hearing I was impressed with the argument advanced on behalf of the respondent that the statute only contemplated the setting aside of the payment, but further consideration of the authorities has convinced me that the real object of the amendment of the section was to enable the trustee to recover the payment from the person actually preferred. Accordingly, I overrule the preliminary objection raised on behalf of the respondent and the summons must be restored for further hearing next sittings.

Dec. 2. The case came on again on this date when, after hearing the arguments, his Lordship decided on the facts that there was no fraudulent preference within the above-mentioned sections.

Summons dismissed.

Solicitors: *H. H. Wells & Sons*; *Raphael Zeffertt & Co.*

[*Reported by* A. W. Chaster, Esq., *Barrister-at-Law.*]

A

ROSE AND FRANK CO. *v.* J. R. CROMPTON & BROS., LTD.

[Court of Appeal (Bankes, Scrutton and Atkin, L.JJ.), February 8, 9, 12, March 23, 1923]

[Reported [1923] 2 K.B. 261; 92 L.J.K.B. 959; 129 L.T. 610; 67 Sol. Jo. 538]

B

[House of Lords (The Earl of Birkenhead, Lord Atkinson, Lord Sumner, Lord Buckmaster, Lord Phillimore), June 23, 24, 26, December 5, 1924]

[Reported [1925] A.C. 445; 94 L.J.K.B. 120; 132 L.T. 641; 30 Com. Cas. 163]

C *Contract—Unenforceable at law—Agreement between parties—Intention that no legal interest be created—Validity—Sale of goods—Transaction carried out under agreement—Right of seller to payment of price—Right of buyer to damages for non-delivery—Rescission of contract—By agreement unenforceable by law.*

In a document, signed by the plaintiffs and the defendants in 1913, the defendants expressed their willingness that the existing arrangements between them and the plaintiffs for the supply by them to the plaintiffs of goods manufactured by them should be continued for a specified period, prices being quoted for periods of six months. The document concluded with the following clause: "This arrangement is not entered into, nor is this memorandum written, as a formal or legal agreement, and shall not be subject to legal jurisdiction in the law courts either of the United States or England, but it is only a definite expression and record of the purpose and intention of the three parties concerned, to which they each honourably pledge themselves with the fullest confidence—based on past business with each other—that it will be carried through by each of the three parties with mutual loyalty and friendly co-operation." The defendants determined this arrangement without notice, and the plaintiffs brought an action for damages for breach of the contract which, they alleged, was contained in the document of 1913, and for non-delivery of goods ordered by them in 1919 in accordance with the course of business prescribed in the document.

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Held: (i) with regard to the document of 1913, it was true that when a tribunal had before it for construction an instrument which created a legal interest and the dispute was only as to the quality and extent of that interest later repugnant clauses in the instrument cutting down that interest were to be rejected, but that doctrine did not apply when, as in the present case, the question was whether it was intended to create any legal interest at all; on construction, the ordinary and natural meaning of the clause in the document of 1913 was that the parties intended that the document should not be legally enforceable, and that clause dominated the whole document; and, therefore, the plaintiffs' action failed.

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(ii) with regard to the claim for damages for non-delivery, the document of 1913 being unenforceable, there was no obligation on the plaintiffs to order goods or on the defendants to accept any order and deliver the goods, and, therefore, that claim must fail.

(iii) but any actual transaction between the parties gave rise to ordinary legal rights, for the fact that it was not of obligation to do the transaction did not divest the transaction, when done, of its ordinary legal significance, and, therefore, the plaintiffs were liable to the defendants for the price of goods actually delivered to them under the course of business laid down in the document of 1913.

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(iv) with regard to agreements existing between the parties before the execution of the document of 1913, that document, being unenforceable, could not be relied on as cancelling the pre-1913 agreements, because it was to have no

legal weight, but on the construction of the documents before the court the proper inference to be drawn was that, though the document of 1913 was unenforceable, the parties intended it to supersede all previous arrangements.

Notes. Considered: *Calico Printers' Association, Ltd.* v. *Barclays Bank* (1930), 145 L.T. 51; *Customs & Excise Comrs.* v. *Pools Finance (1937), Ltd.* (1951), 95 Sol. Jo. 713. Referred to: *Jones* v. *Vernon's Pools, Ltd.*, [1938] 2 All E.R. 626. Generally considered: *Appleson* v. *Littlewood (H.), Ltd.*, [1939] 1 All E.R. 464.

As to the negativing of the intention of the parties that a contract should be enforceable at law, see 8 HALSBURY'S LAWS (3rd Edn.) 54; and as to rescission, see ibid., pp. 173–175. For cases see 12 DIGEST (Repl.) 22, 372–376.

Cases referred to:

(1) *Balfour* v. *Balfour*, [1919] 2 K.B. 571; 88 L.J.K.B. 1054; 121 L.T. 346; 35 T.L.R. 609; 63 Sol. Jo. 661, C.A.; 12 Digest (Repl.) 21, *3*.

(2) *Noble* v. *Ward* (1866), L.R. 1 Exch. 117; 35 L.J.Ex. 81; 12 Jur.N.S. 167; 13 L.T. 639; 14 W.R. 397; affirmed L.R. 2 Exch. 135; 36 L.J.Ex. 91; 15 L.T. 672; 15 W.R. 520; 12 Digest (Repl.) 401, *3108*.

(3) *Morris* v. *Baron & Co.*, [1918] A.C. 1; 87 L.J.K.B. 145; 118 L.T. 34, H.L.; 12 Digest (Repl.) 398, *3086*.

(4) *Re Bywater, Bywater* v. *Clarke* (1881), 18 Ch.D. 17; 30 W.R. 94, C.A.; 44 Digest 601, *4274*.

(5) *Lens* v. *Devonshire Club* (1914), The Times, Dec. 4th.

(6) *Ellison* v. *Bignold* (1821), 2 Jac. & W. 503; 37 E.R. 720; 17 Digest (Repl.) 400, *2054*.

(7) *British and Beningtons* v. *North Western Cachar Tea Co.*, [1923] A.C. 48; 92 L.J.K.B. 62; 128 L.T. 422; 28 Com. Cas. 265; 13 Lloyd L.R. 67, H.L.; 12 Digest (Repl.) 400, *3101*.

Also referred to in argument:

Watling v. *Lewis*, [1911] 1 Ch. 414; 80 L.J.Ch. 242; 104 L.T. 132; 17 Digest (Repl.) 353, *1653*.

Furnivall v. *Coombes* (1843), 5 Man. & G. 736; 6 Scott, N.R. 522; 12 L.J.C.P. 265; 1 L.T.O.S. 80; 7 J.P. 322; 7 Jur. 399; 134 E.R. 756; 17 Digest (Repl.) 358, *1651*.

Williams v. *Hathaway* (1877), 6 Ch.D. 544; 12 Digest (Repl.) 478, *3558*.

Hussey v. *Horne-Payne* (1879), 4 App. Cas. 311; 48 L.J.Ch. 846; 41 L.T. 1; 43 J.P. 814; 27 W.R. 585, H.L.; 12 Digest (Repl.) 80, *440*.

Forbes v. *Git*, [1922] 1 A.C. 256; 91 L.J.P.C. 97; 126 L.T. 616, P.C.; 17 Digest (Repl.) 359, *1655*.

Ford v. *Beech* (1848), 11 Q.B. 852; 17 L.J.Q.B. 114; 11 L.T.O.S. 45; 12 Jur. 310; 116 E.R. 693, Ex. Ch.; 12 Digest (Repl.) 563, *4273*.

Scott v. *Avery* (1856), 5 H.L.Cas. 811; 25 L.J.Ex. 308; 28 L.T.O.S. 207; 2 Jur.N.S. 815; 4 W.R. 746; 10 E.R. 1121, H.L.; 16 Digest 115, *149*.

Appeal and **Cross-appeal** from an order of the Court of Appeal (BANKES, SCRUTTON and ATKIN, L.JJ.), reversing a decision of BAILHACHE, J.

The action was brought by a company, Rose and Frank Co., who carried on business in America, against two firms, J. & R. Crompton & Bros., Ltd., and Messrs. Brittains, Ltd., both of whom carried on business in this country. Crompton & Bros., Ltd., and Brittains, Ltd., were makers of a carbonising tissue paper; the Rose and Frank Co. were merchants who dealt in that paper, it being sent over to them in a state which was not absolutely finished. They finished it and sold it in America. The business relations between the three firms began as far back as 1905, and were embodied in letters dated Mar. 7, 1905, Dec. 24, 1908, and Nov. 9, 1911. These three contracts were renewed from time to time and a very considerable and a profitable business was done between the three parties. In 1913 it was suggested by Messrs. Rose and Frank and acceded to by the defendants that these contracts should be continued for a specific period of time in order to

A put the business on a sure foundation so far as period of time was concerned. Accordingly, a document was drawn up. It was signed by Brittains, Ltd., on July 8, and by J. & R. Crompton & Bros., Ltd., on July 11, and a counterpart was signed by the Rose and Frank company on Aug. 12, 1913. It provided:

> "As the business in carbonising tissues which is now being done between Messrs. Rose and Frank Co. of New York as purchasers and Messrs J. R. Crompton & Bros., Ltd., of Bury, Lancashire, and Messrs. Brittains, Ltd., Cheddleton, Staffordshire, as manufacturers, has attained to a considerable volume, and Messrs. Rose and Frank Co. are of opinion that in the interests of the traders they represent assured arrangements for the supply of these papers should be made for some considerable period ahead, Messrs. J. R. Crompton & Bros., Ltd., and Messrs. Brittains, Ltd., hereby express their willingness that the present arrangements with Messrs. Rose and Frank Co. for the sale of these papers, which are now for one year only, shall be continued on the same lines as at present for a period of three years, say until Mar. 31, 1916, with the understanding that if it is desired by any of the three parties to alter or abrogate this arrangement at the expiration of that period six months' notice shall be given before that date. If no notice be given by either party the arrangement shall be regarded as continuing for a second period of three years subject to the same six months' notice for alteration or abrogation as in the first period of three years."

The document then provided in detail for a course of business to be followed and concluded:

> "This arrangement is not entered into, nor is this memorandum written, as a formal or legal agreement, and shall not be subject to legal jurisdiction in the law courts either of the United States or England, but it is only a definite expression and record of the purpose and intention of the three parties concerned, to which they each honourably pledge themselves with the fullest confidence—based on past business with each other—that it will be carried through by each of the three parties with mutual loyalty and friendly co-operation.
>
> "Prices.—Prices (which on the present occasion are being advanced 10 per cent. after the 30th April, 1913, for the rest of the current year by mutual consent on account of the increased cost of production) shall in future be quoted for periods of six months' duration only. . . ."

In May, 1919, the defendants, being dissatisfied with the way in which the plaintiffs were carrying on their business in America, terminated the arrangement between the parties, and, accordingly, the writ in the present action was issued by the plaintiffs on Nov. 19, 1919. By their statement of claim the plaintiffs alleged, inter alia, that in the autumn of 1918 and during 1919 the defendants in breach of the alleged agreement of July, 1913, supplied persons other than the plaintiffs in America with carbonising tissues and in Canada with special and distinctive grades of paper for carbonising suggested or introduced by the plaintiffs, and with blue carbonising tissues and supplied the tissues at prices lower than those at which they had been or were supplying the plaintiffs; that by cables on May 5 and 9 and by letter of May 10, 1919, the defendants refused to make any further deliveries to the plaintiffs and wrongfully repudiated the alleged agreement of July, 1913; that between Mar. 31, 1919, and Mar. 30, 1920, the plaintiffs would have required 200 cases of paper from the defendants, J. R. Crompton & Bros., Ltd., and 800 cases from the defendants, Brittains, Ltd., and that their estimated loss on the non-delivery of those goods was £10,146 on the 200 cases, and £112,977 on the 800 cases. The plaintiffs also claimed £2,867 for depreciation of unsold stocks owing to the defendants having supplied other firms at prices lower than those charged to the plaintiffs. They further pleaded that, if the alleged agreement of July, 1913, was not valid, the earlier agreements not having been terminated by twelve months' notice, were still in force, and that the defendants, J. R. Crompton & Bros., Ltd., had broken and repudiated those agreements, and that the defendants

made part deliveries in respect of four of certain orders, but in breach of the terms of the said sales failed to deliver the balance of those four orders, and in respect of the remaining orders made no deliveries at all. The defendants pleaded that the arrangement of July, 1913, was made without consideration and was expressly or impliedly intended to be of no legally binding effect save in so far as the actual delivery of tissues by the defendants would raise a legal obligation on the plaintiffs to pay a reasonable price therefor. They further said that all earlier contracts were determined by mutual consent when the arrangement of 1913 was made, and counterclaimed for £2,124 18s. 8d., being the reasonable price of tissues actually delivered on Mar. 24. and April 3 and 17, 1919. BAILHACHE, J., held that the arrangement set out in the document of July 13 was legally binding against the defendants, and gave judgment for the plaintiffs.

The defendants appealed to the Court of Appeal and on Mar. 23, 1923, judgments were read in which it was stated:

BANKES, L.J. [having stated the facts].—The plaintiffs allege that the document [of July, 1913] is a contract in the strict sense of the word, involving each of the parties to it in a legal obligation to perform it. The defendants, on the other hand, say that the document is nothing of the kind, because it expressly provides that it shall not involve any of the parties in any legal obligation to perform any of its terms. There is, I think, no doubt that it is essential to the creation of a contract, using that word in its legal sense, that the parties to an agreement shall not only be ad idem as to the terms of their agreement, but that they shall have intended that it shall have legal consequences and be legally enforceable. In the case of agreements regulating business relations it follows almost as a matter of course that the parties intend legal consequences to follow. In the case of agreements regulating social engagements it equally follows almost as a matter of course that the parties do not intend legal consequences to follow. In some cases, such as *Balfour* v. *Balfour* (1), the law will, from the circumstances of the case, imply that the parties did not intend that their agreement should be attended by legal consequences. It no doubt sounds in the highest degree improbable that two firms in this country, arranging with a firm in the United States the terms upon which a very considerable business should be carried on between them over a term of years, should not have intended that their agreement as to those terms should be attended by legal consequences. It cannot, however, be denied that there is no reason in law why they should not so provide, if they desire to do so.

The question, therefore, in the present case resolves itself into a question of construction. I see nothing in the surrounding circumstances which could justify an interpretation of the language used by the parties in the document of July, 1913, in any other than its ordinary meaning. There is no ground for suggesting that the language used in the clause is not a bona fide expression of the intention of the parties. If so, it appears to me to admit of but one construction, which applies to and dominates the entire agreement. The intention clearly expressed is that the arrangement set out in the document is only an honourable pledge, and that all legal consequences and remedies are excluded from it. If this is the true construction of the clause, it must govern the entire arrangement, and there is consequently no room for the principle upon which the learned judge decided this part of the case [that the clause was void as being repugnant to the rest of the document and contrary to public policy as ousting the jurisdiction of the King's courts]. Once it is established that the language of the clause is the bona fide expression of the intention of the parties, the matter is, in my opinion, concluded, and it becomes manifest that no action can be maintained upon the agreement contained in the document of 1913.

The next point which arises for decision is whether the pre-1913 arrangements are still in existence, and if in existence, whether they are enforceable. The point was partly argued before us, and reference was made to *Noble* v. *Ward* (2) and to what WILLES, J., there said in reference to rescission of one agreement by the sub-

A stitution of another. His view of the law that the question would be one for a jury was cited with approval in *Morris* v. *Baron & Co.* (3). When this point was urged before us we did, I think, intimate to counsel that this point must be tried, and that we did not propose to decide it. Whether this was a wise decision on our part I am not prepared to say, but after consideration I am satisfied that it is better to leave the matter as it stands than to direct any further argument upon it.

B The last point involved in the appeal is as to the so-called orders [given by the plaintiffs to the defendants in 1919 for goods to be delivered at the dates therein specified] referred to in the statement of claim. BAILHACHE, J., decided that these orders were accepted by the defendants Cromptons, and when accepted became contracts legally binding upon these defendants, though not upon the defendants Brittains. [The plaintiffs claimed damages for non-delivery of these goods.] In C these circumstances it appears to me manifest that these so-called orders were really requisitions under the existing 1913 agreement, intended to be orders to be executed by both the defendants under that agreement, the acknowledgment of the receipt of which by the defendants Cromptons did not give them the contractual force against one of the two defendants only which, but for the existence of the agreement, they might certainly have had. Had the orders been executed, the D price at which they would have been executed would have been regulated by the terms of the 1913 agreement. No case is made by the plaintiffs that the defendants or either of them are bound by any estoppel in relation to these orders, or any of them. The case made is a simple one of offer and acceptance. For the reasons I have given, I think that this case fails. The defendants in my opinion succeed both on the point as to the legal effect of the document of July, 1913, and as to E the legal effect of the orders mentioned in the statement of claim.

SCRUTTON, L.J.—In 1913 the parties concurred in signing a document which gives rise to the present dispute. I agree that if the clause beginning "This arrangement" were omitted, the courts would treat the rest of the agreement as giving rise to legal relations, though of great vagueness. But the clause in question F beginning "This arrangement" is not omitted. BAILHACHE, J., thought that by itself this clause "plain as it is" means that the parties shall not be under any legal obligation to each other at all, but, coming to the conclusion that without this clause the agreement would create legal obligations, he takes the view that the clause must be rejected as repugnant to the rest of the agreement. He also holds that, if the clause merely means to exclude recourse to the law courts as a G means of settling disputes, it is contrary to public policy as ousting the jurisdiction of the King's courts.

In my view, the learned judge adopts a wrong canon of construction. He should seek the intention of the parties as shown by the language they use, not in part of that language only, but in the whole of that language. It is true that in deeds and wills where it is impossible from the whole of the contradictory language H used to ascertain the true intention of the framers, resort may be had, but only as a last expedient, to what JESSEL, M.R., called "the rule of thumb" in *Re Bywater* (4), of rejecting clauses as repugnant according to their place in the document, the later clause being rejected in deeds and the earlier in wills. But before this heroic method is adopted of finding out what the parties meant by assuming that they did not mean part of what they have said, it must be clearly impossible I to harmonise the whole of the language they have used. It is quite possible for parties to come to an agreement by accepting a proposal with the result that the agreement concluded does not give rise to legal relations. The reason of this is that the parties do not intend that their agreement shall give rise to legal relations. This intention may be implied from the subject-matter of the agreement, but it may also be expressed by the parties. In social and family relations such an intention is readily implied, while in business matters the opposite result would ordinarily follow. But I can see no reason why, even in business matters, the parties should not intend to rely on each other's good faith and honour, and to

exclude all idea of settling disputes by any outside intervention with the accompanying necessity of expressing themselves so precisely that outsiders may have no difficulty in understanding what they mean. If they clearly express such an intention I can see no reason in public policy why effect should not be given to their intention.

Both legal decisions and the opinions of standard text-writers support this view. In *Balfour* v. *Balfour* (1) the court declined to recognise relations of contract as flowing from an agreement between husband and wife that he should send her £30 a month for her maintenance. ATKIN, L.J., speaking of agreements or arrangements between husband and wife involving mutual promises and consideration in form, said: "They are not contracts because the parties did not intend that they should be attended by legal consequences." In the early years of the war [of 1914-18], when a member of a club brought an action against the committee to enforce his supposed rights in a club golf competition, I non-suited him for the same reason—that from the nature of the domestic and social relations, I drew the inference that the parties did not intend legal consequences to follow from them: *Lens* v. *Devonshire Club* (5). MR. LEAKE says (CONTRACTS (7th Edn.) p. 3) that:

> "an agreement as the source of a legal contract imports that the one party shall be bound to some performance, which the latter (sic) shall have a legal right to enforce."

In SIR FREDERICK POLLOCK's language (CONTRACTS (9th Edn.) p. 3) an agreement to become enforceable at law must

> "be concerned with duties and rights which can be dealt with by a court of justice. And it must be the intention of the parties that the matter in hand shall, if necessary, be so dealt with, or at least they must not have the contrary intention."

SIR WILLIAM ANSON requires in contract "a common intention to affect" the legal relations of the parties. Judged by this test, I come to the same conclusion as the judge that the particular clause in question shows a clear intention by the parties that the rest of their arrangement or agreement shall not affect their legal relations, or be enforceable in a court of law, but in the words of the clause, shall be "only a definite expression and record of the purpose and intention of the three parties concerned, to which they each honourably pledge themselves," and "shall not be subject to legal jurisdiction." If the clause stood first in the document, the intention of the parties would be exceedingly plain. The cases cited to us to the contrary were cases in which the form of the other part of the document, as a covenant in a deed, or a grant of a right in property in legal terms, clearly showed an intention to create a legal right, and subsequent words, purporting not to define, but to negative, the creation of such a right, were rejected as repugnant. In *Ellison* v. *Bignold* (6), where the parties under seal "resolved and agreed and did by way of declaration and not of covenant spontaneously consent and agree," LORD ELDON laid aside "the nonsense about agreeing and declaring without covenanting." An agreement under seal is quite inconsistent with no legal relations arising therefrom, and in the present case I think the parties, in expressing their vague and loosely worded agreement or arrangement, have expressly stated their intention that it shall not give rise to legal relations, but shall depend only on mutual honourable trust. This destroys the decision of BAILHACHE, J., so far as it is based on the view that the document of 1913 gives rise to legal rights which can be enforced.

It was unnecessary for the judge below to decide the next point, whether, if the 1913 document gave rise to no legal rights, the earlier agreements which contained no similar clause could be enforced. This turned on whether the parties in coming to the agreement of 1913 intended to rescind the earlier agreements except in so far as they were incorporated in the new agreement, and even then only to continue them as honourable obligations. It follows from *Morris* v. *Baron & Co.* (3) that a valid contract may be rescinded by an agreement unenforceable in law, the

A test being whether the parties intend to rescind the old agreement, replacing it by a new agreement which may incorporate many of the old terms or merely to vary the old agreement which remains effective except in so far as it is varied: see per LORD SUMNER, *British and Beningtons* v. *North Western Cachar Tea Co.* (7). *Morris* v. *Baron & Co.* (3) also says that the intention of the parties would be a question of fact, though the House of Lords themselves decided the question of fact: see B per LORD HALDANE ([1918] A.C. at p. 21). I have carefully considered the documents and the forcible argument of counsel for the defendants on this point, and have come to the conclusion that the parties who transformed a contract between two parties into an honourable arrangement between three parties incorporating some parts of the old arrangement, varying others, and adding fresh terms, clearly intended to abandon or rescind the old arrangement and leave their relations C depending on the new honourable understanding of 1913. Any alternative claim on the documents before 1913 therefore fails.

The remaining question is the claim in the statement of claim for damage for the non-delivery of the whole of the undelivered part of the goods said to be legally due under some thirty-two specified orders. The judge below, deciding that the agreement of 1913 was legally enforceable, held that any facts giving a legal answer D under the agreement would also give a legal answer to the claim under the separate orders. But he said that, had he held the arrangement of 1913 not enforceable in law, he would have held that a legal claim arose under the specific orders. As I have held the agreement of 1913 not enforceable in law, I have now to consider the position of the separate orders. For if they were given under an unenforceable arrangement, they may so far as not executed partake of the character of the over- E riding agreement under which they came into existence. The clause in the agreement of 1913 relating to the supply of goods to Rose and Frank, for which they have the sole agency in the United States, appears to run as follows. Rose and Frank agree that the volume of business in any year shall not fall in any year below the average of three years, 1910 to 1912, "without such explanations as shall be considered satisfactory" by Cromptons and Brittains. The latter two firms on F their part agree that they will "subject to unforeseen circumstances and contingencies do their best . . . to respond efficiently and satisfactorily to the calls of Messrs. Rose and Frank Co. for deliveries both in quantity and quality." Accordingly, in December, 1918, the English manufacturers are asking for Rose and Frank's "prospective requirements," and on Jan. 24, 1919, Rose and Frank send some thirty-two orders for deliveries, for various dates, some as far ahead as Oct. 1, G 1919. They say they have not yet determined the full quantity of paper they will require in the year, but send orders which will cover part of their wants. Messrs. Crompton, on Feb. 12, 1919, write a letter which appears to me fully to carry out the vague arrangements in honour which I have held to be constituted by the arrangement of 1913, but, as made under that arrangement in honour, to give rise to no legal obligation. It runs as follows:

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> "We beg to acknowledge receipt of your favour of the 24th ult., contents of which are duly noted. We also thank you for the twenty-four orders for 286 cases of Messrs. Brittains' papers, and eight orders for sixty-four cases of our paper, to all of which we will give our best attention, and Messrs. Brittain write us with regard to the orders for their papers that they are endeavouring I to let you have deliveries this year up to at least the full 100 per cent. for the standard year ending Feb. 28, 1918, but that at the moment conditions are particularly uncertain. Nevertheless, they would like us to assure you that they would give their most careful attention to your requirements, and endeavour to let you have the fullest output they possibly can, and they add that time will make the position clearer."

This I cannot construe as a binding acceptance of a legal proposal. It is, in my opinion, an assurance that the suppliers will do their best to comply with the probable requirements of the agents, but do not bind themselves as conditions are

particularly uncertain. So far as delivery was made and accepted, legal consequences as to payment of price would follow, but I think there is no legal remedy for non-delivery. In my view, therefore, the judgment of BAILHACHE, J., ordering that the issue of liability for damages under the "legally binding agreement" of 1913 and the special orders shall be tried by himself, should be reversed. The judgment for £224 3s. 6d. for the plaintiffs and £2,124 for the defendants with costs stand. The defendants should have the costs of the hearing to date here and below.

ATKIN, L.J.—The first question in this case is whether the document signed by the defendants on July 11, 1913, with a counterpart signed by the plaintiffs on Aug. 12, 1913, constituted a contract between the parties. To create a contract there must be a common intention of the parties to enter into legal obligations, mutually communicated expressly or impliedly. Such an intention ordinarily will be inferred when parties enter into an agreement which in other respects conforms to the rules of law as to the formation of contracts. It may be negatived impliedly by the nature of the agreed promise or promises, as in the case of offer and acceptance of hospitality, or of some agreements made in the course of family life between members of a family as in *Balfour* v. *Balfour* (1). If the intention may be negatived impliedly it may be negatived expressly. In this document, construed as a whole, I find myself driven to the conclusion that the clause in question expresses in clear terms the mutual intention of the parties not to enter into legal obligations in respect to the matters upon which they are recording their agreement. I have never seen such a clause before, but I see nothing necessarily absurd in business men seeking to regulate their business relations by mutual promises which fall short of legal obligations, and rest on obligations of either honour or self-interest, or perhaps both. In this agreement I consider the clause a dominant clause, and not to be rejected, as the learned judge thought, on the ground of repugnancy. I might add that a common instance of effect being given in law to the express intention of the parties not to be bound in law is to be found in cases where parties agree to all the necessary terms of an agreement for purchase and sale, but subject to a contract being drawn up. The words of the preliminary agreement in other respects may be apt and sufficient to constitute an open contract, but if the parties in so agreeing make it plain that they do not intend to be bound except by some subsequent document, they remain unbound though no further negotiation be contemplated. Either side is free to abandon the agreement and to refuse to assent to any legal obligation; when the parties are bound they are bound by virtue only of the subsequent document. On this, the main question, I agree with the judgments of the other members of the court.

The plaintiffs have an alternative claim against the defendants J. R. Crompton & Bros., Ltd. They say that before 1913 they had been for years doing business with these defendants on the terms of binding agreements terminable on notice, and that if the arrangements made in 1913 did not result in contractual relations, the contracts in existence at that date have never been terminated, and they sue for their breach. The defendants Cromptons, by their defence, content themselves with a denial that the agreements in question were in force in 1919, the date of the alleged breach. They do not allege notice to terminate; nor do they allege rescission, as I think technically they should; but their case in substance is that the former agreements were rescinded by mutual consent when the arrangement of August, 1913, was made. If the document of August, 1913, were a contract, there would, I think, be no doubt that the true inference in law would be that by entering into fresh contractual obligations covering the whole field of the former contracts, the parties must be taken to have agreed to rescind the former contracts. But we have now to assume that there were no contractual obligations undertaken in 1913, and the question is: What was the effect of the new arrangement upon existing contracts? This seems to me to be the point reserved by LORD ATKINSON in *Morris* v. *Baron & Co.* (3), where he is considering the effect upon a written con-

A tract for the sale of goods of a subsequent parol contract inconsistent with the terms of the first.

> "If the parol agreement were absolutely void it might possibly be otherwise; but owing to the terms of s. 4 of the Sale of Goods Act, 1893, this latter question does not arise in this case, and it is not, in my view, necessary to decide it."

B There seems to be no difference in principle between a void contract and an agreement which is not a contract; the essence of the matter is that in neither case do the purported stipulations result in legal obligations. The question raised appears to me difficult. I think it quite conceivable that a man whose express object was that "assured arrangements should be made for the supply of paper for some con-
C siderable period ahead" might assent to an honourable understanding extending the period of agency, but might be unwilling to relinquish the only substantial rights he had in his existing agreements; and I think the repeated reference in the record of the honourable understanding to the continued existence of present arrangements would encourage this view. On the other hand, I also think it conceivable, though I personally should think it improbable, that a man having the avowed
D object referred to would abandon his legal rights for the benefits he hoped to get under the new arrangement. But, whatever the true view is, I am of opinion that this court is not in a position to decide the question for three reasons.

It is plain from the decision in *Morris* v. *Baron & Co.* (3), adopting the judgment of WILLES, J., in the Exchequer Chamber in *Noble* v. *Ward* (2), that the question of recission is a question of fact; in *Noble* v. *Ward* (2) a question for the jury: see
E per LORD FINLAY, [1918] A.C. at p. 10, and LORD HALDANE, ibid. at p. 18. On this question of fact I do not think we are sufficiently informed of the relevant circumstances to pronounce. It would be necessary to consider what the actual existing contracts were, as constituted by letters and modified, if at all, by subsequent correspondence and course of business. It would be further necessary to consider the circumstances under which the arrangement of August, 1913, was made, and
F the conduct of the parties under it. The question, though raised in the pleadings and mentioned to the learned judge, was not considered by him, and his construction of the contract made it unnecessary. Some, but very few, of the relevant letters were read before us, the discussion being limited on behalf of the plaintiffs for the reason hereinafter given. In the circumstances, I come to the conclusion that this matter should be ordered to be re-tried.

G The question of the orders given in 1919 requires separate consideration. I myself am at a loss to understand how the provisions of the arrangement of 1913, whether binding or not, affect the matter. The general relation of the parties was that the plaintiffs were to be the sole vendors of the defendants' goods in the United States of America. Agreements constituting one party sole selling agent in a defined area of the other party's goods are, of course, common. Their special
H provisions vary; often the agent enters into a correlative obligation that he will not sell within his area any other maker's goods of similar description. Sometimes the manufacturer is under no legal obligation to sell any or any particular amount of goods to the selling agent; sometimes the agent succeeds in putting him under such an obligation. In this case the defendants by the honourable understanding entered into the vague engagement contained in the document which had as a basis
I the average turnover for the last three years before the agreement. But whatever the terms of the agreement or understanding, it contemplated, as nearly all such agreements do, that the actual business done under it should be done by particular contracts of purchase and sale upon the terms of the general agreement so far as applicable. The actual business was done in this case, as in countless others, by orders for specific goods given by the "agent" and accepted by the manufacturer or merchant. To see whether the orders given were accepted the terms of the alleged acceptance have to be regarded. In this case I find that after a correspondence as to the possible requirements of the plaintiffs for the whole of the year, the

plaintiffs, on Jan. 24, 1919, write: A

> "We have not yet determined the full quantity of paper that we will require from you and Brittains, but realising that you have no special orders from us, we are sending you orders enclosed which will cover part of our wants for the year 1919."

Enclosed were orders all addressed to Messrs. Cromptons: "Please enter our order for the following goods and ship . . . to us at. . . ." The blanks were all filled up by various directions, "When convenient," "As soon as possible," Feb. 1, Mar. 1, April 1, up to Dec. 1, 1919, and the destination was either New York or Toronto. The price and terms are left blank, and I agree with the learned judge that these are sufficiently defined by the course of business between the parties. No question arises before us as to the provisions of s. 4 of the Sale of Goods Act, as it was expressly waived by counsel for the defendants. The order proceeds: "Kindly acknowledge and state when you will ship." The last words obviously mean: "Advise us when the time comes of any proposed shipment." The answer is on Feb. 12, 1919: B C

> "We . . . thank you for the twenty-four orders for 286 cases of Messrs. Brittains' papers and eight orders for sixty-four cases of our paper, to all of which we will give our best attention." D

Pausing there, this is the common formula of acceptance in the business world which has been treated as acceptance in countless cases since merchants first wrote to one another. It would be understood as an acceptance passing between two merchants while there was no obligation at all on the part of the vendor to accept. Why it should bear a different meaning in a case where there is an honourable understanding by the merchant to accept up to some vague limit, I am unable to understand. The letter continues, E

> "and Messrs. Brittains write us with regard to the orders for their papers that they are endeavouring to let you have deliveries this year up to at least the full 100 per cent. for the standard year ending Feb. 28, 1918, but that at the moment conditions are particularly uncertain." F

This seems to me to relate to the business likely to be done over the whole year, and particularly to the plaintiff's statement in the letter of Jan. 24, 1919, under reply that they had not yet determined the full quantity of paper that they would require, and that they would send on further orders later. I read the whole letter as saying: "We definitely accept these orders and as to further orders for Brittains' paper we expect to be able to execute them up to the 1918 quantity, but this is not certain." I cannot think that any business man receiving the letter of Feb. 12 would understand that the writers were making their acceptance conditional on Brittains' choosing to supply the goods. If Messrs. Cromptons meant to convey that after using the previous formula, they should have used much more definite language. The remaining orders are order 4661, an order for goods "as soon as possible," sent on Feb. 7 and accepted on Feb. 25: "We thank you for your order . . . and we will endeavour to get this through during the next three or four weeks," and six further orders for Brittains' paper sent on Mar. 11, three "at once," and three for July 1 accepted on Mar. 29, 1919: "We thank you for the six orders for Messrs. Brittains' paper which we have passed on to them, and the same will have their best attention." It may be noticed that some of the orders so sent, and, as I think, so accepted, were in fact executed. The dispute is as to the large balance that remained unexecuted. In my view this is a very plain case of acceptance of a written order, and I entirely agree with the judgment of BAILHACHE, J., on this part of the claim. G H I

I should vary the order of BAILHACHE, J., by declaring that the agreement of July, 1913, is not a legally binding agreement, but allowing the question of rescission to be tried under the order as one of the "other issues remaining to be tried."

The plaintiffs appealed to the House of Lords and the defendants cross-appealed.

R. A. Wright, K.C., and *C. J. Conway* for the appellants.

Sir John Simon, K.C., *Clauson*, K.C., *T. Eastham*, K.C., and *J. Wylie* for the respondents.

The House took time for consideration.

Dec. 5. The following opinions were read.

LORD PHILLIMORE.—At the conclusion of the arguments in this case none of your Lordships had, I think, any doubt what our judgment ought to be, but as there were several points to be dealt with, your Lordships took time to consider how best to express your decision upon them. We are all still, I believe, of the same mind, and there is no reason for further delay. The appellants, Rose and Frank Co., carry on business in the United States as dealers in carbonising tissue paper, which they have been in the habit of buying from England, then treating in some manner, and selling in the perfected state. Their relations with the respondents, James R. Crompton & Bros., Ltd., began as early as 1905, and there were three arrangements, which for the purposes of this appeal we may assume to have been binding contracts, under which Rose and Frank Co. were to be entitled to have the exclusive or nearly exclusive right of selling Crompton and Brothers' carbonising tissues in America, subject to twelve months' notice—a notice which was never given. In 1913 circumstances led to the relations between the parties being re-considered; and it was then for the first time brought to the notice of Rose and Frank Co. that the respondents, Brittains, Ltd., had been interested with Cromptons in supplying the carbonising tissue. Thereupon the three parties entered into the arrangement which has given rise to the present litigation. It is dated July 8, 1913, and in the earlier part of it appears to be a binding agreement under which the English companies agree to confine the sale of all their carbonising tissue in the United States and Canada to Rose and Frank Co. —subject to certain defined exceptions—and Rose and Frank Co. agree to confine their purchases of the same stuff exclusively to the two English companies and to do their best to increase their trade. The arrangement was to last for three years subject to six months' notice. The other supplementary provisions need not be stated, but towards the end of the document appears this remarkable clause:

> "This arrangement is not entered into, nor is this memorandum written, as a formal or legal agreement, and shall not be subject to legal jurisdiction in the law courts either of the United States or England, but it is only a definite expression and record of the purpose and intention of the three parties concerned, to which they each honourably pledge themselves with the fullest confidence—based on past business with each other—that it will be carried through by each of the three parties with mutual loyalty and friendly co-operation."

There is no explanation upon the record, and no suggestion was made by counsel at the Bar of any reason for the introduction of this remarkable clause. During the progress of the hearing it occurred to some of your Lordships that it might have been inserted in order to avoid the operation of some American law discouraging monopolies. But this was a mere surmise. For whatever reason it was introduced the clause is there, and it remains for the courts to give the proper effect to it.

The terms of this arrangement, whatever may be its force or effect, were continued by correspondence for a second three-yearly period, and by arrangement in August, 1918, till Mar. 31, 1920. During the early part of 1919 differences arose between the parties. The respondents thought that the appellants were not conducting the business as they should, and that their (the respondents') interests were suffering. Accordingly, on May 5, they demanded by telegram compliance with certain requirements, threatening, if the requirements were not met, to communicate direct with the consumers. On the same day the appellants telegraphed back that they refused to consent to terminate the agreement and would hold

the respondents accountable for any violation of contract, and they demanded immediate shipment of the parcels they had ordered; but on May 9 and 10, by cable and letter, the respondents definitely refused to allow further deliveries to be made. During the existence of the arrangement the appellants had been giving to the respondents Cromptons, from time to time, orders for certain numbers of cases of tissues to be delivered at various dates. The documents took this form. An order from the appellants to Cromptons: "Please enter our order for the following goods and ship." Then followed either a specific date—usually the first of the month—or, if no specific date, then "as soon as possible," and the place to which they were to be shipped, either New York or sometimes Toronto, as the nature of the articles required. In compliance with these orders the respondents used to ship the goods. A few of the orders sent in this way in the early part of 1919 were complied with, but the others had not actually been complied with by the time of the quarrel and were not fulfilled afterwards.

On Nov. 19, 1919, the appellants brought their action, treating the arrangement as a binding contract and claiming damages for the breach, alternatively averring that the three earlier agreements were still in force and claiming damages for their breach, and as a third alternative relying on the several specific orders for parcels of goods in the early part of 1919 as having been accepted by the respondents Cromptons and constituting specific contracts and claiming damages for the non-delivery of these goods. As to this part of their claim, they made no case against the respondents Brittains, Ltd. The respondents joined in their defence and contended that the arrangement was not a binding contract, and that the earlier agreements were not binding contracts or had expired by lapse of time. They also offered an alternative plea that if the respondents, Cromptons, ever made any of the earlier agreements, then "all of such agreements were determined by mutual consent by virtue of or alternatively at the date of the signing of the document [the arrangement of 1913] and/or alternatively the plaintiffs by signing the said document and acting thereon are estopped from relying on any of the said alleged agreements."

As to the appellants' claim in respect of the specific orders, they denied that these orders gave rise to any contracts, said that the requirements of s. 4 of the Sale of Goods Act had not been complied with, and further that these orders and acceptances, if any, were given as part of a specification under the arrangement of 1913, and that, if that arrangement did not constitute any legal contract, neither did these orders with provisional acceptances constitute contracts. They further pleaded misconduct on the part of the appellants justifying them in determining the agreement. By an order made by McCardie, J., the action was transferred to the Commercial List, and it was ordered that the court should try all questions of liability

> "except the issue as to whether the appellants committed certain acts which were alleged by the respondents to have justified the respondents in determining the agreements (if any) between the parties";

and all questions as to damages. The order provided that the court should construe all the agreements.

These issues were then tried by Bailhache, J. He decided that the arrangement of 1913 was a binding contract, and further that if the appellants were ultimately held to fail on this ground, they had a good case as to the orders and acceptances. He then dealt with two comparatively small money questions, directing judgment for the plaintiffs for £244 odd with costs up to the date of the admission of this claim, and for the respondents Cromptons for £2,124 odd with costs up to the date of admission; and he gave the appellants the costs of the hearing before him in any event. The present respondents appealed from this order, and the Court of Appeal came unanimously to a different conclusion to that of Bailhache, J., with respect to the arrangement of 1913, and by a majority (Bankes and Scrutton, L.JJ., Atkin, L.J., dissenting), thought that Bailhache, J.,

A was also wrong on the question of orders and acceptances. They declined, however, to determine whether the pre-1913 arrangements were still in existence, and whether if in existence they were enforceable, and said that this matter remained to be tried. They gave the respondents costs of the issues on which they were successful and the costs of the appeal. Appeal and cross-appeal have been preferred from this order and are now before your Lordships for decision.

B With regard to the first and most important point, that of the legal force or want of force of the arrangement of 1913, your Lordships are, I conceive, of one mind with the Court of Appeal. I do not propose to repeat their reasoning, with which I venture to concur, but I wish to add one observation. I was for a time impressed by the suggestion that as complete legal rights had been created by the earlier part of the document in question, any subsequent clause nullifying those rights C ought to be regarded as repugnant and ought to be rejected. This is what happens for instance in cases where an instrument inter vivos purports to pass the whole property in something either real or personal, and there follows a provision purporting to forbid the new owner from exercising the ordinary rights of ownership. In such cases this restriction is disregarded. But I think the right answer was made by SCRUTTON, L.J. It is true that when the tribunal has before it for con- D struction an instrument which unquestionably creates a legal interest and the dispute is only as to the quality and extent of that interest, then later repugnant clauses in the instrument cutting down that interest which the earlier part of it has given are to be rejected, but this doctrine does not apply when the question is whether it is intended to create any legal interest at all. Here, I think, the overriding clause in the document is that which provided that it is to be a contract of E honour only and unenforceable at law.

With regard to the next point, namely, the right of the plaintiffs to recover damages for non-delivery of the goods specified in the particular orders for the year 1919, it should be stated that the defence under the Sale of Goods Act was abandoned at the trial. On this point I agree with your Lordships in preferring the judgments of BAILHACHE, J., and ATKIN, L.J., to that of the majority of the Court F of Appeal. According to the course of business between the parties which is narrated in the unenforceable agreement, goods were ordered from time to time, shipped, received, and paid for, under an established system; but the agreement being unenforceable, there was no obligation on the American company to order goods or upon the English companies to accept an order. Any actual transaction between the parties, however, gave rise to the ordinary legal rights; for the fact G that it was not of obligation to do the transaction did not divest the transaction when done of its ordinary legal significance. This will, I think, be plain if we begin at the latter end of each transaction. Goods were ordered, shipped, and received. Was there no legal liability to pay for them? One stage further back. Goods were ordered, shipped, and invoiced. Was there no legal liability to take delivery? I apprehend that in each of these cases the American company would H be bound. If the goods were short-shipped or inferior in quality, or if the nature of them was such as to be deleterious to other cargo on board or illegal for the American company to bring into their country, the American company would have its usual legal remedies against the English companies or one of them. Business usually begins in some mutual understanding without a previous bargain. However, as to this claim for damages for the unfulfilled orders, the defendants I have, under the terms of the order of MCCARDIE, J., the defence open to them that the conduct of the appellants was such as to justify them in determining the agreements to deliver.

There remains the matter of the cross-appeal. This, I think, succeeds. The unenforceable agreement cannot (it is true) be relied upon as cancelling the previous agreements, because it was to have no legal weight, but the parties who entered into the relations implied by the unenforceable agreement must have previously cancelled, as they could do by mutual consent, all the earlier agreements. Upon the documents which were before the court—which were, indeed,

the only materials before the court—the proper inference to be drawn was that the arrangement of 1913 was, though unenforceable, intended to supersede all previous arrangements or agreements whether enforceable or unenforceable. The principle laid down in *Morris* v. *Baron & Co.* (3) followed in *British and Beningtons, Ltd.* v. *North Western Cachar Tea Co.*, *Same* v. *Baintgoorie (Dooars) Tea Co.*, *Same* v. *Mazdehee Tea Co.* (7), is the one which governs the present case. It was a pity, I think, that the Court of Appeal determined, apparently against the view of SCRUTTON, L.J., to remit this issue for trial instead of deciding it themselves. I think they should have decided it and decided it in favour of the respondents and cross-appellants.

Upon the whole, I would advise your Lordships to restore the judgment of BAILHACHE, J., except that part of it which declares "that the agreement of July, 1913, is a legally binding agreement against both defendants," and directs that the plaintiffs should have the costs of the hearing before him as against the defendants Brittains, Ltd., and I would advise that the plaintiffs (the present appellants) should have the costs of the appeal to the Court of Appeal as against the defendants Cromptons. I presume that the respondents and defendants Brittains, Ltd., had no separate costs on that appeal. With regard to the costs of the appeal to your Lordships' House, the appellants have succeeded in what may prove a very substantial part of their case, but, on the other hand, the result of the issue still to be tried may wipe out their claim. The respondents, Brittains, Ltd., have been successful, but I imagine that before your Lordships' House, as in the Court of Appeal, they had no separate costs. I think that the right order would be that neither side should have any costs of the appeal, but that the cross-appellants should have the costs of their cross-appeal. Any costs of the action not disposed of by these orders should be disposed of by the judge who tries the remaining issue. The case should be remitted to the High Court of Justice with a declaration that it be disposed of accordingly.

LORDS BIRKENHEAD, ATKINSON, SUMNER, and **BUCKMASTER** concurred in the judgment delivered by LORD PHILLIMORE.

Appeal allowed in part.

Solicitors: *Rawle, Johnstone & Co.*, for *Addleshaw, Sons*, and *Latham*, Manchester; *Wild, Collins*, and *Cross*.

[*Reported by* W. C. SANDFORD, ESQ., *Barrister-at-Law.*]

A

LEEDS INDUSTRIAL CO-OPERATIVE SOCIETY *v.* SLACK

[House of Lords (The Earl of Birkenhead, Viscount Finlay, Lord Dunedin, Lord Sumner, Lord Carson), March 13, 14, 17, 18, May 30, 1924]

B [Reported [1924] A.C. 851; 93 L.J.Ch. 436; 131 L.T. 710; 40 T.L.R. 745; 68 Sol. Jo. 715]

High Court—Jurisdiction—Award of damages in lieu of injunction—Quia timet action—Easement—Interference—Compensation for future injury—Chancery Amendment Act, 1858 (*Lord Cairns' Act*) (21 & 22 *Vict.*, *c.* 27), *s.* 2.

C By s. 2 of the Chancery Amendment Act, 1858 (Lord Cairns' Act): "In all cases in which the Court of Chancery has jurisdiction to entertain an application for an injunction against . . . the commission or continuance of any wrongful act . . . it shall be lawful for the same court, if it shall think fit, to award damages to the party injured either in addition to or in substitution for such injunction . . . and such damages may be assessed in such manner as the court shall direct." This enactment was repealed by the Statute Law Revision D and Civil Procedure Act, 1883, s. 3 and schedule, but by s. 5 the repeal was not to affect the jurisdiction established by the repealed s. 2, now vested in the High Court by s. 16 of the Supreme Court of Judicature Act, 1873 [replaced by s. 18 of the Supreme Court of Judicature (Consolidation) Act, 1925]. In the exercise of the jurisdiction originated by s. 2 the court has jurisdiction to grant E damages in lieu of an injunction, not only where the act complained of has been done, but also in a quia timet action where the injury is merely threatened and no wrongful act has yet been committed, as, for instance, where, according to plans which have been prepared, a building the erection of which has not been begun will, when completed, infringe the right to light enjoyed by a neighbouring tenement. In such a case the measure of the damages will be F the damage to be sustained in the future by the injury which an injunction, if granted, would have prevented.

So **held** by the Earl of Birkenhead, Viscount Finlay and Lord Dunedin; Lord Sumner and Lord Carson dissentiente.

Dicta in *Dreyfus & Co.* v. *Peruvian Guano Co.* (1889), 43 Ch.D. 316, disapproved.

G Decision of Court of Appeal, [1923] 1 Ch. 431, reversed.

Notes. Considered: *Fishenden* v. *Higgs & Hill, Ltd.*, [1935] All E.R.Rep. 435. Referred to: *Peech* v. *Best*, [1930] All E.R.Rep. 268.

As to damages in addition to or substitution for an injunction, see 21 Halsbury's Laws (3rd Edn.) 349, 357–360; in the case of interference with an easement, see H ibid., vol. 12, pp. 617–619. For cases see 28 Digest (Repl.) 788–796, 19 Digest 187–195. For Chancery Amendment Act, 1858, see 18 Halsbury's Statutes (2nd Edn.) 456.

Cases referred to:

(1) *Dreyfus* v. *Peruvian Guano Co.* (1889), 43 Ch.D. 316; 62 L.T. 518; 6 Asp.M.L.C. 492, C.A.; 28 Digest (Repl.) 791, *404*.

I (2) *Martin* v. *Price*, [1894] 1 Ch. 276; 63 L.J.Ch. 209; 70 L.T. 202; 42 W.R. 262; 10 T.L.R. 172; 38 Sol. Jo. 127; 7 R. 90, C.A.; 28 Digest (Repl.) 788, *377*.

(3) *Holland* v. *Worley* (1884), 26 Ch.D. 578; 54 L.J.Ch. 268; 50 L.T. 526; 49 J.P. 7; 32 W.R. 749; 28 Digest (Repl.) 792, *412*.

(4) *Shelfer* v. *City of London Electric Lighting Co.*, *Meux's Brewery Co.* v. *City of London Electric Lighting Co.*, [1895] 1 Ch. 287; 64 L.J.Ch. 216; 72 L.T. 34; 43 W.R. 238; 11 T.L.R. 137; 39 Sol. Jo. 132; 12 R. 112, C.A.; 28 Digest (Repl.) 792, *418*.

(5) *Cowper* v. *Laidler*, [1903] 2 Ch. 337; 72 L.J.Ch. 578; 89 L.T. 469; sub nom. *Cooper* v. *Laidler*, 51 W.R. 539; 47 Sol. Jo. 548; 28 Digest (Repl.) 793, *420.*

(6) *Sayers* v. *Collyer* (1884), 28 Ch.D. 103; 54 L.J.Ch. 1; 51 L.T. 723; 49 J.P. 244; 33 W.R. 91; 1 T.L.R. 45, C.A.; 28 Digest (Repl.) 789, *381.*

(7) *Chapman, Morsons & Co.* v. *Auckland Union Guardians* (1889), 23 Q.B.D. 294; 58 L.J.Q.B. 504; 61 L.T. 446; 53 J.P. 820, C.A.; 28 Digest (Repl.) 790, *398.*

(8) *Stokes* v. *City Offices Co., Ltd.* (1865), 2 Hem. & M. 650; 12 L.T. 602; 29 J.P. 708; 11 Jur.N.S. 560; 71 E.R. 616; affd., 13 L.T. 81; 19 Digest 195, *1473.*

(9) *Fritz* v. *Hobson* (1880), 14 Ch.D. 542; 49 L.J.Ch. 321; 42 L.T. 225; 28 W.R. 459; 24 Sol. Jo. 366; 28 Digest (Repl.) 789, *380.*

(10) *Ferguson* v. *Wilson* (1866), 2 Ch. App. 77; 15 L.T. 230; 30 J.P. 788; 12 Jur.N.S. 912; 15 W.R. 80; 9 Digest (Repl.) 239, *1550.*

(11) *Davenport* v. *Rylands* (1865), L.R. 1 Eq. 302; 35 L.J.Ch. 204; 14 L.T. 53; 12 Jur.N.S. 71; 14 W.R. 243; 28 Digest (Repl.) 795, *446.*

(12) *Krehl* v. *Burrell* (1879), 11 Ch.D. 146; 40 L.T. 637; 27 W.R. 805, C.A.; 28 Digest (Repl.) 778, *296.*

(13) *Elmore* v. *Pirrie* (1887), 57 L.T. 333; 28 Digest (Repl.) 790, *397.*

(14) *Hindley* v. *Emery* (1865), L.R. 1 Eg. 52; 35 L.J.Ch. 6; 13 L.T. 272; 11 Jur.N.S. 874; 14 W.R. 25; 28 Digest (Repl.) 789, *383.*

Also referred to in argument:

Colls v. *Home & Colonial Stores, Ltd.*, [1904] A.C. 179; 73 L.J.Ch. 484; 90 L.T. 687; 53 W.R. 30; 20 T.L.R. 475, H.L.; 28 Digest (Repl.) 889, *1181.*

Jordeson v. *Sutton, Southcoates & Drypool Gas Co.*, [1899] 2 Ch. 217; 68 L.J.Ch. 457; 80 L.T. 815; 63 J.P. 692; 15 T.L.R. 374, C.A.; 28 Digest (Repl.) 782, *329.*

Aynsley v. *Glover* (1874), L.R. 18 Eq. 544; 43 L.J.Ch. 777; 31 L.T. 219; 39 J.P. 36; 23 W.R. 147; affd. (1875), 10 Ch. App. 283; 28 Digest (Repl.) 789, *387.*

Sussex Peerage Case (1844), 11 Cl. & Fin. 85; 6 State Tr.N.S. 79; 3 L.T.O.S. 277; 8 Jur. 793; 8 E.R. 1034, H.L.; 37 Digest 46, *268.*

Paul v. *Robson* (1914), 83 L.J.P.C. 304; L.R. 41 Ind. App. 180; 111 L.T. 481; 30 T.L.R. 533, P.C.; 19 Digest 134, *910.*

Curriers' Co. v. *Corbett* (1865), 4 De G.J. & Sm. 764; 13 L.T. 154; 29 J.P. 644; 11 Jur.N.S. 719; 13 W.R. 1056; 46 E.R. 1119; 19 Digest 191, *1429.*

Black v. *Scottish Temperance Life Assurance Co.*, [1908] 1 I.R. 541, 561, 577; 42 I.L.T. 194; 19 Digest 187, *1381 c.*

Litchfield-Speer v. *Queen Anne's Gate Syndicate (No. 2), Ltd.*, [1919] 1 Ch. 407; 88 L.J.Ch. 137; 120 L.T. 565; 35 T.L.R. 253; 63 Sol. Jo. 390; 28 Digest (Repl.) 782, *330.*

Senior v. *Pawson* (1866), L.R. 3 Eq. 330; 15 W.R. 220; 28 Digest (Repl.) 805, *540.*

Allen v. *Ayres*, [1884] W.N. 242.

Anderson v. *Francis*, [1906] W.N. 160; 19 Digest 195, *1476.*

Isenberg v. *East India House Estate Co., Ltd.* (1863), 3 De G.J. & Sm. 263; 3 New Rep. 345; 33 L.J.Ch. 392; 9 L.T. 625; 28 J.P. 228; 10 Jur.N.S. 221; 12 W.R. 450; 46 E.R. 637; 28 Digest (Repl.) 776, *276.*

National Provincial Plate Glass Insurance Co. v. *Prudential Assurance Co.* (1877), 6 Ch.D. 757; 46 L.J.Ch. 871; 37 L.T. 91; 26 W.R. 26; 28 Digest (Repl.) 794, *433.*

Imperial Gas Light & Coke Co. (*Directors, etc.*) v. *Broadbent* (1859), 7 H.L.Cas. 600; 29 L.J.Ch. 377; 34 L.T.O.S. 1; 23 J.P. 675; 5 Jur.N.S. 1319; 11 E.R. 239, H.L.; 28 Digest (Repl.) 768, *211.*

A *W. H. Bailey & Son, Ltd.* v. *Holborn & Frascati, Ltd.*, [1914] 1 Ch. 598; 83 L.J.Ch. 515; 110 L.T. 574; 58 Sol. Jo. 321; 19 Digest 140, *956*.

Kine v. *Jolly*, [1905] 1 Ch. 480; 74 L.J.Ch. 174; 92 L.T. 209; 53 W.R. 462; 21 T.L.R. 128; affd., [1907] A.C. 1; 76 L.J.Ch. 1; 95 L.T. 656; 23 T.L.R. 1; 51 Sol. Jo. 11; 19 Digest 137, *932*.

B *Bowes* v. *Law* (1870), L.R. 9 Eq. 636; 39 L.J.Ch. 483; 22 L.T. 267; 34 J.P. 436; 18 W.R. 640; 40 Digest (Repl.) 350, *2821*.

Darell v. *Pritchard* (1865), 1 Ch. App. 244; 35 L.J.Ch. 223; 13 L.T. 545; 14 W.R. 212; 12 Jur.N.S. 16, L.JJ.; 28 Digest (Repl.) 779, *305*.

A.-G. v. *Nicholl* (1809), 16 Ves. 338; 3 Mer. 687; 33 E.R. 1012, L.C.; 19 Digest 134, *906*.

C **Appeal** from an order of the Court of Appeal (reported [1923] 1 Ch. 431), affirming a decision of ROMER, J.

The plaintiff and the defendants were the owners of premises on opposite sides of and abutting on a narrow passage known as Albion Square, Leeds. The defendants, having decided to re-build their premises, pulled down the existing building and commenced the erection of the new, and the plaintiff complained that the D erection, even so far as it had proceeded, constituted an unlawful interference with some, at least, of his ancient lights and asserted that the completion of the building in accordance with the defendants' proposed plans and elevations would greatly aggravate such interference. Accordingly, on May 15, 1922, he commenced this action claiming by his writ, in a form both prohibitory and mandatory, an injunction to restrain the interference of which he complained. At the trial it E appeared that at the date of the writ no unlawful interference with the plaintiff's ancient lights had taken place. The defendants' new building had not then proceeded far enough, and, therefore, the action in its origin was, and at the trial, it remained a quia timet action only, although the writ asked for a mandatory as well as for a prohibitory injunction. The Court of Appeal (LORD STERNDALE, M.R., and WARRINGTON, L.J.; YOUNGER, L.J., dissenting) held, affirming the decision of F ROMER, L.J., that though, apart from authority, they would be of opinion that the wide words used in s. 2 of the Chancery Amendment Act, 1858 (Lord Cairns' Act), did give jurisdiction, though the injury was only threatened, to the Court of Chancery to give damages in lieu of an injunction, leaving it to the discretion of the judge not to exercise it where the difficulties of assessing the damages were too great, they thought they ought to follow the views expressed by their predecessors in that court that s. 2 of the Act conferred no jurisdiction to award damages in G a case where no wrong had actually been done. The defendants appealed.

J. H. Cunliffe, K.C., and *W. E. Vernon* for the appellants.
T. R. Hughes, K.C., and *J. E. Harman* for the respondent.

The House took time for consideration.

H May 30. The following opinions were read.

VISCOUNT FINLAY.—This action was brought on May 15, 1922, by Slack, the respondent in the present appeal, against the appellant society. The claim was (i) for an injunction restraining the further erection of certain buildings by the society so as to obstruct the plaintiff's ancient windows in Nos. 2, 3 and 4 Albion Square, Leeds; (ii) for an order on the defendants to pull down so much I of the building as caused such an obstruction, and (iii) for damages. The case was tried by ROMER, J., who found that the defendants' buildings, when completed according to the plan, would cause an actionable obstruction of the plaintiff's lights, but that no such obstruction had yet taken place. He further said that, in his opinion, the interference with the plaintiff's legal rights when the building was completed would be small and capable of being estimated in money, and that the plaintiff could be adequately compensated by damages. He said, however, that he considered he ought to act upon the opinion expressed by the members of the Court of Appeal in *Dreyfus* v. *Peruvian Guano Co.* (1), that there was no jurisdiction

to give damages in a case in which no injury had accrued, and, therefore, he granted an injunction restraining the defendants from the prosecution of the building so as to cause illegal obstruction to the plaintiff's windows. The Court of Appeal by a majority (LORD STERNDALE, M.R., and WARRINGTON, L.J.) dismissed an appeal by the society (YOUNGER, L.J., dissenting). The society now appeal to your Lordships' House, asking that it may be held that the court has jurisdiction to give damages, that the order for an injunction should be reversed, and the case remitted to the Chancery Division to make the proper order under the circumstances. Your Lordships are asked on this appeal to deal solely with the question of jurisdiction to award damages in such a case as the present.

Until Lord Cairns' Act damages could be obtained only in a court of common law. Such damages were given only in respect of a cause of action which had accrued at the date of the commencement of the action. No damages could be recovered for injury which was merely threatened, but, of course, the damages might include compensation for consequences of the injury already committed which it was proved would occur in the future. In 1858 Lord Cairns' Act was passed. Section 2 is as follows:

> "In all cases in which the Court of Chancery has jurisdiction to entertain an application for an injunction against a breach of any covenant, contract, or agreement, or against the commission or continuance of any wrongful act, or for the specific performance of any covenant, contract, or agreement, it shall be lawful for the same court, if it shall think fit, to award damages to the party injured either in addition to or in substitution for such injunction, or specific performance, and such damages may be assessed in such manner as the court shall direct."

Learned and elaborate arguments have been addressed to your Lordships' House upon the construction of this enactment. Does it empower the court to award damages in lieu of an injunction when injury is threatened, but has not yet been done?

In my opinion, this question must be answered in the affirmative. The power given is to award damages to the party injured, either in addition to or in substitution for an injunction. If the damages are given in addition to the injunction, they are to compensate for the injury which has been done, and the injunction will prevent its continuance, or repetition. But if damages are given in substitution for an injunction, they must necessarily cover not only injury already sustained, but also injury that would be inflicted in the future by the commission of the act threatened. If no injury has yet been sustained, the damages will be solely in respect of the damage to be sustained in the future by injuries which the injunction, if granted, would have prevented. The power conferred on a Court of Chancery by Lord Cairns' Act included power to give damages in respect of a past injury. This in itself was a useful extension of jurisdiction, as it would prevent the hardship involved by the necessity of going to another court to get such relief. But the enactment did not stop there. In terms it gave power to substitute damages for an injunction. Such a substitution in the very nature of things involves that the damages are to deal with what would have been prevented by the injunction, if granted. In the present case the building has not proceeded far enough to constitute an actionable wrong in respect of the plaintiff's lights, and an injunction would prevent the commission of that wrong in the future. On what principle can it be said that, until there has been some interference with the plaintiff's windows, the court cannot give damages in lieu of an injunction against obstruction? Such a construction would impose a purely arbitrary and meaningless restriction on the relief to be given under the Act. To say that the power to give damages under Lord Cairns' Act applies only to what has already been done, would be at least logical, and this was the proposition put forward in his most admirable argument by counsel for the respondent, but it seems to me that it is

A inconsistent with the terms of the Act and that it would, in practice, nullify the provision that damages may be given in substitution for an injunction.

It is, however, the fact that in *Dreyfus* v. *Peruvian Guano Co.* (1) an opinion was expressed by BOWEN, L.J., with the concurrence of COTTON and FRY, L.JJ., that Lord Cairns' Act did not confer on the Court of Chancery any jurisdiction to award damages in a case in which no wrongful act had been committed by the person B against whom an injunction is sought. This view was not necessary for the conclusion at which the majority of the court arrived, but it appears to have been carefully considered. It has always been treated, and always must be treated, with the utmost respect, but even if there had been an actual decision of the Court of Appeal, it would, of course, not be binding upon your Lordships' House. It has been discussed on many occasions, and it is now your Lordships' duty to C consider whether the opinion was well founded. Attempts have been made on behalf of the appellants in the present case to explain away what was said in *Dreyfus' Case* (1). These attempts have, in my opinion, entirely failed. Whether right or wrong, what was said by BOWEN, L.J., and assented to by the other members of the court, is perfectly clear. Sir Horace Davey had asserted that, although it might be assumed that there had been no tortious act in law at all, D damages might be given, because Lord Cairns' Act had clothed the Court of Chancery with jurisdiction to give them on a threat of injury which would give rise to the jurisdiction for injunction. BOWEN, L.J., said in terms that the Act did not clothe the Court of Chancery with any such jurisdiction. He said:

> "It is true the section applies in all cases in which the Court of Chancery has jurisdiction to entertain an application for an injunction, but the only weapon E with which the court is armed by virtue of the section is to award damages to a party injured, which must, I think, mean damages where damage has arisen, and in a case where no damage has arisen in the ordinary sense of the term as known to lawyers, I am of opinion that the court has no power to give damages."

F I am unable to take this view of the Act. It appears to me that such a view must proceed upon the basis that the power of giving damages for torts which Lord Cairns' Act confers upon the Court of Chancery was only to give damages according to the rules which had prevailed in the courts of common law, and in respect of wrongs already committed. This would confine the operation of the Act within very narrow limits, and appears to me not to be reconcilable with the language of G the Act. Injunctions are given to prevent wrongs which are threatened and the power to give damages in lieu of an injunction must, in all reason, import the power to give an equivalent for what is lost by the refusal of the injunction; for this purpose compensation only for what has passed would be futile. On the other hand, there would be no sense in saying that the accrual of some injury is to be a condition precedent to damages in place of an injunction.

H It has been suggested that it follows from the provision that the power to give damages to the party injured, that some injury must have happened. The words "to the party injured" seem to me quite apt, according to the ordinary use of language, to denote parties injured or to be injured, including those who will be injured by buildings against which the court refuses an injunction. Section 2 deals with cases in which the Court of Chancery has jurisdiction to entertain an I application for an injunction "against the commission or continuance of any wrongful act." Some particular tort is threatened; nothing has yet been done. The commission can be restrained by injunction. How can it be said that the power to give damages instead of an injunction does not apply in such a case? It has been urged that the word "damages" must be used as denoting compensation for what has already happened. It is, of course, true that a court of common law gives damages as compensation for past wrongs, but the word "damages" is perfectly apt to denote compensation for the damage which will be sustained if a building is allowed to proceed so as to obstruct ancient lights. If an injunction

is granted the obstruction will never take place. If damages are given instead of the injunction, they must be in respect of an injury which is still in the future. With the utmost respect for the members of the Court of Appeal in *Dreyfus' Case* (1), and more particularly for BOWEN, L.J., I feel constrained to say that I am unable to concur in the opinion given in that case on this point. There has been no such general acquiescence in the correctness of that opinion as to make it inconvenient that we should put upon the Act the construction which seems to us the natural and right one. For the present purpose it is sufficient to quote what was said on this subject in 1893 by LINDLEY, L.J., in *Martin* v. *Price* (2):

> "The question whether the court has jurisdiction to award damages by way of compensation for an injury not yet committed, but only threatened and intended, is by no means free from difficulty. On the one hand this court, in *Dreyfus* v. *Peruvian Guano Co.* (1), expressed a clear opinion against the existence of such jurisdiction. On the other hand, it has been very commonly assumed (and there are several observations by eminent judges favouring the view) that there is such a jurisdiction; and in *Holland* v. *Worley* (3) the late PEARSON, J., did award damages in lieu of an injunction, which, if granted, would have been simply preventive, and in no sense mandatory. The question is one of very great importance; but we do not think it right to keep the parties waiting while we make up our minds upon it."

And so *Martin* v. *Price* (2) was decided upon special grounds which left open the question which now arises for decision.

It has been urged as an objection to the construction of Lord Cairns' above stated, that it would give the Chancery Courts power to legalise the commission of torts by any defendant who was able and willing to pay damages. The courts have on more than one occasion expressed their determination to prevent any abuse of the Act in this direction. It is sufficient to quote two passages from the reports on this subject. The first occurs in the judgment of LINDLEY, L.J., in *Shelfer* v. *City of London Electric Lighting Co.* (4):

> "The jurisdiction to give damages instead of an injunction is in words given in all cases; but the use of the word 'damages' has led to a doubt whether the Act applies to cases where no injury at all has yet been inflicted, but where injury is threatened only. Subject, however, to this doubt, there appears to be no limit to the jurisdiction. But in exercising the jurisdiction thus given attention ought to be paid to well settled principles; and ever since Lord Cairns' Act was passed the Court of Chancery has repudiated the notion that the legislature intended to turn that court into a tribunal for legalising wrongful acts; or in other words, the court has always protested against the notion that it ought to allow a wrong to continue simply because the wrongdoer is able and willing to pay for the injury he may inflict."

The other occurs in the judgment of BUCKLEY, J., in *Cowper* v. *Laidler* (5):

> "The court has affirmed over and over again that the jurisdiction to give damages where it exists is not so to be used as in fact to enable the defendant to purchase from the plaintiff against his will his legal right to the easement."

These passages bring out very clearly the scope of the Act and the care taken to prevent abuse of its powers.

There is one other point upon which I ought to say a few words, and that is, the repeal of Lord Cairns' Act by the Statute Law Revision Act, 1883. Lord Cairns' Act became law in 1858. Section 16 of the Supreme Court of Judicature Act, 1873 [see now s. 18 of the Supreme Court of Judicature (Consolidation) Act, 1925], vested in the High Court justices the jurisdiction which was vested in or capable of being exercised by the Courts of Chancery and the courts of common law. All courts of the Chancery Division acquired thereby the power of awarding damages, and they had, of course, the power of granting injunctions. In 1883 there was passed the Statute Law Revision and Civil Procedure Act of that year which

repealed Lord Cairns' Act, but with the proviso in s. 5 that the repeal should not affect any jurisdiction, principle, or rule of law or equity established or confirmed by any enactment so repealed. The Statute Law Revision Act, 1898, repealed parts of that Act of 1883, including s. 5, and the repealing section of the Act of 1898 (s. 1) contains a proviso that the Act shall not affect any principle or rule of law or established jurisdiction, notwithstanding that the same might have been affirmed by or derived from any of the repealed enactments. There has been a general consensus of opinion that Lord Cairns' Act, or something equivalent to it, has remained in force after the statute law revision repeal of 1883. It is a truism that a statute law revision repeal was never intended to alter the law, but merely to remove from the Statute Book enactments which were obsolete or unnecessary. The repeal of 1883 must have proceeded on the view that Lord Cairns' Act was no longer necessary, and that its place had been taken by some equivalent provision. BAGGALLAY, L.J., in *Sayers* v. *Collyer* (6), took the view that notwithstanding the repeal in 1883, the substance of Lord Cairns' Act remained in force. He relied both on the proviso of the Statute Law Revision Act itself and on the Judicature Act as clothing the court with jurisdiction, both as to injunction and as to damages. LORD ESHER in *Chapman, Morsons & Co.* v. *Guardians of the Auckland Union* (7) rested his opinion to the same effect entirely on the view that the Judicature Act had given full powers, and, therefore, that Lord Cairns' Act had become unnecessary. BUCKLEY, J., in *Cowper* v. *Laidler* (5) was of the opinion that the jurisdiction of the court under Lord Cairns' Act is preserved by the provisions of the repealing Act itself, notwithstanding the repeal.

In my opinion, the view presented on behalf of both of the parties at your Lordships' Bar, that the substance of Lord Cairns' Act remains in force in spite of the repeal, is correct. For the purpose of arriving at the conclusion it is, I think, necessary to look at the combined effect of the Judicature Act, 1873, and the saving clauses in the Statute Law Revision Acts; for this purpose the saving clauses in the two repealing Acts are to the same effect. The Judicature Act conferred the power to award damages on the courts of the Chancery Division, and in estimating the damages the principles which Lord Cairns' Act laid down are still applicable by virtue of the saving clause in the Statute Law Revision Act. The court, therefore, retains the power of awarding damages on the principles which I have stated in dealing with the terms of Lord Cairns' Act itself. The Act itself is now repealed, but the combined effect of s. 16 of the Judicature Act and the saving clause is that the law and practice on this point remain unaltered. I think it unfortunate that Lord Cairns' Act was included in the statute law revision repeal of 1883, and suspect that it proceeded on some misapprehension, possibly the view that it conferred merely the right of giving damages as at common law. The repeal did not extend to Ireland, so that the Act still appears in the revised statutes, and all that has been gained by the repeal is that the expense of printing the few words in the statute which relate to England has been saved. Any person who uses the revised statutes may be a good deal puzzled by finding that the Act appears there as if it were an Irish statute. Lord Cairns' Act is one which is continually referred to, and will be continually referred to in English cases, as giving, in a convenient form, results which it might cost some effort and a good deal of time to work out afresh, and its absence from the revised statutes is to be regretted. Though the Act is gone, the law which it laid down still exists, and this case, like many others of the same kind, has throughout, from beginning to end, been dealt with on this view.

In my opinion the injunction granted should be dissolved and the case remitted to the Chancery Division with a declaration that there is jurisdiction to give damages. I am authorised to state that my noble and learned friend, **LORD BIRKENHEAD**, agrees with this judgment.

LORD DUNEDIN.—I cannot help remarking that I think the judgments in this appeal are in a peculiar position. On the question of construction of the statute

all four judges are—so far as their own opinions are concerned—of one mind that the jurisdiction in question is conferred by the words used. ROMER, J., considered that he was bound by the decision of the Court of Appeal in *Dreyfus's Case* (1). YOUNGER, L.J., considered that the *Dreyfus* (1) decision did not bind him, and would, therefore, have given effect to his own opinion. He was, however, outvoted by his two colleagues, who took up a position which personally I cannot quite appreciate. They said that *Dreyfus's Case* (1) did not bind them, but that the dicta in *Dreyfus's Case* (1) must be followed, and, if wrong, must be put right by a higher court, that is to say, your Lordships' House. If a decision is binding there is an end of it. But if you have only to do with dicta, though such dicta may well serve to help you to form your own opinion, I cannot see that you ought to follow it. It is a different question when a practice follows on dicta. A practice it might not be right to disturb, but then it is the practice and not the dicta that forms the binding authority. Further, the present case seems to be the last in which such a course ought to be followed, because LORD LINDLEY, L.J., sitting in the Court of Appeal with A. L. SMITH and DAVEY, L.JJ., distinctly stated in *Martin* v. *Price* (2) that the question was still an open one. In my view, I respectfully think that LORD STERNDALE, M.R., and WARRINGTON, L.J., ought not to have confined themselves to the question whether the dicta in *Dreyfus's Case* (1) were carefully considered—their conclusion is one with which I cordially agree—but ought to have considered whether their own opinions or the dicta in *Dreyfus's Case* (1) were right, and, if they thought that their view was right, to have said so, and let a higher court, if it was so minded, go back to *Dreyfus's Case* (1).

On the merits, I think it necessary to say very little, for I have had an opportunity of carefully considering the judgment just delivered by my noble friend who has preceded me, and he has exactly expressed my views. Put in a single sentence, my view is that the words "against the commission" clearly point to the inclusion of that state of circumstances which give rise to an application quia timet; that the words "injured" and "damages" need not, and should not, be taken in the purely technical sense; that there is injury in a threat, and that damages in substitution for an injunction, if once one holds that an injunction may be a quia timet injunction, clearly point to a pecuniary payment equalling the loss to be occasioned by the act against which, but for the provision in question, an injunction would have been obtained; and, further, I think that there is no fear of abuse of the power, in view of the authorities which LORD FINLAY has quoted. I, therefore, concur in the judgment proposed.

LORD SUMNER.—The question here is whether the High Court has jurisdiction to refuse an injunction, when a wrong is apprehended, but has not yet been committed, and to award damages in lieu of it, or whether, until some wrong has been committed, its jurisdiction is limited to the grant or refusal of an injunction in order to prevent the commission of any wrong. The extent of the jurisdiction is to be determined by finding the meaning which the words of s. 2 of Lord Cairns' Act bore, on a true construction, prior to the formal repeal of that Act in 1883. There is no authority which binds your Lordships' judgment on this question, though there are numerous expressions of opinion and some decisions in the courts below. As the question turns ultimately on the construction of the words, I apprehend that the best course is to consider them first, and apart from authority.

The section, expressed in one sentence, falls into parts. The second specifies the power newly conferred by the Act. The first states the class of cases within which the power may be exercised. Without in the least disregarding the importance of the first part of the section, I think that it is the language, which describes the newly conferred power, that first demands attention. This power, a discretionary one, is to award (i) damages, (ii) to the party injured, and this either in addition to or in substitution for an injunction. It would seem, therefore, to be only capable of being exercised where there is a party injured and where damages are capable of being assessed and awarded. What grounds are there for a contrary

A construction? To turn now to the first part of the section, which states the area for the exercise of the power. The cases, in which the power is exercisable, are all the cases in which, when the Act passed, injunctions could be granted or specific performance could be decreed, for I take it that breaches of contracts, agreements and covenants and injunctions against the commission or continuance of wrongful acts, cover among them the whole field, to which these remedies apply. B I think, however, that all cases must mean all cases in which the power as defined is applicable. So far as specific performance is concerned, they must always be cases where there has been an antecedent breach. No damages could be awarded, either in addition to or in substitution for any other remedy, where the right to be vindicated is a consensual one, and has not yet been violated. It is, therefore, only in the case of injunctions against wrongful acts that any opportunity could C arise for the exercise of this new power, where the wrongful act is only apprehended, and has not yet been committed. It is also fairly plain that a very extensive and sufficient content is already given to the section, even though it be not carried so far as to include cases of applications for protection against apprehended wrongs. It may be true to say that, if the section is not carried so far, an important class of cases will be left outside its operation, but it is not at any D rate possible to say, that, without the inclusion of quia timet actions, the section would be an insignificant extension of the powers of the court.

I think that the appellants' main stress must be laid on the word "against." The expression "commission or continuance" certainly seems to differentiate that which is continuing from that which is not, and to cover by the word "commission" something which is not yet completed. It does not follow that the word E "commission" by itself will apply before anything is done at all. A tortfeasor commits a nuisance when he begins to do the act which constitutes the nuisance, and not before, and an adequate content can be given to this expression by applying "commission" to something that is being done and "continuance" to failure to undo that which has been done. The words have, however, to be read in conjunction with the words "injunction against." So read I do not say that they F cannot cover the case of a preventive application, quia timet, but they do no more than bring such cases within the possible field of the exercise of the power, where no actual wrong has begun when the proceedings commence. They cannot in themselves have the further effect of extending the words in which the power itself is conferred. Whether that power is exercisable in a quia timet action must depend on the latter part of the section. Again, it must be noted that the section G endeavours to embrace in a single sentence many differing cases and subjects, and perhaps suffers from excessive compression. It includes contract and tort, specific performance and injunction, commission and continuance of wrongs. It does not follow that the power conferred applies equally and always to all these different things, or must always be applicable to every case. The words "intended or actual" after "commission" would have cleared up the ambiguity, which otherwise H exists, and they are certainly not words that can be implied. The words which define the power, in my opinion, are neither apt nor adequate for the wide effect which is contended for. In a quia timet action there is no party injured at the commencement of the proceedings. It is just because he is not injured, but frightened, that he sues at all. I know of no authority for saying that injured means aggrieved, and to say that injured includes "alarmed and aggrieved" is to I beg the question. Again, until a wrong has been actually committed, to award a sum of money in substitution for an injunction is to fix the price at which a court will licence an intending tortfeasor to commit a wrong, to which the victim of it refuses to consent. It may have been right to confer on the Court of Chancery this novel power, but no word so unsuitable as "damages" could have been selected for the purpose. In such a case the defendant has so far done nothing at all, but, wishing to lay hands on what does not belong to him, may hope to find a court of equity the most convenient place in which to effect his purpose. The succeeding words of the clause—"in addition to such injunction"—plainly mean, that the

power to award damages in addition to an injunction is exercisable only when the wrong has been done already. Why should the words "in substitution for" have a wider scope? Damages "in addition" are real common law damages in the true meaning of the word. What warrant is there for construing the same word, when it is "in substitution," in some sense which, down to that time, was unknown alike to courts of common law and to courts of equity? "To award damages to the party injured" are words perfectly apt to describe the power of compensating the person who has suffered a tort, but, to my mind, by no construction can they be made to mean power to award money to a person who has not suffered a tort. The past participle "injured" is the word used: it cannot also be made to include the future participle "about to be injured." That would be not construction, but reconstruction. The whole point of a preventive injunction is to forestall injury, and in such a case as the present the truth is that the plaintiff is a party, who is crying out, and quite rightly too, before he is hurt. He is doing so before any damage is done, or any damages arise, simply in order to get protection against the commission of an anticipated act, which, if committed, will be unlawful. So far as these words go, they mean, according to their grammatical construction, a party who has suffered some injury and nothing else.

Next, the word "damages" means money compensation for wrong done. The term is a legal term of art, before 1858 inapplicable, so far as I know, to any jurisdiction in equity. It postulates the commission already accomplished of injuria cum damno, and it is the compensation, measured in money, which a court of law would award to the party who had thus suffered damnum. The party injured must be a party injured by somebody or something. It may be "injured by the commission of the wrongful act" or "injured by the tortfeasor," whom the court would restrain from such commissions in the future as well as order to pay damages for what he has already done, but beyond this construction cannot go. The words always remain inapplicable to the case of a party, who is not yet injured at all. It is quite true that the jurisdiction, which has been exercised, in fact, in pursuance of s. 2, where damages are awarded in lieu of an injunction, has differed in two respects from the jurisdiction as to damages exercised in courts of common law. For the purposes of the assessment, (i) the injuries suffered by the plaintiff have been taken as at the date of the judgment of the court, and not as at the commencement of the action only; and (ii) the sum awarded has been calculated so as to include the whole injurious effects both present and future, so as to be, in intention at any rate, a compensation once and for all for what has been actually done up to the date of the judgment with all its consequences. On the other hand, for damage actually done by the invasion of the plaintiff's rights, the courts of common law would have awarded damages only in respect of damage suffered at and before the commencement of the action, leaving him to bring fresh actions for damage suffered thereafter. On this principle also, they would have calculated the damages, exclusively of anything attributable to subsequent prejudice to be suffered by the plaintiff arising after the commencement of the proceedings, and not included in the action. Without suggesting any doubt, I express no opinion about these differences. After all they relate to procedure only; they cannot in any way affect the particular point now under consideration. The difference arises in each case from the construction of the words of the section, which has been adopted in the Chancery Division. Damages, it is said, which are in addition to or in substitution for an injunction, can only come into question when the time has arrived for the grant or the refusal of the injunction. For this purpose, injunction means a perpetual injunction after the hearing, and not an interlocutory injunction granted merely to keep things in medio. Further, no money awarded in substitution can be justly awarded, unless it is at any rate designed to be a preferable equivalent for an injunction, and, therefore, an adequate substitute for it, and this involves the necessity for taking the future as well as the past and the present into account so as to end matters once for all, instead of awarding damages only toties quoties as was done in common law actions, leaving the

injured party to bring as many further actions as there might be further separate torts: *Stokes* v. *City Offices Co., Ltd.* (8), LORD CRANWORTH, L.C.; *Fritz* v. *Hobson* (9), FRY, J. Such questions can only arise after the statutory jurisdiction to award damages to the party injured has attached. If, on the true construction of the section, that jurisdiction attaches only when some party has been injured, so as to become entitled to some "damages," these questions do not affect that construction, but belong exclusively to the subsequent process of calculating the damages to be awarded. Right or wrong, the practice throws no light on the construction of the words which determine the conditions under which any jurisdiction to give damages at all must arise.

If, however, the words of the enactment are not in themselves clear, as, for my part, I think they are, the next step is to consider the nature and scope of the whole Act, the state of the law existing when the Act passed, and the defects in it, which the Act was designed to remedy. The Act from title and preamble to the last word of the last section is a procedure Act. It empowers the Court of Chancery to award damages in certain cases, to impanel juries and take verdicts, and so forth. It has been repeatedly said, and especially in the years immediately following this enactment, that its object was to save the litigant from being harassed by the necessity for applying to two courts for complete relief in respect of one wrong and from being "turned over," as the phrase was, by equity to law, if the case was not one for an injunction, or was a case for damages as well: *Ferguson* v. *Wilson* (10); *Davenport* v. *Rylands* (11). The scheme of the Act abundantly bears out this account of its character and object. Surely it would have been incongruous with such a scheme to create a power, which no court theretofore had enjoyed at all, and to bestow it on the Court of Chancery alone. If the legislature was really minded to do this, surely it would have done so in plain language. It would never have left its intention to be spelt out of a section, which, as to the greater part of its contents, deals only with remedies for wrongs which have been committed, and, on this construction of it, employs a technical term of the common law to express, not only its recognised common law meaning, but a new and alien meaning altogether. Before 1858 the Court of Chancery sometimes said to a litigant: "Our jurisdiction to grant injunctions is a jurisdiction supplementary to that of the courts of law. Injunctions are only granted where damages will not suffice. For you damages will suffice, if and whenever you are damaged at all—go to law." Sometimes the court said: "We will grant an injunction in this case to restrain any further interference with your rights, but not a mandatory injunction to undo what has been done, for that would be oppressive. Damages will be enough for that: to get them go to law." For this mischief it was that s. 2 of the Act of 1858 was meant to provide a remedy. Was it meant to do more? To empower the Court of Chancery to refuse an anticipatory injunction and yet, where no wrong had actually been done, to award money, fixed as it thought fit, was not to improve procedure, but to confer a power, which in effect enabled the court to fix the price at which an intending tortfeasor should be judicially licensed to violate the rights of another. This might be wise policy, but at any rate it was not a matter of mere procedure; as it happens it was a thing which judges have repeatedly described in terms of not exaggerated disfavour: *Krehl* v. *Burrell* (12). I think it is not unreasonable to say that, if the legislators of 1858 had meant as much as this, the whole Act, and not merely s. 2, would have borne unmistakable evidence of their intention.

The theory on which the appellants have urged this view of the meaning of the Act, is that Parliament meant (i) to enable the Court of Chancery to do what is called "complete justice" between the parties in the proceeding: *Elmore* v. *Pirrie* (13); *Hindley* v. *Emery* (14); and (ii) that "complete justice" involved the possession of this new power. The two propositions are distinct, and both seem to me to be assumptions. Sixty odd years ago the reform of procedure was, so to speak, in its infancy. Historically I think there is no ground for supposing that cautious

reformers (a term which, I am sure, Sir Hugh Cairns would not have disowned) intended to do more than to put into one hand the remedies theretofore held in two. For my part I doubt, as SIR GEORGE JESSEL doubted (7 Ch.D. 554), whether it is complete justice to allow the big man, with his big building and his enhanced rateable value, and his improvement of the neighbourhood to have his way, and to solace the little man for his darkened and stuffy little house by giving him a cheque that he does not ask for. I think that this kind of reasoning is really an argument for a modern amending Act, framed in accordance with the notions of 1924, not for a construction of this Act according to the words used in 1858.

In this view, it is not necessary to decide whether the power conferred by the Act of 1858 was kept alive after its repeal in 1883 by the saving of the Statute Law Revision Act of that year, and subsequently of that of 1898, or by the prior provisions of the Judicature Act, 1873, s. 16. In either case this may be truly said. The words of s. 2 were the title deeds of a wholly new jurisdiction, if the appellants' argument is sustained. I cannot, in that event, understand how the legislature could have repealed it as a spent Act, whether its effect was continued by a procedure Act, as the Judicature Act was, or by omnibus savings, such as the Statute Law Revision Acts contained. If, on the other hand, the section only effected a change in procedure by gathering into one hand powers previously held in the separate grasps of Chancery and of law, nothing was simpler than to recognise that by 1883 it was spent, and the question how it was to be kept alive, so as to negative any suggestion that its effect had been undone, was not a matter of real moment. I have not thought it necessary to deal at length with the numerous cases, in which the existence of this wider power is sometimes recognised, but more often denied. To count the number of the learned judges who may be ranged on each side would be fruitless; to endeavour to compare or to weigh their reputations would, in me, be indecent. I think it is clear that the balance of judicial opinion has been in favour of the limited construction of the section, and that since 1889 there is no real authority for giving effect to it in its suggested wider form. I have done my best to form an independent opinion of my own, but I may now confess that I should differ with real trepidation from the opinion of COTTON, BOWEN, and FRY, L.JJ., and from the assent, which was afterwards given to it by LORDS LINDLEY and WRENBURY. I think that any injustice, such as YOUNGER, L.J., apprehended, if the respondent's contention should be upheld, can be very fully met in the way he suggests, by making a declaration and adjourning the question of damages with liberty to either party to apply; but if more is needed, it is for the legislature to supply it. I think that this appeal should be dismissed.

LORD CARSON.—I agree with the conclusion arrived at by my noble and learned friend LORD SUMNER that this appeal should be dismissed. ROMER, J., who tried this case, has found that the buildings which the defendants propose to erect will, if erected, cause a nuisance or illegal obstruction to the plaintiffs' ancient rights sufficient to give him a cause of action and to entitle him to relief. Primâ facie, therefore, the plaintiff is entitled to an injunction to prevent such nuisance or illegal obstruction. No damage has yet been done, nor has the plaintiff been in any sense injured, but the learned judge has found that the interference with the plaintiff's legal right would be small, and capable of being estimated in money, and that the plaintiff could be adequately compensated by damages if the court had power to make an order for that purpose in lieu of granting an injunction. My Lords, it is said that the Chancery Amendment Act, 1858, commonly known as Lord Cairns' Act, gave such a power. It is not suggested that before the passing of that Act the court had any power in the case of anticipated injury to refuse relief by injunction or to suggest to the parties threatened that there was any remedy at the common law side of the courts. One would, therefore, expect to find, in any Act giving a party a right to commit a trespass on condition of paying damages or compensation, clear and unambiguous language making such a revolutionary change. When we turn, however, to the Act relied upon, we find it is

entitled "An Act to amend the course of procedure in the High Court of Chancery," and as LORD STERNDALE, M.R., says in his judgment in the present case,

> "the expression is in favour of the respondent's contention, for to give a right of action for damages to a person who has in fact suffered no injury, but has merely been threatened with one, is to give a new right of action and not merely to amend procedure."

I can find no words in the section relied upon which, in my opinion, could be construed to confer this new right of action. "To award damages to the party injured" seems to me to refer and only to be capable of referring, to a case where some legal wrong has been already committed. "Damages" is, of course, a legal term meaning "the recompense given by process of law to a person for a wrong another has done": see 10 HALSBURY'S LAWS OF ENGLAND, p. 302 [see now ibid. (3rd Edn.), vol. 11, p. 216], and "a party injured" cannot in my view be held to describe a person who anticipates injury in certain circumstances, and is entitled by legal process to prevent it. I am aware, of course, that the words in the earlier part of the section, "against the commission of any wrongful act," are relied upon as entitling us to give a wider construction to the section, but, in my opinion, these words can and ought to be so construed as to be applicable to an award of "damages to the party injured," and I agree with the view expressed by LORD SUMNER "that an adequate content can be given to this expression by applying 'commission' to something which is being done." The conclusion at which I have arrived is in accordance with the decision of COTTON, BOWEN, and FRY, L.JJ., in *Dreyfus* v. *The Peruvian Guano Co.* (1) decided as far back as 1889. It is not necessary to discuss the comments which have been made upon that case, so fully analysed by the Master of the Rolls, as your Lordships are all of opinion, I think, that it must be considered as the deliberate judgment of the learned lords justices. In the subsequent cases of *Shelfer* v. *City of London Electric Lighting Co., Ltd.* (4) and *Cowper* v. *Laidler* (5), *Dreyfus* v. *Peruvian Guano Co.* (1) was treated as a binding authority, and I agree with WARRINGTON, L.J., when he says that

> "on the whole I cannot find that the opinions in question have been overruled in subsequent cases or that they were inconsistent with any decision in which the point was raised."

I am of opinion, therefore, that as ROMER, J., was satisfied that the defendants were intending to commit what would amount to a legal wrong which, if inflicted, would involve damage, the respondent is entitled to maintain the injunction granted by the learned judge.

Appeal allowed.

Solicitors: *Jaques & Co.*, for *Boniton, Son & Malcolm*, Leeds; *McKenna & Co.*, for *Pettitt, Carter & Wade*, Leeds.

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

A

R. *v.* DWYER. R. *v.* FERGUSON

[Court of Criminal Appeal (Lord Hewart, C.J., Shearman and Salter, JJ.), December 1, 1924]

[Reported [1925] 2 K.B. 799; 95 L.J.K.B. 109; 132 L.T. 351; 89 J.P. 27; 41 T.L.R. 186; 27 Cox, C.C. 697; 18 Cr. App. Rep. 145] B

Criminal Law—Identification—Photograph of suspected person previously shown to identifying witness—Evidence—Prison photographs shown to jury.

Before the appellants were arrested police officers handed photographs, showing a good likeness of each of the appellants, to witnesses who were afterwards C called on to assist in their identification. During the trial prison photographs of each of the appellants were shown to the jury. The appellants appealed against both conviction and sentence.

Held: a police officer who was in doubt about who should be arrested might show a photograph of the suspected person to another person in order to obtain information or a clue on the matter; the proper course was for him to show D a series of photographs, but he should not show a photograph to any person who was to be asked to identify the suspected person, and, if he did, the evidence of that witness must be taken subject to his having seen a photograph; prison photographs should not be shown to the jury at the trial as that amounted to informing them that the accused had been previously convicted and so might prejudice his fair trial. E

Notes. Considered: *R.* v. *Hinds*, [1932] 2 K.B. 644. Referred to: *R.* v. *Wainwright* (1925), 19 Cr. App. Rep. 52; *R.* v. *Daily Mirror* (*Editor and Proprietors*), *Ex parte Smith*, [1927] All E.R.Rep. 503.

As to use of photographs for identification, see 10 Halsbury's Laws (3rd Edn.) 439, para. 814; and for cases see 14 Digest (Repl.) 405–406, paras. 3964–3973. F

Case referred to:

(1) *R.* v. *Melany* (1924), 18 Cr. App. Rep. 2, C.C.A.; 14 Digest (Repl.) 406, *3968*.

Also referred to in argument:

R. v. *Goss* (1923), 17 Cr. App. Rep. 196, C.C.A.; 14 Digest (Repl.) 406, *3966*.

R. v. *Kingsland* (1919), 14 Cr. App. Rep. 8, C.C.A.; 14 Digest (Repl.) 406, *3970*.

Appeal against conviction and sentence. G

The appellants had been convicted of housebreaking and stealing at Monmouth Assizes and sentenced respectively to fifteen months' and six months' hard labour. The offence in question was committed on the night of Sept. 29. Certain persons saw the appellants hurriedly leaving the house, and one of these persons saw one of them later the same evening. Before the arrest of these appellants, detached H and separate photographs, showing a remarkably good likeness of each of them, were handed to the persons who had seen them on the night of the crime. About a week later these same persons were summoned by the police to take part in identifying the accused. At the trial, photographs showing the full face and profile of each of the accused were handed to the jury. These photographs represented each of the accused wearing on his right breast a large ticket stamped with I the prison number.

Ida Duncan for both appellants.

Somerset for the Crown.

The judgment of the court was delivered by

LORD HEWART, C.J.—The two appellants, Thomas Dwyer and Allen Ferguson, were convicted at Assizes at Monmouth of breaking and entering a house and stealing rings, watches, and other things. The appellant Dwyer was sentenced to

six months' imprisonment with hard labour, and the appellant Ferguson was sentenced to fifteen months' imprisonment with hard labour. The appellants now apply for leave to appeal against conviction and sentence, and in fact appeal.

The real question in this case was a question of identity. The facts shortly were, that on Sept. 29 last at a quarter past five in the afternoon or thereabouts a Mrs. Williams left her house apparently safe. At about a quarter to eight, when it was somewhat dark, the next-door neighbour, Mrs. Jones, heard noises coming from the inside of Mrs. Williams' house, and she also noticed a flashlight in the bedroom. She called another neighbour, a Mr. Rees, and a son-in-law of Mrs. Williams, Mr. James Williams. They went to the house of Mrs. Williams and Mrs. Jones saw a man in a dark suit standing at the next-door gate, near an electrical standard, and that man, she said, was whistling. James Williams and Thomas Rees also saw a man standing at the electrical standard and heard him whistling. They went into the house, and as they were going they saw a man in a brown suit come out and jump from an upstairs window. The witness Rees, after going into the house, came out again and some time later in the evening saw the man whom he had seen at the gate walking down the road. The trial was perfectly satisfactory except in two respects, each of which was crucial. In the first place, it was made plain that the witnesses who were to identify the defendants, witnesses who had seen the defendants in the dusk or in the dark, had been shown extremely good photographs of the defendants before they were invited to enter upon the task of identification. It is quite true, as counsel for the crown has urged, that the police, in showing those photographs to the persons who afterwards became witnesses, were not at all intending to influence them in the task of identification or to equip them for it; on the contrary they were seeking only to ascertain who were the persons proper to be arrested. The fact remained, however, that the witnesses upon whose testimony the identification depended had seen very good photographs of each of the accused before the process of identification was formally entered upon. In the second place, during the trial photographs of the two defendants were actually produced for the inspection of the jury and were inspected by the jury. These photographs are now before the court. There are two photographs, that is to say, there are two documents; each contains two photographs. One document refers to one prisoner, the other document to the other prisoner, and there is shown with great clearness upon each of these documents a photograph full face and profile of the prisoner referred to, and the prisoner is wearing upon his right breast a large ticket stamped with the prison number. These photographs having been handed to members of the jury, it was apparent to the jury that the defendants had been previously convicted; it was just as clear a statement to the jury that the defendants had been previously convicted as would have been sworn evidence to that effect. In those circumstances counsel for the appellants, who has urged their case with so much clearness and force, says that these convictions cannot stand. In the opinion of the court that is right. The appeals must be allowed and the convictions quashed.

The court has been asked to formulate some principles relating the use of photographs in the detection and punishment of crime. It is not possible, nor indeed would it be useful, to attempt to produce a series of rules. They are to be collected from cases which have been decided. But this observation is to be added: the circumstances of different cases differ greatly, and it is not easy to lay down general rules. One distinction, however, is quite clear. It is one thing for a police officer, who is in doubt about the question who shall be arrested, to show a photograph to another person in order to obtain information or a clue upon that matter; it is another thing for a police officer, dealing with witnesses who are afterwards to be called as identifying witnesses, to show such persons beforehand photographs of those whom they are about to be asked to identify. It is clearly illegitimate, and it would be most improper, to inform a witness beforehand by the process of making the features of the accused familiar to him through a photograph. But

even where the photographs are employed for the purpose of obtaining information on the question of arrest, it is fair that all proper precautions should be observed. I shall not attempt to enumerate possible contingencies, but it would be manifestly open to remark if, in a doubtful case, the police were to show one photograph or two photographs to a person who was supposed to be able to give information and then obtain assent to act upon that information. The fair thing is, as was said in *R.* v. *Melany* (1), to show a series of photographs and to see if the person who is expected to give information can pick out the appropriate defendant. Even when that process has been gone through, no matter with what care, it is quite evident that afterwards the witness who has so acted in relation to a photograph is not a useful witness for the purpose of identification, or at any rate the evidence of that witness for the purpose of identification is to be taken subject to this, that he has previously seen a photograph. As I said, it is not easy, certainly not upon the spur of the moment, to formulate rules, but, in this matter, as in all matters, as has so often been said in this court, it is the duty of the police to behave with exemplary fairness, remembering always that the Crown has no interest in securing a conviction but has only an interest in convicting the right person. These appeals are allowed.

Appeals allowed.

Solicitors: *Registar of the Court of Criminal Appeal*; *Director of Public Prosecutions.*

[*Reported by* T. R. F. Butler, Esq., *Barrister-at-Law.*]

BUTWICK *v.* GRANT

[King's Bench Division (Horridge and Sankey, JJ.), March 14, 1924]

[Reported [1924] 2 K.B. 483; 93 L.J.K.B. 972; 131 L.T. 476]

Agent—Sale of goods—Authority of agent to receive purchase price—Express authority to sell—Failure of agent to pay principal—Buyer aware of agent's position—Right of principal to recover from buyer.

In March, 1923, the plaintiff, a wholesale dealer in the city of London, became acquainted with one C., who had previously done business with, and was, therefore, well known to, the defendant, a tradesman. The plaintiff gave C. express authority to sell to the defendant a number of coats, of which the plaintiff gave C. one as a sample. C. offered the coats to the defendant, who agreed to buy them and then bought and paid for the sample coat. The plaintiff shortly afterwards despatched the coats to the defendant and sent him an invoice by post. The defendant paid C. the price of the coats and obtained from C. a receipt for the amount paid. C. did not pay over the money to the plaintiff, who, accordingly, brought an action in the county court to recover the price of the goods from the defendant.

Held: there was no hard and fast rule of law that an agent to sell had authority to receive payment for the goods; such an authority could not be implied in the present case since the defendant was aware of the fact of agency and was thus put on his inquiry as to the scope of the agent's authority; and, therefore, the plaintiff's claim succeeded.

Drakeford v. *Piercy* (1) (1866), 7 B. & S. 515, applied.

Notes. As to the authority of agents, see 1 HALSBURY'S LAWS (3rd Edn.) 218; and for cases see 1 DIGEST 361 et seq.

Cases referred to:

(1) *Drakeford* v. *Piercy* (1866), 7 B. & S. 515; 14 L.T. 403; 1 Digest 362, *714*.
(2) *Anon.* (1698), 12 Mod. Rep. 230; 88 E.R. 1282; 1 Digest 362, *711*.
(3) *Capel* v. *Thornton* (1828) 3 C. & P. 352; 1 Digest 362, *712*.
(4) *Howard* v. *Chapman* (1831), 4 C. & P. 508; 1 Digest 370, *781*.

Appeal from Bloomsbury County Court.

The plaintiff, Butwick, who was a wholesale merchant, carrying on business in the City of London, brought an action to recover from the defendant, Grant, who was a tradesman, carrying on business at Southend, the price of goods—namely, a quantity of sports coats sold and delivered by the plaintiff to the defendant. In March, 1923, the plaintiff had for sale a job lot of sports coats. About the end of March a man named Chait, who was a stranger to the plaintiff, called on the plaintiff and told the plaintiff that he had a client at Southend, namely, the defendant Grant, who would probably be a customer for the whole of the job lot of sports coats. Chait had previously done business with the defendant, but this was the first time that the plaintiff met him. After some conversation the plaintiff gave Chait authority to sell the lot of coats to the defendant Grant and gave him one of them as a sample. Shortly afterwards, Chait saw the defendant and offered him the coats. The defendant bought the sample coat, paid Chait for it, and agreed to buy the whole of the lot, which comprised sixty-four coats. Chait thereupon passed on to the plaintiff the defendant's order for the coats, and on April 6 the plaintiff despatched the coats to the defendant at Southend, and sent him by post an invoice for the price. The defendant duly received the consignment of coats and the invoice. Shortly afterwards, Chait called again on the defendant and received payment for the coats and gave the defendant a receipt for the price. But Chait did not pay the price over to the plaintiff. The plaintiff thereupon brought this action against the defendant to recover the price of the coats.

The county court judge found that, at the time when the defendant agreed to buy the goods, he knew that Chait was acting as agent for some other person, and not as a principal. He also found that the plaintiff did not authorize Chait to sell the goods as principal, nor did he, in fact, authorize him to receive payment for them, and that Chait had, in fact, no authority to receive payment of the price. He held, that the authority to sell given by the plaintiff to Chait did not in itself confer on Chait any authority to receive payment, or raise any implication of such authority. He therefore gave judgment for the plaintiff.

The defendant appealed.

Hinde (*A. C. D. Jackson* with him) for the defendant.
Sachs for the plaintiff.

HORRIDGE, J.—This is an appeal from a judgment of the learned judge of the Bloomsbury County Court. The plaintiff in the action, who is the respondent in this appeal, employed a man called Chait as his agent to sell a number of sports coats, and gave him one of the coats as a sample. Chait sold the sample coat to the defendant, who is the appellant here, and took an order from him for a large number of coats. The plaintiff was the principal in the transaction, and, at the time of the sale to the defendant, Chait was acting as agent of the plaintiff, and not as a principal. Chait subsequently received the price of the coats from the defendant, but failed to pay it over to the plaintiff, who then brought this action against the defendant in the county court to recover the price of the goods. The learned county court judge, in his judgment, said:

> "I hold that Chait had no actual authority to receive payment for the goods, as stated by him, and that the fact of his being authorised to sell these particular goods on this occasion did not in itself confer or raise any implication of

authority to receive payment, and that he had not, in the circumstances of this case, on this or any other ground, either implied or apparent authority in that behalf."

The question is, what must we be satisfied of in order to interfere with that decision of the county court judge?

We must be satisfied that, on the authority of the cases, it has become a rule of law that, in the bare case in which an agent has been authorized to sell, he has also authority to receive payment of the price. Is there any such rule of law? It is true that in an *Anonymous Case* (2) LORD HOLT, C.J., is reported to have said:

"He who has power to sell, has power to receive the money; for if a man give power to his servant to sell his horse, he impliedly gives him power to receive the money; and payment to such servant is payment to the owner."

But that statement is much too general having regard to the later decisions. In *Capel* v. *Thornton* (3) LORD TENTERDEN, C.J., said:

"And if he, as their agent, had authority to sell goods, so had he (in the absence of advice to the contrary), an implied authority to receive the proceeds of such sale."

That statement, however, is applicable only to the facts of that particular case, and is not a proposition of general application. In *Howard* v. *Chapman* (4) TINDAL, C.J., is reported as saying, in the course of the argument, that a traveller who was authorized to take orders was also authorized to receive payment in money, but not in goods. But that remark must have had regard only to the particular facts of that case. The case which deals with the matter most clearly is *Drakeford* v. *Piercy* (1). In that case counsel said (7 B. & S. at p. 517):

"In *Capel* v. *Thornton* (3) LORD TENTERDEN said that if Ellsworth as agent of the plaintiffs 'had authority to sell goods, so had he (in the absence of advice to the contrary), an implied authority to receive the proceeds of such sale.'"

But BLACKBURN, J., replied:

"That would be right in respect to the particular class of agents there referred to, but is not generally true"

while LUSH, J., said (ibid. at p. 522):

"The facts stated in the plea may perhaps afford primâ facie evidence to be submitted to a jury under the plea of payment, and justify a verdict for the defendant on it; but that an agent authorized to sell has as a necessary legal consequence authority to receive payment is a proposition utterly untenable and contrary to authority."

In face of these dicta, therefore, we cannot say that the learned county court judge, in the absence of special circumstances, could have held in this case that the agent had power to receive payment of the price of the goods. Chait was not a traveller for the plaintiff, and the appellant knew that he was the plaintiff's agent. He was, therefore, put upon inquiry with regard to the scope of Chait's authority. There is no hard and fast rule of law that an agent to sell has power to receive the price. This appeal must be dismissed.

SANKEY, J.—I am of the same opinion, and I found my decision on the judgment of LUSH, J., in *Drakeford* v. *Piercy* (1). The learned judge there said (7 B. & S. at p. 522):

"that an agent authorised to sell has as a necessary legal consequence authority to receive payment is a proposition utterly untenable and contrary to authority."

It may be open to the purchaser, who has paid the purchase price to the agent, to show that the latter in fact had authority to receive payment, or that he had

ostensible authority to receive payment, or it may be shown that the payment to the agent was a payment made in the ordinary course of such agencies. In the present case, however, the learned county court judge has held that none of these things was here shown. In these circumstances, I agree that the appeal must be dismissed.

Appeal dismissed.

Solicitors: *Bentley & Jenkins*, for *D. G. Verney*, Southend-on-Sea; *Windsor & Brown.*

[*Reported by* T. W. MORGAN, ESQ., *Barrister-at-Law.*]

SWAN *v.* SINCLAIR

[HOUSE OF LORDS (Viscount Cave, L.C., Viscount Finlay, Lord Shaw, Lord Wrenbury and Lord Carson), October 27–30, November 21, 1924]

[Reported [1925] A.C. 227; 94 L.J.Ch. 104; 132 L.T. 577; 89 J.P. 38; 41 T.L.R. 158; 22 L.G.R. 705]

Easement—Right of way—Creation—Obligation to form road—Road never formed—Non-user for fifty years—Acquiescence in obstruction—Abandonment of agreement for creation of way—Revival.

In 1870 the owner of land on which stood twelve houses put the property up for sale by auction in eleven lots. The recitals contained in the conveyances of lots 1, 2, and 3 provided for the setting aside, along the eastern boundary of the land, of a strip 15 ft. wide which was to give the occupiers of each lot a carriage way from and into a highway, the duty being cast on each purchaser to bear a proportion of the expense of the formation of the carriageway, which was 6 ft. above the level of the plots sold. Fences passed over the site of the proposed carriageway and divided the plots from one another, and a wall stood across lot 1, where it joined the highway. For fifty years from the date of the sale no attempt was made to form the carriageway and the fences dividing the plots and the wall separating lot 1 from the highway remained intact. On Oct. 21, 1873, the purchaser of lot 1 leased it for a term of fifty years commencing on June 24, 1872, subject to the right of way. In 1883 the lessee of lot 1 raised the surface of the strip of land at the end of his plot to the level of the highway with the result that there was a 6 ft. drop from that strip to the land included in lot 2. In 1895 the defendant acquired the freehold of lot 1. In 1904 the plaintiff took an assignment of the lease, and in 1911 he purchased the freehold of lots 2 and 3 with the benefit of and subject to the right of way. In 1919, in anticipation of the expiration of his lease in 1922, the plaintiff proposed to build a garage on lots 2 and 3. He, therefore, pulled down the wall which separated the rear portion of lot 1 from the highway, erected gates there, raised the level of the rear portion of lot 2 and caused a car to be driven through the gates over the strip in lot 1 into lot 2. When the lease expired the defendant blocked up the gates and obstructed the way, and the plaintiff brought this action to enforce his right of way.

Held: until the land had been cleared and the carriageway formed there could be no effectual creation of an easement, and, as more than fifty years had elapsed and no person in that time had sought to enter on the enjoyment of the easement, but the grantees had acquiesced in obstruction of the way, it must be inferred that the arrangement made in 1871 had been abandoned by

common consent, and, therefore, it could not now be revived, the lapse of time being fatal to the plaintiff's claim. A

Decision of the Court of Appeal ([1924] 1 Ch. 254), affirmed.

Notes. As to effect of non-user of easement, see 12 HALSBURY'S LAWS (3rd Edn.) 564; and for cases see 19 DIGEST 85 et seq.

Cases referred to: B

(1) *Moore* v. *Rawson* (1824), 3 B. & C. 332; 5 Dow. & Ry.K.B. 234; 3 L.J.O.S. K.B. 32; 107 E.R. 756; 19 Digest 86, *511*.

(2) *Bower* v. *Hill* (1835), 1 Bing. N.C. 549; 1 Hodg. 45; 1 Scott. 526; 4 L.J.C.P. 153; 131 E.R. 1229; 19 Digest 85, *502*.

(3) *R.* v. *Chorley* (1848), 12 Q.B. 515; 12 L.T.O.S. 371; 13 J.P. 136; 12 Jur. 822; 3 Cox, C.C. 262; 116 E.R. 960; 19 Digest 82, *493*. C

(4) *Spicer* v. *Martin* (1888), 14 App. Cas. 12; 58 L.J.Ch. 309; 60 L.T. 546; 53 J.P. 516; 37 W.R. 689, H.L.; 40 Digest (Repl.) 336, *2744*.

(5) *Ward* v. *Ward* (1852), 7 Exch. 838; 21 L.J.Ex. 334; 155 E.R. 1189; 19 Digest 85, *505*.

(6) *Crossley & Sons, Ltd.* v. *Lightowler* (1867), 2 Ch. App. 478; 36 L.J.Ch. 584; 16 L.T. 438; 15 W.R. 801, L.C.; 19 Digest 83, *494*. D

Appeal by the plaintiff from a judgment of the Court of Appeal (WARRINGTON and SARGANT, L.JJ., POLLOCK, M.R., dissenting), reported [1924] 1 Ch. 254.

The facts are fully set out in the opinions of their Lordships.

C. E. E. Jenkins, K.C. (*J. E. Harman* with him), for the appellant.
Owen Thompson, K.C. (*R. M. Pattisson* with him), for the respondent. E

The House took time for consideration.

Nov. 21. The following opinions were read.

VISCOUNT CAVE, L.C.—This is an appeal by the plaintiff in the action from an order of the Court of Appeal confirming a judgment of P. O. LAWRENCE, J., in favour of the defendant, and raises questions relating to an alleged right of way. F In the year 1870 two persons named Dyson and Parker were the owners of a block of land on the east side of Essex Road, Islington, and having a return frontage to Church Road; and on this block of land there stood twelve houses known as numbers 316 to 338 (even numbers, inclusive), Essex Road. Each of these houses faced towards Essex Road and had a garden running back to a wall which formed the eastern boundary of the property and was divided by cross walls from the G gardens on each side. On Oct. 27, 1870, the owners put the property up for sale by auction in eleven lots. Lot 1 (which was the southernmost lot and included the return frontage on Church Road) consisting of Nos. 316 and 318, Essex Road, Lot 2 consisting of No. 320, Lot 3 of No. 322, and so on up to Lot 11, which consisted of the northernmost house known as No. 338, Essex Road. No copy of the conditions of sale is available, but from the recital contained in the conveyances H of Lots 1, 2, and 3 (to be hereafter referred to) it appears that one of the conditions provided for setting aside along the eastern boundary of the land a strip 15 ft. wide running north and south, which was to give the occupier of each lot a back way for carriages from and into Church Road; and it is with reference to the right of the owner of Lots 2 and 3 to use this back way over the rear of Lot 1 that the present dispute arises.

Lot 2 at the sale (No. 320, Essex Road) was sold to one James Frederick Corben, I and the conveyance to him, dated Feb. 2, 1871, contained the following recital, which it is desirable to set out in full:

"And whereas the said William Dyson and James Parker in exercise of the said power of sale contained in the hereinbefore recited will and with the assent of the said Daniel Thomas Sharp and Peter Borgnis caused the messuage being number 320 Essex Road, hereinbefore described and intended to be hereby conveyed with other messuages and premises known as numbers 316, 318, 322,

A 324, 326, 328, 330, 332, 334, 336 and 338 in Essex Road aforesaid comprised in and assured by the said recited indenture of the 7th day of July, 1854, to be put up to sale by public auction by Messrs. Newbon and Harding at the Auction Mart, Tokenhouse Yard, in the City of London, on the 27th day of October, 1870, in eleven lots, and it was amongst others a condition of the said sale that the part coloured brown on the plan drawn in the margin of these presents was B intended to form a right of way from the back gardens of each house into the Church Road and that the lots would be sold subject to and with the benefit of such right of way and that the piece of ground marked brown on the said plan of the width of 15 ft. at the rear or bottom of the back gardens of each Lot 1 to 10 inclusive would be included in the purchase of each of those lots but subject to a right of carriage way to the owners of Lot 11 and each of the C other Lots through and over the same into the Church Road but such right of way would only belong to the respective purchasers on the determination of the existing tenancies and for that purpose each purchaser (except the purchaser of Lot 3 which was vacant) would have to determine at the earliest possible period the tenancy of the lot purchased by him and that the respective purchasers were on the completion of their respective purchases to forth- D with at the earliest possible period consistent with the determination of the existing tenancies remove the 15 ft. of end garden wall and form the beforementioned right of way. . . ."

The deed then contained a conveyance of number 320, Essex Road,

"together with such right of carriage way into and over the pieces of ground E marked brown at the rear of the premises Lot 1 on the said plan into Church Road as in the said conditions mentioned"

to James Frederick Corben in fee simple

"subject nevertheless as to the part thereof coloured brown on the said plan to a right of way for the owners of the messuages, and premises numbers 322, 324, 326, 328, 330, 332, 334, 336 and 338, Essex Road aforesaid as in the said F conditions of sale mentioned."

Lot 3 at the sale (number 322, Essex Road) was sold to John Edwin Corben and was conveyed to him by an indenture also dated Feb. 2, 1871. This deed was in like form as to recitals and otherwise with the above-mentioned conveyance of number 320. Lot 1 at the sale (numbers 316 and 318, Essex Road) was sold to G James Jay, and was conveyed to him by an indenture dated Feb. 3, 1871. This deed contained a recital of the condition identical with that contained in the conveyances of Lots 2 and 3, and conveyed the property to the purchaser in fee simple "subject as hereinbefore mentioned or referred to"; but as this lot abutted on Church Road and was intended to become a servient tenement only and not a dominant tenement in respect of the strip of land 15 ft. wide, there was, of course, H no grant to this purchaser of any right of way. The conveyances of the other lots (4 to 11) are not in evidence, but it may be presumed that they were in like form with the conveyances of Lots 2 and 3. All the tenancies of the several lots expired within a year and a half after the sale.

The subsequent history, so far as the paper title is concerned, of Lots 2 and 3 was as follows: On April 12, 1871, Lot 2 was conveyed by James Frederick Corben I to John Edwin Corben in fee simple with and subject to the right of way mentioned in the above conveyance of Feb. 2, 1871. On May 19, 1909, John Edwin Corben leased Lot 3, except the strip of land 15 ft. wide at the rear thereof, but together with a right of way over that strip, to Davis and Greenland for three years, the lessees covenanting on being required to do so by the lessor to wall off the strip of land from the garden and make and form a roadway upon it. On Aug. 11, 1911, John Edwin Corben having died, his executrix conveyed Lots 2 and 3 to the appellant, George Swan, in fee simple with and subject to the right of way. The history so far as title is concerned of Lot 1 was as follows: On Oct. 21, 1873,

James Jay leased that lot, subject to the right of way to the owners and occupiers of Lots 2 to 11, to William George Swan (the father of the appellant) for fifty years from June 24, 1872, the lessee covenanting to keep the site of the roadway on the demised land in good repair and, if required, to pay a fair proportion with the owners and tenants of the other lots using the roadway towards keeping it in good repair and towards erecting and maintaining gates at the entrance from Church Road, and also covenanting that the roadway should be used as a private roadway only for the owners and occupiers of Nos. 320 to 338, Essex Road. On July 25, 1904, William George Swan having died, his executors assigned this lease to the appellant. James Jay died in July, 1895, having demised the freehold of Lot 1 to the respondent.

Notwithstanding the elaborate provisions contained in the deeds of 1871 for the formation and use of the proposed roadway at the rear of numbers 316 to 338, Essex Road, no such roadway was in fact (until the appellant's proceedings in the year 1922 to be hereafter mentioned) either formed or used, nor is there any evidence that any person interested in any of the several lots ever desired or requested that it should be formed or made any attempt to use it as a means of access to his premises. The walls dividing the several lots, including those parts of them which ran across the 15 ft. strip to the eastern boundary of the land, remained intact, and in places where they fell down were rebuilt or replaced by fences. The wall dividing the southern end of the proposed roadway from Church Road was not breached; and although the level of the 15 ft. strip which it had been proposed to form into a roadway was 6 ft. below the level of Church Road, no attempt was made to form a gradient by which carriages could have passed into or from Church Road. As to the reason why all the purchasers of the eleven lots so refrained from action there is no evidence. It may be conjectured that having regard to the small size of the houses and the existence of sufficient access from Essex Road they were unwilling to incur trouble and expense in bringing all the purchasers into line, getting the road formed, made up and graded, and erecting new walls or fences for the protection of their gardens, and accordingly preferred to keep the strips of land which would have been required for the road in their own undisturbed possession and enjoyment. But however that may be, the fact is, that from the years 1871 until the year 1922—that is to say, for a period exceeding fifty years—the road remained unformed and unused. There is one other circumstance to be mentioned. In the year 1883 the appellant's father, W. G. Swan, the lessee of Lot 1, erected some stabling upon a part of that lot adjoining the site of the proposed roadway; and in the course of so doing he deposited a quantity of soil taken from the excavation made for the stables on the site of the roadway where it crossed the premises demised to him, and so raised the surface of that strip of land to the level of Church Road. No attempt was then made to level or grade the strip or to open a gate from it into Church Road; and the effect of this proceeding was to fill up the space between the northern and southern walls of Lot 1 where they ran across the 15 ft. strip so that there was a drop of 6 ft. from that strip into Lot 2, and the wall between Lots 1 and 2 at the rear became a retaining wall instead of a dividing wall. At some later date, probably about 1918 or 1919, the appellant, the owner of Lot 2, put a row of stakes into the ground on his side of this retaining wall, close together, and to a height above the top of that wall about 18 in., as a means of preventing accidents, having regard to the drop. It may be mentioned, though little (if anything) turns upon it, that at or about the same date the appellant deposited a quantity of sand, which had been used in protecting the premises from damage by enemy aircraft, on the strip of land at the back of Lot 2.

It remains to state the circumstances giving rise to this action. In the year 1919 the appellant proposed to build a new garage on the rear parts of Lots 2 and 3, and deposited plans for that purpose. These plans showed the proposed garage as to be built right across the strip of land 15 ft. wide at the back of the appellant's premises in such a manner as to block any possibility of the strip being used as a roadway by the occupiers of the premises to the north of it. For some reason the

appellant did not proceed with the building at that time; but he appears to have adhered to his intention of building a garage, for on July 14, 1922, ten days before the expiration of his lease of Lot 1, he made a breach in the wall separating that lot from Church Road and erected gates there, and caused a car to be driven through those gates and over the strip of land on Lot 1 into Lot 2. This was obviously done, not with any desire to conform with the covenant contained in his lease, but with a view to asserting a right of way from Church Road into Lot 2, of which he was the owner. On the termination of the lease of Lot 1 the respondent, having entered as the reversioner on that lot, blocked up the gates opened by the appellant into that lot and erected a wall across the strip of land on the boundary of Lots 1 and 2, so preventing any attempt to exercise any right of way over the strip of land. Thereupon the appellant commenced this action to establish his right of way. The action was heard by LAWRENCE, J., who held that, having regard to the fact that the roadway over which the right of way was claimed had never been formed or used and the fences had remained as in 1871, and having regard also to the filling up of the strip on Lot 1 by the tenant of that lot, he must infer an abandonment of the right of way long before 1922, and he accordingly dismissed the action. The plaintiff having appealed to the Court of Appeal, that court by a majority (WARRINGTON and SARGANT, L.JJ.; POLLOCK, M.R., dissenting) affirmed the judgment of LAWRENCE, J., and thereupon the present appeal was brought. I do not doubt that LAWRENCE, J., and the Court of Appeal came to the right conclusion. Even if the right of way claimed had been effectively granted to the appellant's predecessors in title in the year 1871, the non-user of the way for upwards of fifty years, coupled with the fact that throughout that time the appellant and his predecessors acquiesced in the continuance of the walls running right across the proposed roadway and (since 1883) in the additional obstruction caused by the filling up of the strip of land on Lot 1, would, according to the decisions in *Moore* v. *Rawson* (1), *Bower* v. *Hill* (2) and *R.* v. *Chorley* (3), have been good ground for inferring a release or abandonment of the easement. But the present case is not of that simple character. The conveyances of Lots 2 and 3 do not contain a clean grant of the right of way claimed, but only a grant of such right of way as was mentioned in the conditions of sale; and in the same way Lot 1 was granted subject, not to a right of way, but to the provisions of the conditions of sale. There was no covenant by the several purchasers with the vendors to pull down the walls and form a roadway, nor was there any deed of mutual covenants entered into between the several purchasers. The effect of the transactions was at the most to create a contractual relation between the several purchasers and the vendors, under which the purchasers might perhaps have been called upon within a reasonable time after the execution of the conveyances and the determination of the existing tenancies to clear the land and form the road; but until that had been done there could be no effectual creation of the easement of passage. In these circumstances it appears to me that the lapse of time is fatal to the appellant's claim. For the period of fifty years or thereabouts no person sought to enforce the contract, if contract there was, or to enter upon the enjoyment of the easement; and this being so, it appears to me that it must inevitably be inferred that the arrangement made in 1871 has by common consent been released or abandoned and cannot now be revived. The fact that in the lease of Lot 3 in 1909 and the conveyance of Lots 2 and 3 in 1911 the right of way is referred to as still existing does not appear to me to militate against the above conclusion. In each of those cases, as SARGANT, L.J., pointed out, the transaction was solely between persons interested in the particular tenement in question, and according to the ordinary practice of conveyancing, a reference would be made to any right of way which might be found upon the paper title. Further, these deeds were executed upwards of thirty years after the agreement to grant the right of way, and therefore at a period when the right must be deemed to have been already abandoned. For these reasons I am of opinion that the decision of LAWRENCE, J.,

and the Court of Appeal was right, and accordingly that this appeal fails and should be dismissed with costs.

VISCOUNT FINLAY.—The action in this case was brought to obtain a declaration of an alleged right of way in favour of the plaintiff (the appellant) as owner of two plots of land over a plot belonging to the defendant (respondent). The plaintiff's plots are Lots 2 and 3 on the Plan No. 1 annexed to the appendix, and the defendant's plot is Lot No. 1 (Nos. 316 and 318) on the same plan. The right of way is claimed over land coloured brown on the plan at the back of the defendant's plots, and would give access to Church Road. Church Road runs into Essex Road, Islington, nearly at right angles, and all these lots are situate in the angle between this road and Essex Road, on which latter they front.

The case came before LAWRENCE, J., in the first instance. He decided in favour of the defendant on the ground that there had been an abandonment by the plaintiff of the right of way alleged. His decision was affirmed by the majority of the Court of Appeal (WARRINGTON, L.J., and SARGANT, L.J.; POLLOCK, M.R., dissenting). Both the plaintiff's and the defendant's tenements form part of a piece of property which was sold by auction in 1871 in eleven lots, all of which are shown on the plan to which I have already referred. There were separate conveyances of the different lots. One of the conditions at this sale by auction was that the part coloured brown on the plan was intended to form a right of way from the back gardens of the houses into Church Road, and that the lots were to be sold subject to a right of carriageway in the owners of each of the lots to Church Road over the intervening lots. It was further provided in the conditions that the respective purchasers should with all possible despatch form the right of way and remove all the existing fences dividing up the strip coloured brown on the plan. Each of the conveyances contained a grant of the right of way into Church Road as in the conditions mentioned. The conveyances were executed in 1871, but nothing was done to make the roadway on the land coloured brown, and the exercise of the right of way was totally impracticable, as none of the fences between the different lots were removed, and the wall separating Lot 1 from Church Road made access to that road impossible. This state of things continued to exist from 1871 down to 1918. In 1918 the plaintiff was lessee of the defendant's premises under a fifty years' lease expiring in 1922, which had been assigned to the plaintiff on July 25, 1904, and between these dates, from 1904 to 1922, the plaintiff was in possession of the premises, Lot 1, now the defendant's, as well as of his own Lots 2 and 3. At the end of 1918 or the beginning of 1919 the plaintiff raised the level of the 15 ft. strip at the back of the premises, of which he was lessee, so as to correspond with the level of the strip at the back of Lots 2 and 3 on the plan. In 1919 the plaintiff appears to have conceived the idea of erecting a garage upon Lot 2 and of forming a carriage road which would give communication between the garage and Church Road. He proposed to do this by the exercise of the right of way supposed to have been granted by the conveyance in 1871 and which he conceived would be available for him when his lease of Lot No. 1 should determine in June, 1922. He demolished the wall between Lot No. 1 and Church Road and put up a gate opening on Church Road. The defendant in his turn erected a wall across the strip over which the right of way was claimed, and this action was brought, on Oct. 20, 1921, to have a declaration in favour of the plaintiff of the right of way.

In both the courts below the case was dealt with on the footing that a right of way had been created as an incorporeal hereditament by the various conveyances in conformity with the scheme under the condition at the auction. Both courts held (the Master of the Rolls dissenting) that this right of way had been abandoned and thereby extinguished. I do not desire to throw any doubt upon the correctness of this view, but it is not necessary to consider it, inasmuch as early in the argument in your Lordships' House it became apparent that no right of way had, in fact, ever come into existence. The scheme contemplated that it should come

into existence when the road at the back of the premises had been made and the other provisions of the conditions had been complied with. As this never took place, the right of way remained a mere possibility of the future. After so great a lapse of time it would be impossible for the owners of any of these lots to assert as against the owners of other lots a right to have the scheme carried out by making the road and keeping it open for traffic as had been intended. A period of fifty years had run before the attempt in 1922 to assert the right by the owner of Lots 2 and 3 as against Lot 1. I assume for this purpose, without deciding the point, that if sufficiently prompt action had been taken the purchaser of any one lot might have asserted in some form of proceeding as against the owners of the other lots a right to have the scheme including the road carried out. But more than twenty years had elapsed before unity of possession was established in 1904, and all right of action was gone even if any such proceedings could be regarded as proceedings to enforce a contract under seal. Right of way there was none. There was at the outside merely a contract that certain things should be done and that then there should be a right of way. In the present case the right is claimed merely for the owner of Lots 2 and 3. Questions might arise whether if the scheme for the road and right of way were to be carried out, it would not be necessary that it should be carried out as a whole, but this it is unnecessary to consider. This claim seems to me to be now quite incapable of enforcement, and the only rational conclusion is that it has been abandoned by common consent for many years. In my opinion, the appeal should be dismissed with costs.

LORD SHAW.—I concur. There is at the back of each of a row of houses in Essex Road, Islington, certain vacant ground, and in the year 1871 these houses with the background to each were exposed for sale under certain conditions. These clearly show that the contention was that a strip of ground was to be formed by dedicating 15 ft. in breadth of each back plot so as to form a continuous way in the nature of a blind alley, giving access from Church Road to the back land of each house. This intention was expressed in the conditions of sale and these conditions of sale were imported by reference and narrative into, it may be assumed, the conveyances of all the plots. So far as the title deeds are concerned, important questions might have arisen between the respective owners. Speaking generally (except with regard to the end plot) each tenement purported to become servient to the others further away from Church Road and to become dominant to the others nearer to Church Road in the easement of a right of way over the 15 ft. strips as described. A question that might naturally have arisen was whether such purported rights and obligations conferred and imposed by the common author among the grantees inter se involved such mutuality of right and obligation as could be enforced by law. For it is to be observed that the right purported to be created was not in an existing right of way over solum which was accessible, but only in a right of way which could be used if existing obstructions were removed and the solum to the breadth designed had been lifted about 6 ft. or thereby in height, so as to enable access to be given on, or approximately on, the level of Church Road, which would be the exit of the alley. And in view of these facts, coupled with the non-user afterwards mentioned, it is unnecessary to enter upon such questions as might have arisen on the title as such. Agreeing with your Lordships who have preceded me, I am clearly of opinion that it is now too late to attempt to maintain such a right.

The deed of conveyance of 1871, Sharp to Corben, may be presumed to afford an example of the conveyances of all the lots; it refers to the conditions of sale, to the intention to form a right of way from the back garden of each house into Church Road, and to the fact that the lot would be sold subject to and with the benefit of such right of way as I have indicated. The important clause is thus narrated:

> "The respective purchasers were on the completion of their respective purchases to forthwith or at the earliest possible period consistent with the

determination of the existing tenancy remove the 15 ft. of end garden wall and form the before-mentioned right of way,"

and the grant is made of the parcel of ground with the messuage or tenement thereon,

"together with such right of carriageway into and over the piece of ground marked brown at the rear of the premises Lot 1 on the said plan into Church Road as in the said conditions mentioned."

I am of opinion that these conveyances did not purport to create the incorporeal hereditament of an easement de plano. The conveyances in my view contain a grant sub conditione. That condition was suspensive and of a twofold character. In the first place, the various division walls and fences which would have been obstructive to the right of way would have to be removed; in the second place, the level of the roadway would have to be filled up as described. Until these things were done, no usable road could come into existence.

But, further, it is most important to observe that each owner became bound in the year 1871 at the expiry of the existing leases of the ground—and they all expired in a year or two thereafter—to purify the twofold condition that I have described, and they were under obligation to remove the fences and raise the land. The grant having thus been made both sub conditione and sub obligatione, that condition was, to speak of the period of over 50 years, namely from 1871 to 1922, never purified; and that obligation was never fulfilled. The right to compel its fulfilment after such a long lapse of time in order to create the physical basis and conditions of what after such creation would then, and not till then, become an incorporeal hereditament, seems to me to have been long lost, and whether founded on contract or on covenant, to be incapable, after such a lapse of time, of enforcement. The case is not one, I repeat, of the exercise of a right the physical conditions of which are in existence so as to enable the right to be exercised. All the arguments as to non-use of a subject which is res mere facultatis can find no place in the present case. For there was no res, no right, and the physical basis of the right, including the very construction of the road over which the right of way was to run, has never yet been in existence. On that simple ground I think that the judgment of LAWRENCE, J., and the majority of the learned judges of the Court of Appeal should be affirmed.

LORD WRENBURY (read by LORD CARSON.)—If in 1871, when the conveyances were executed, the grant to each purchaser had been a grant of a right of carriageway to be enjoyed in praesenti over a strip of land over which it was physically possible for a carriage to pass, a question would have arisen which is not the question in this case. In that supposed case the question might have been whether non-user for fifty years was evidence of abandonment of an incorporeal hereditament created by deed. The material inquiry would have been whether the grantee of the right had in that state of facts the intention to renounce the right. The facts here are that the grant to each purchaser was a grant of a right of carriageway to be enjoyed in futuro over a strip of land upon which work had to be done before a carriage could pass over it. There were existing tenancies of the several plots over which the servitude was to be created, and until their expiration the vendor could not give the right of way in question. There were dividing walls across the brown strip between each two lots—there was a wall at the exit into Church Road—and the level of the brown strip was 6 ft. below the level of Church Road. Until the tenancies expired, until the obstructions above mentioned were removed, and until the gradient up to Church Road had been provided, there could be no carriageway such as was the subject of the grant. In other words, it was a condition precedent to the existence of the way that something should first be done affirmatively. There is, for the present purpose, an important difference between an obligation to do something affirmatively and an obligation to suffer something passively. The latter is a mere servitude. The

A former is not. The question here is whether acquiescence for fifty years in something not being done which there was, as I will assume, a contractual obligation to do, is an abandonment of the right to require that it be done. This question is more easy than the supposed case above stated.

The frame of the deed upon which the question arises is peculiar. It does not by any express words create an obligation in the purchasers to do the works necessary B to be done before the defined carriageway can exist. The deed in favour of the plaintiff's predecessors in title recites, and the deeds in favour of the purchasers of the other lots in like manner recited, conditions of sale, which included a condition that the part coloured brown on the plan was intended to form a right of way from the back garden of each house into the Church Road and that the lots would be sold subject to and with the benefit of such right of way, and that the C brown land would be included in the purchase of each lot, but subject to a right of carriageway to the owner of each lot through and over the same into Church Road. And the purchasers were forthwith at the earliest possible moment consistent with the existing tenancies to remove 15 ft. of each garden wall and form the beforementioned right of way. So far this was recital only. Each purchaser's deed then granted a right of carriageway over the brown land into Church Road "as in the D said conditions of sale mentioned," and the habendum is to have and to hold (subject as to the brown land to a right of way for the owners of the other lots as in "the said conditions of sale mentioned") to the purchaser. It is unnecessary to consider whether and how one purchaser could as against another purchaser have compelled the performance of the works necessary to create the right of way. I will assume that upon the principle of *Spicer* v. *Martin* (4) the purchaser of one E lot could successfully have asserted that this was a scheme whose provisions he could enforce. Assuming this, the case is one not of non-user merely of a right but a case of acquiescence in the non-performance of acts (which I am assuming to be obligatory) necessary to be done before the right can possibly be exercisable. In that state of things the doctrine of non-user to be found in such cases as *Ward* v. *Ward* (5), *Crossley & Sons, Ltd.* v. *Lightowler* (6), and the other like cases F which have been cited is not applicable. The facts here are that neither the plaintiff's predecessor in title nor the plaintiff, nor any owner of any of the plots, ever during fifty years sought to do or called on his neighbours to join with him in doing what was necessary (viz., the removal of the walls and the making a gradient to reach the higher level of Church Road) to make possible the carriageway which had been granted to him. This was, I think, an abandonment of the whole G scheme. There never existed a state of things in which the right of carriageway could exist or be exercised. There was acquiescence for fifty years in abstention from doing or enforcing the acts necessary to allow of the existence or exercise of the right of way. This, I think, was evidence of intention to renounce all that which the deed of 1871 had directly or by implication provided for the creation of the way over which the right of way was to extend. For these reasons I think H that the action was rightly dismissed and that this appeal should be dismissed with costs.

LORD CARSON concurred.

Appeal dismissed.

Solicitors: *Stanley Evans & Co.*; *Davey & Pearce.*

I [*Reported by* W. C. SANDFORD, ESQ., *Barrister-at-Law.*]

A

R. *v.* HARRIS

[Court of Criminal Appeal (Lord Hewart, C.J., Avory and Salter, JJ.), December 16, 1924]

[Reported 94 L.J.K.B. 164; 132 L.T. 672; 89 J.P. 37; 41 T.L.R. 205; 27 Cox, C.C. 746; 18 Cr. App. Rep. 157] B

Criminal Law—Possession of housebreaking implements by night—Need to prove both finding and possession by night, and possession before arrest—Larceny Act, 1916 (6 & 7 *Geo.* 5, *c.* 50), *s.* 28.

To constitute the offence of being found by night in possession of housebreaking implements under s. 28 (2) of the Larceny Act, 1916, both finding and possession must be by night. The possession must be physical, not constructive, and it must be by a free man. Possession after arrest does not satisfy the requirements of the statute. C

Criminal Law—Practice—Plea of Not Guilty to first indictment—Prisoner invited to plead to second indictment—Previous conviction recited—Presence of jurors who are to try prisoner on first indictment. D

When a prisoner has pleaded Not Guilty to an indictment and is about to stand his trial, he ought not to be invited to plead to another indictment reciting previous convictions in the presence of jurors who are about to try him on the first indictment.

Notes. Referred to: *R.* v. *Lester and Byast* (1956), 39 Cr. App. Rep. 157.

As to the offence of being found armed by night or in the possession of housebreaking implements, see 10 Halsbury's Laws (3rd Edn.) 808, para. 1563; and for arraignment of accused, see ibid., p. 401, para. 727; and for cases see 15 Digest (Repl.) 1138, 1139; 14 Digest (Repl.) 576, 577. For the Larceny Act, 1916, s. 28, see 5 Halsbury's Statutes (2nd Edn.) 1028. E

Appeal against conviction and sentence. F

The appellant was convicted at Chelmsford Assizes of being found by night in possession of housebreaking implements under s. 28 (2) of the Larceny Act, 1916, and sentenced to five years' penal servitude. The material facts were that just about 9 o'clock at night a police officer saw the appellant and another man sitting inside a shelter, and observed that the men had something between them, which they appeared to be trying to hide. On being asked what they were doing, both men ran away. The officer arrested the appellant at some little distance from the shelter, took him back there, and then found the implements. There had been some discrepancy in the evidence as to whether it was before or after 9 o'clock when the police officer first saw the appellant, and Swift, J., directed the jury: "It does not matter whether it was before or after 9 o'clock when the officer first saw the men. The point is, what time was it when the officer took the prisoner back to the shelter and discovered the housebreaking implements." After the appellant had pleaded not guilty to this indictment, he was immediately and before trial called on to plead to a second indictment, charging him with loitering under s. 7 of the Prevention of Crime Act, 1871. This indictment recited two previous convictions of the accused, and the jurors, who were about to try him on the first indictment, were then present in court. G H I

St. John Hutchinson for the appellant.
St. John Morrow for the Crown.

The judgment of the court was delivered by

LORD HEWART, C.J.—The real question in dispute at the trial in this case was a question of time. The offence with which the appellant was charged was under s. 28 of the Larceny Act, 1916. That section provides that

"Every person who shall be found by night . . . having in his possession without lawful excuse . . . any . . . implement of housebreaking shall be guilty of a misdemeanour. . . ."

Section 46 (1) defines the expression "night" as being the interval between 9 o'clock in the evening and 6 o'clock in the morning on the next succeeding day.

On Oct. 21, 1924, a police officer was on duty on the Western Esplanade, Westcliff, as he said, just after 9 p.m. As he was passing a shelter he saw two men sitting in it. He observed that they had something between them on the seat which they appeared to be trying to hide. He asked them what they had got, and both of them jumped up and ran away. The officer caught the appellant just outside the shelter. There was a struggle and the appellant was arrested. The officer took him back into the shelter and on the seat he found a rope ladder and a jemmy. The officer thereupon took the appellant to the police station, which was 1283 yards away, about ten minutes' walk. The officer said that from the time he first saw the appellant until the time he left the shelter was not more than five minutes. Another police officer, named Lindsay, met the first police officer and the appellant at about 9.15, and it was between 9.17 and 9.18 when they got to the police station. The police sergeant in charge said that it was at 9.15 that they entered the station, and another police officer said that it was 9.14. On these facts it may well be that there was some evidence that the appellant was found by night in the possession by night of housebreaking implements, but there was also no little evidence the other way. It was of crucial importance that the minds of the jury should be directed to the real problem. The judge, in summing up, said:

"It does not matter whether it was 9 p.m. when the officer first saw the men in the shelter or not. The point you must direct your minds to is: What time was it that the police officer arrested the appellant and took him back to the shelter, and then for the first time discovered the housebreaking implements? If that was after 9 p.m., I tell you, as a matter of law, that that was the moment in which he was found in possession of the things."

That direction, unfortunately, was incorrect. To prove the offence with which the appellant was charged it must be shown that he was found by night in possession by night of the housebreaking implements. In the direction which Swift, J., gave to the jury he seems to have said that it might be sufficient if a man were found by night who had been by day in possession of housebreaking implements. In view of that direction and the fact that there were materials on which the jury might have come to the conclusion that the possession proved was possession by day, it is apparent that this conviction cannot stand. On the true construction of s. 28 (2) of the Act of 1916 the finding of the defendant and the possession by him of the housebreaking implements must both be by night and the possession be possession by a free man. Possession after arrest does not satisfy the statute. If it did, a person might be arrested by day, and then, after 9 p.m., being in custody, might be found to be in possession of housebreaking implements and charged under the section. The judge has invited the attention of this court to another section of another statute where criminal possession is defined for the purposes of that statute, namely, s. 15 of the Forgery Act, 1913. In the opinion of this court, that section deals with a different subject-matter. The possession referred to in s. 28 (2) of the Act of 1916 is physical possession and not constructive possession.

It is right that I should also refer to what took place on the arraignment of the appellant. There were two indictments against him, and the second of them charged him that he was found in the shelter waiting for an opportunity to commit burglary, and that on April 13, 1920, at the Central Criminal Court, he was convicted on indictment of shopbreaking, and that a previous conviction for felony was then proved against him. The appellant had to answer to that indictment. We are told by counsel that there can be no doubt that the second indictment was

put to the appellant before his trial on the first indictment in the presence of those who, afterwards, as jurors, had to try him. That practice is wrong. When a person has pleaded "Not Guilty" to an indictment, and is about to stand his trial, he ought not to be invited to plead to another indictment, which recites a previous conviction in the presence of those who, as jurors, will have to try him.

Appeal allowed.

Solicitors: *H. Flint & Co.*; *Director of Public Prosecutions.*

[*Reported by* T. R. F. Butler, Esq., *Barrister-at-Law.*]

Re OLDHAM. HADWEN *v.* MYLES

[Chancery Division (Astbury, J.), November 14, 17, 18, 1924]

[Reported [1925] Ch. 75; 94 L.J.Ch. 148; 132 L.T. 658; 69 Sol. Jo. 193]

Will—Mutual wills—Identical terms—Husband and wife—Each given absolute interest—In case of lapse property to be distributed in similar ways—Fresh will by wife after accepting benefit under husband's will—Implication of trust created by wills so as to bind survivor.

In 1907 a husband and wife made mutual wills in identical terms, mutatis mutandis, under each of which the survivor was to take the property absolutely. In each will it was provided that, if the other party died in the lifetime of the party making the will, the property was to be distributed in similar ways. Legacies were given to the same persons in each will, and the residue was to be divided between the same persons in the same proportions, these persons being relatives of the husband. The husband died in 1914, without either will having been revoked. His estate was sworn at £117,000, while the wife's estate was about £10,000. The wife proved the will and took possession of the husband's estate. In 1921 the wife re-married, and on her marriage she made another will entirely different from that of 1907, whereby she gave her second husband a life interest in half her estate, and the residue mainly to her own relatives. One of the husband's relatives, a residuary legatee under the will of 1907, claimed that, under the mutual wills, the wife having taken the benefit of the husband's will, a trust was created in favour of the beneficiaries under her will of 1907.

Held: in the circumstances there was insufficient evidence for any inference to be drawn from the wills of 1907, and so the wife was entitled to dispose of the property as she pleased, and the plaintiff's claim must fail.

Dufour v. *Pereira* (1) (1769), 1 Dick. 419, explained and distinguished.

Notes. Approved: *Gray* v. *Perpetual Trustee Co., Ltd.*, [1928] All E.R.Rep. 758. Distinguished: *Re Green, Lindner* v. *Green*, [1950] 2 All E.R. 913.

As to joint and mutual wills, see 34 Halsbury's Laws (2nd Edn.) 17–19; and for cases see 44 Digest 180–182.

Cases referred to:

(1) *Dufour* v. *Pereira* (1769), 1 Dick. 419; 21 E.R. 332, L.C.; 44 Digest 181, *105*.

(2) *Lord Walpole* v. *Lord Orford* (1797), 3 Ves. 402; 30 E.R. 1076, L.C.; 44 Digest 178, *75*.

(3) *Denyssen* v. *Mostert* (1872), L.R. 4 P.C. 236; 41 L.J.P.C. 41; 8 Moo.P.C.C. N.S. 502; 20 W.R. 1017; 17 E.R. 400, P.C.; 44 Digest 181, *104ii*.

(4) *Stone* v. *Hoskins*, [1905] P. 194; 74 L.J.P. 110; 93 L.T. 441; 54 W.R. 64; 21 T.L.R. 528; 44 Digest 181, *107*.

Also referred to in argument:

French v. *French*, [1902] 1 I.R. 172.

In the Estate of Heys, *Walker* v. *Gaskill*, [1914] P. 192; 83 L.J.P. 152; 111 L.T. 941; 30 T.L.R. 637; 59 Sol. Jo. 45; 44 Digest 182, *111*.

Page v. *Cox* (1852), 10 Hare, 163; 68 E.R. 882; 44 Digest 184, *131*.

Witness Action for a declaration.

In 1907 Frederick Weldon and his wife, Helen Maria Weldon, of whose marriage there was no issue, made wills in favour of each other in substantially the same terms. By his will dated Jan. 4, 1907, Frederick Weldon appointed his wife sole executrix and trustee, and after giving two legacies, amounting together to £400, and a life annuity, devised and bequeathed his residuary real and personal estate to his wife absolutely if she should survive him. If his wife should die in his lifetime, or at the same time as himself, he appointed John Eustace Anderson and Herbert Toomer executors and trustees of the will, gave them each a legacy of £500, and devised and bequeathed to them his residuary real and personal estate upon trust for sale and conversion, and for payment of funeral and testamentary expenses, debts and legacies, and to hold the residue upon certain trusts for his children. In default of children he gave a number of legacies to his own relatives, to mutual friends of himself and his wife, and to his wife's relations, the amount of the legacies to the wife's relations being about £6,000, and directed the residue to be divided into twenty parts and held in trust as to nineteen of such parts for certain named relations of his own, one of whom, Anna Mary Hadwen, was to have three-twentieths. He directed that his trustees should deal with the other twentieth of the residue in such manner as he might thereafter direct in any letter or memorandum signed by him and deposited with his said will, or which might be left by him and come into the hands of his trustees within one month of his decease. The wife's will, also dated Jan. 4, 1907, was, with the exception of the two legacies of £400 and the life annuity, in exactly the same terms mutatis mutandis as the husband's will. She appointed her husband sole executor and trustee and sole beneficiary if he should survive her, and if he should predecease her, or die at the same time, she appointed Anderson and Toomer executors and trustees with the same provision as to her children. In default of children she gave the same legacies as in the husband's will, and directed the residue to be divided in the same manner and held in trust for the same persons as in the case of the husband's residue, and the will contained the same provision as to one-twentieth of the residue being dealt with according to a memorandum or letter.

Frederick Weldon died on Sept. 9, 1914, without having revoked or altered his will, which was duly proved by Helen Maria Weldon, who administered the estate and paid the legacies of £400, the life annuity having lapsed by the death of the annuitant in the lifetime of Frederick Weldon. No letter or memorandum was found. The estate of Frederick Weldon was proved at £117,000, the value of the separate estate of his wife at that time being about £10,000. Mrs. H. M. Weldon had not revoked or altered her will of 1907 in her husband's lifetime. She made one or two wills after her husband's death, which departed very slightly from her will of Jan. 4, 1907. She took possession of and enjoyed the benefit of her husband's estate. On Dec. 1, 1921, Mrs. H. M. Weldom, being then sixty-four, married Gerald Oldham, who was more than thirty years her junior. The same day, after the marriage, she made a will, the provisions of which were entirely different from those of the will of 1907, and thereby gave to Gerald Oldham a life interest in one-half of her estate, and subject thereto gave her estate mainly to her own relatives. She appointed Charles Derwentwater Myles and Edmund Lawson her executors. Mrs. H. M. Oldham died on April 7, 1922, without having revoked or altered the last-mentioned will, which was duly proved, her estate being sworn at £108,000, largely consisting of real estate which had belonged to Frederick Weldon,

and also of personal estate which had formed part of his estate. As claims were made by persons interested under the mutual wills, her executors issued an administration summons, and in their affidavit stated that all her estate, except about £10,000, was derived from Frederick Weldon. The executors, under the direction of the judge, gave notice to all claimants under the will of 1907 that unless an action to establish the claims were brought within six weeks they would distribute the estate on the footing of the will of 1921. Anna Mary Hadwen brought this action against the executors claiming a declaration that a valid trust was created by the will of Mrs. H. M. Weldon of Jan. 4, 1907, in favour of the beneficiaries therein named, and that the executors were the trustees of the said trust. The solicitor who drew the mutual wills was dead, and there was no evidence as to any agreement between husband and wife other than a few letters written by the husband to the solicitor at the time of the preparation of the wills.

Farwell, K.C., and *Dighton Pollock* for the plaintiff.

Luxmoore, K.C., and *Gavin Simonds, K.C.*, for the defendants.

Archer, K.C., and *Beebee* and *E. F. Ball* held watching briefs for parties interested.

ASTBURY, J.—This is an action which raises a question of more than usual interest. The plaintiff seeks to enforce what she alleges to have become an enforceable trust by the making of two mutual wills by husband and wife in circumstances that I will detail.

On Jan. 4, 1907, the husband, Frederick Weldon, being then fifty-seven years of age and his wife forty-nine, and after having been married for twenty-nine years without issue, each made a will in substantially identical terms. The husband died on Sept. 9, 1914, without having revoked or altered his will, which was proved by the wife, the sole executrix and trustee. His estate was sworn for probate at £117,000 odd. On Dec. 1, 1921, his widow, then sixty-four years of age, married Gerald Oldham, many years her junior. The same day she made a new will, and died four months afterwards on April 5, 1922, without having revoked it, and it was duly proved by the defendants, her executors. I have no definite evidence as to the value of the wife's assets at the date of her will of 1907; but in the administration action of her estate the defendants state that the whole of the property of which she died possessed, except £10,000, was acquired under F. Weldon's will. Her estate was sworn at £108,000 odd. Under the two mutual wills, except for a few small and irrelevant gifts, the husband and wife made depositions of their property in practically identical terms, under what must, in my opinion, be regarded as an agreement to do so. I will take as sufficient for the purposes of this action the general character of those dispositions in Frederick Weldon's will. He gave the whole of his property to his wife absolutely if she survived him, and appointed her executrix and trustee. If she died in his lifetime he appointed fresh executors and trustees, to whom he devised and bequeathed the whole of his real and personal estate upon trust for sale and conversion, and to stand possessed of the proceeds upon trust for his children, if any, and in default of children upon trusts which I will state shortly. [His Lordship then stated the provisions of the will in default of children, and continued:] Mrs. Weldon's will of the same date contained an exactly similar devise and bequest of her property to her husband and appointed him sole executor and trustee. In the event of his death in her lifetime she appointed the same two persons as in the husband's will executors and trustees, gave similar legacies and disposed of her residue in a similar way, reserving a similar power of disposition of one-twentieth by letter or memorandum. Certain evidence has been produced as to how these wills came to be made in the form of letters between Mr. Weldon and his solicitor, Mr. Anderson, which refers to interviews between Mr. Weldon and Anderson when instructions for the wills were given, and state particulars of the legacies. In September, 1913, Mrs. Weldon writes to Anderson on behalf of her husband, who was ill, and asks him to send a copy of the wills and inquires: "Are there likely to be any complications?" Ander-

A son replied: "I feel quite certain there can be no complications." That is the only evidence of the circumstances leading up to the making of the wills of 1907, as Anderson died some years ago. The question is, whether on that evidence and substantially from the fact that the husband and wife agreed to make these wills and did make them, and from their contents, I am entitled or bound to hold that, in the circumstances, the wife having taken the benefit of the husband's will, a B trust was created and attached to the property taken by the wife, which is now enforceable by persons to whom residuary gifts were given by what is described as the second part of the wife's will of Jan. 4, 1907. After her husband's death Mrs. Weldon, having acquired all his estate, made certain further testamentary dispositions, which were shortly as follows: On Sept. 16, 1914, a few days after her husband's death, she made a will with the assistance of Anderson, but there is C no evidence that that will was not substantially in accord with the mutual will of 1907. Anderson died in September, 1915, and on Nov. 30, 1915, Mrs. Weldon made another will which appears to have been much the same as the will of 1907, both as to legacies and the disposition of the residue. Under her instructions the will of 1907 was subsequently destroyed, but I hold as a fact that its execution and contents have been proved by sufficient satisfactory evidence. On Feb. 20, 1921, D she made another will in which the residue was divided into eighteen parts, and one of her own relatives took a share of the residue, but otherwise it appears to have been in accordance with the will of 1907. Her present will, made on Dec. 1, 1921, departed entirely from the provisions of the will of 1907, giving to her second husband, Gerald Oldham, a life interest in one-half of her estate, and, subject to that, leaving her estate almost, if not entirely, to her own relatives.

E The plaintiff is one of Frederick Weldon's relatives and a residuary legatee under Mrs. Weldon's mutual will of 1907, and she claims a declaration that a valid trust was created under part two of that will, and that the defendants, the executors and trustees of the will of 1921, must hold the testatrix's property upon the trusts of the will of 1907. I have had the benefit of extremely able arguments on both sides. Counsel for the plaintiff put her case thus: The plaintiff admittedly could F not enforce as such an agreement made for her benefit by two other persons; but, from the agreement to make these mutual wills in the form in which they were made, the survivor who accepts the benefit under this mutual arrangement, thereby becomes subject to the alternative trusts in the second part of those wills. In other words, in the circumstances, the survivor cannot, as a matter of law, take the benefit and repudiate the alternative trusts. Consequently, on the death G of F. Weldon, his surviving widow had to elect whether she would take or leave the benefit under her husband's will, with a liability to a trust to carry out the gifts of legacies and the disposition of residue in the second part of the will. The authorities on the subject are few. The principal one is *Dufour* v. *Pereira* (1), on which the plaintiff relies, which is reported shortly in 1 Dickens 469, and more fully stated in Hargrave's Juridical Arguments, vol. 2, p. 304. In that case a H husband, and a wife, the latter having a power notwithstanding coverture to make a will of some personal property secured for her separate use, joined in a single document expressed to be their mutual last will, and bearing date Nov. 21, 1745. By that will the residuary estate of both was seemingly made one, and was bequeathed to the survivor for his or her life with a limitation over. The wife survived, and having enjoyed the benefit of both properties for many years, died I leaving a will in which the trusts of the mutual will were disregarded. The beneficiaries under the latter will filed their bill in Chancery and Hargrave says (ibid. at p. 311) that, after delivering his energetic and eloquent judgment, Lord Camden made a decree that the wife had bound her assets to make good all the bequests in the mutual will. The judgment, which is very alluring, seems to have been based by Lord Camden on the fact that these two parties had agreed to pool their estates, and in consideration of the agreed benefits that the survivor was to take, was to give effect to the agreement, which Lord Camden seems to have held that they made as to the disposition of the property. An important point in that case

is that the trust of the property was rendered safe by the fact that the survivor took only a life interest under the mutual will. No difficulty arose under the then existing law of England as to the husband's interest in his wife's property. The parties lived at Geneva, and made the will apparently in accordance with the law of that country. LORD CAMDEN says (ibid. at p. 310):

> "The instrument itself is the evidence of the agreement [that is, the agreement that created the trust which he enforced] and he that dies first, does by his death carry the agreement on his part into execution. If the other then refuses, he is guilty of a fraud, can never unbind himself, and becomes a trustee of course. For no man shall deceive another to his prejudice. By engaging to do something that is in his power, he is made a trustee for the performance, and transmits that trust to those that claim under him."

All that is based on LORD CAMDEN's finding of fact that there was a certain and unequivocal trust agreed to and created by the parties. It is true that he comes to that conclusion from the contents of the document itself, but nevertheless he bases his judgment on the fact of the actual existence of such an agreement. In *Lord Walpole* v. *Lord Orford* (2) LORD LOUGHBOROUGH, L.C., who had been counsel in *Dufour* v. *Pereira* (1) was asked to enforce an agreement which was very similar. The facts of the case are very complicated, but LORD LOUGHBOROUGH came to the conclusion that the agreement sought to be enforced as a trust was too uncertain; he found that there had been some agreement, but that it was impossible to ascertain precisely and certainly its terms. He assented to the view of LORD CAMDEN in *Dufour* v. *Pereira* (1), but distinguished it. Counsel for the plaintiff argued that in *Lord Walpole* v. *Lord Orford* (2) there were not mutual wills at all, and pointed out that in the plaintiff's bill the agreement was put forward merely as an agreement of honour, and not as a legal agreement, and the plaintiff claimed partly under and partly against a codicil which, if LORD CAMDEN's decision was applicable, was invalid. In *Denyssen* v. *Mostert* (3) SIR ROBERT COLLIER says (L.R. 4 P.C. at p. 253):

> "It may be enough to observe that, in the case of *Dufour* v. *Pereira* (1), LORD CAMDEN held that a husband and wife having made a mutual will, and that the wife, after her husband's death, having possessed all his personal estate, and enjoyed the interest thereof during her life, by that act bound her assets to make good all her bequests in the mutual will, and that her subsequent will, so far as it broke in upon the mutual will, was void. And that, in the case of *Lord Walpole* v. *Lord Orford* (2) LORD LOUGHBOROUGH refused to confirm the compact of a mutual will, under circumstances which are referred to."

He then cites with approval this passage from WILLIAMS ON EXECUTORS (6th Edn.) vol. 1, p. 122; (11th Edn.) p. 93:

> "LORD LOUGHBOROUGH, however, refused to enforce the compact of the mutual will, but this was chiefly, it seems, by reason of the uncertainty, and, in some sense, unfairness of the compact; so that it leaves the principle of LORD CAMDEN's decision in *Dufour* v. *Pereira* (1) wholly unshaken."

In *Stone* v. *Hoskins* (4) the headnote in the LAW REPORTS, which is accurate, says:

> "Where two persons have made an arrangement as to the disposal of their property and executed mutual wills in pursuance of that arrangement, the one of them which predeceases the other dies with the implied promise of the survivor that the arrangement shall hold good; and if the survivor, after taking a benefit under the arrangement, alters his will, his personal representative takes the property upon trust to perform the contract, for the will of the one who dies first has, by the death, become irrevocable. . . ."

SIR GORELL BARNES, P., says: "There remains a legal point of considerable interest. These were no doubt mutual wills made in accordance with an arrangement"—that

A is to say, an arrangement as to the existence of which the court was satisfied by evidence. Later on he says:

> "If these two people had made wills which were standing at the death of the first to die, and the survivor had taken a benefit by that death, the view is perfectly well founded that the survivor cannot depart from the arrangement on his part, because, by the death of the other party, the will of that party and
B the arrangement have become irrevocable; . . ."

That must mean an arrangement proved to the satisfaction of the court, the terms of which are certain and unequivocal, and such as the court can see its way to enforce. Other cases have been cited, but they do not touch the question which I have to decide.

C The first point to determine is whether, on the evidence in this case, which substantially consists only of the fact of the making of these mutual wills, I am bound or able to come to the conclusion to which LORD CAMDEN came in *Dufour* v. *Pereira* (1) that there was in fact an agreement between the husband and wife that the survivor (here the wife), who was to take the other's property, not for life, but absolutely, should, if she accepted the benefit, be bound not to alter the dis-
D position in the second part of her 1907 will. Counsel for the plaintiff contends that no such agreement need be proved outside the fact of the form of the mutual wills. I regret that I am unable, in the circumstances of this case, to give effect to that contention, and all the more so because I have no doubt at all that if the husband in 1907 had foreseen that his wife, after seven years of survivorship, would marry a young man and leave the whole of her first husband's property to that young
E man and to her own relatives, he would have made a very different testamentary disposition. In order to enforce the trust for which the plaintiff's counsel contend, I must be satisfied that its terms are certain and unequivocal and such as, in the circumstances, I am bound to give effect to. The evidence in this case does not appear to me to go nearly far enough. It is difficult to understand why, if there was such an agreement as suggested, the mutual wills gave the survivor an absolute
F interest in all the property of the spouse who died first. It is said that each was satisfied to trust the other, and wished to bind only so much of the property taken by the survivor as had not been disposed of in his or her lifetime. This question must be answered: Could these parties have acted as they did with any other object or intent than the plaintiff asserts? It is impossible for me to hold anything of the kind. I cannot build up a trust on conjecture. Many other reasons may
G have operated upon their minds. Having regard to the ages of the parties it was not likely that the property would be seriously diminished in the lifetime of the survivor, and they may have considered that the survivor could be trusted to give effect to what must have been known to be the wishes of both. But that is a very different thing from saying that they bound themselves by a trust to be operative in all circumstances. Supposing that the wife had died first, and the husband,
H who was at the date of the wills not yet sixty, had married again. It is difficult to believe that he agreed to a course that would prevent him making any testamentary provision for his second wife, except as to one-twentieth of his residuary property. Again, many of his own relatives, who were beneficiaries under the wills, might have predeceased the survivor of himself and his wife; but if the alleged trust is operative, there is no means of making any provision by will for
I such circumstances. I cannot help thinking that if a trust of that kind had been brought to the attention of any reasonable professional man he would have advised against the creation of any such trust. It is difficult to imagine that it was the intention of the parties, when they made the mutual wills, that the survivor should in no circumstances have power to alter the trusts except by disposition inter vivos. Lastly, I think that a very great difference between the present case and *Dufour* v. *Pereira* (1) is that in that case the capital of the trust property was secured in fact by the life interest only being given to the survivor, whereas in the present case the survivor is given the whole estate absolutely, and could, if so minded,

dispose of the whole property inter vivos. It is said by the defendants, and I think rightly, that the fact that these two wills were made in identical terms connotes no more than an agreement of so making them, and that there is no evidence on which I ought to hold that there was an agreement that the trust in the mutual wills should in all circumstances be irrevocable by the survivor who took the benefit. Putting it shortly, I have no sufficient evidence to enable me to decide what inference, if any, should be drawn in the circumstances from the wills. For these reasons, I have come to the conclusion, although I do so with the utmost regret, that the plaintiff's action fails.

Solicitors: *Powell, Burt & Lamaison*, for *Howard Marshall*, Halifax; *Patersons, Snow & Co.*; *E. Ernest Winterbotham*; *Lazarus & Son.*

[*Reported by* E. K. Corrie, Esq., *Barrister-at-Law.*]

BRITISH THOMSON-HOUSTON CO., LTD. *v.* STERLING ACCESSORIES, LTD., AND OTHERS; SAME *v.* CROWTHER AND OSBORN, LTD., AND OTHERS

[Chancery Division (Tomlin, J.), March 27, April 2, 1924]

[Reported [1924] 2 Ch. 33; 93 L.J.Ch. 335; 131 L.T. 535; 40 T.L.R. 544; 68 Sol. Jo. 595; 41 R.P.C. 311]

Company—Director—Liability—Liability for tort of company—Sole shareholder.

Even where directors are the sole directors of, and sole shareholders in, a company, in the absence of proof (which cannot be implied from their relationship with the company) that they have authorised the company to commit a tort, the company is not their agent to commit such tort so as to render them personally liable therefor.

Salomon v. *Salomon & Co.* (1), [1897] A.C. 22, and *Rainham Chemical Works, Ltd.* v. *Belvedere Fish Guano Co.* (2), [1921] 2 A.C. 465, applied.

Betts v. *de Vitré* (3) (1868), 3 Ch. App. 429, and *Welsbach Incandescent Gas Light Co.* v. *Daylight Incandescent Mantle Co., Ltd.* (4) (1899), 16 R.P.C. 344, distinguished.

Notes. Applied: *Prichard and Constance* v. *Amata* (1924), 42 R.P.C. 63. Referred to: *Harmer* v. *Armstrong*, [1934] Ch. 65; *Leggatt* v. *Hood's Original Licensees Darts Accessories, Ltd., and Hood* (1950), 67 R.P.C. 134; *Bank Voor Homdel en Scheepvaart* v. *Slatford*, [1951] 2 All E.R. 779.

As to the liability of directors, see 6 Halsbury's Laws (3rd Edn.) 306 et seq.; and for cases see 9 Digest (Repl.) 508 et seq.

Cases referred to:

(1) *Salomon* v. *Salomon & Co., Ltd., Salomon & Co., Ltd.* v. *Salomon*, [1897] A.C. 22; 66 L.J.Ch. 35; 75 L.T. 426; 45 W.R. 193; 13 T.L.R. 46; 41 Sol. Jo. 63; 4 Mans. 89, H.L.; 9 Digest (Repl.) 30, *11.*

(2) *Rainham Chemical Works, Ltd.* v. *Belvedere Fish Guano Co., Ltd.*, [1921] 2 A.C. 465; 90 L.J.K.B. 1252; 126 L.T. 70; 37 T.L.R. 973; 66 Sol. Jo. (W.R.) 7; 19 L.G.R. 657, H.L.; 9 Digest (Repl.) 31, *15.*

(3) *Betts* v. *Neilson*, *Betts* v. *de Vitré* (1868), 3 Ch. App. 429; 37 L.J.Ch. 325; 18 L.T. 165; 32 J.P. 547; 16 W.R. 529, C.A.; varied, sub nom. *Neilson* v. *Betts* (1871), L.R. 5 H.L. 1, H.L.; sub nom. *de Vitré* v. *Betts* (1873), L.R. 6 H.L. 319, H.L.; 9 Digest (Repl.) 532, *3504.*

(4) *Welsbach Incandescent Gas Light Co.* v. *Daylight Incandescent Mantle Co., Ltd.* (1899), 16 R.P.C. 344; 36 Digest (Repl.) 1033, *3822.*

(5) *Penny* v. *Wimbledon U.D.C.*, [1899] 2 Q.B. 72; 68 L.J.Q.B. 704; 80 L.T. 615; 83 J.P. 406; 47 W.R. 565; 15 T.L.R. 348; 43 Sol. Jo. 476, C.A.; 26 Digest 410, *1308.*

Actions to restrain infringements of letters patent.

The two actions were brought by the same plaintiff against two companies. The actions involved the same subject-matter, and his Lordship delivered one judgment covering both actions.

BRITISH THOMSON-HOUSTON CO., LTD. *v.* STERLING ACCESSORIES, LTD.

The following statement of the facts in this action is taken from the judgment. This is an action to restrain the infringement of letters patent No. 23499 of 1909 for an invention for improvements in and relating to the treatment of tungsten to facilitate working. The letters patent in question were recently held to be valid in an action by the plaintiffs against other defendants, which was tried before RUSSELL, J. The first of the defendants is a limited company which was registered in December, 1921, with a capital of £1,000 divided into 1,000 shares of £1, and is a private company. The second and third defendants are the sole directors of the company and the only subscribers to the memorandum of association and the only shareholders. The defendants admit the validity of the letters patent and the title of the plaintiffs thereto. They also admit the sales by the defendant company, alleged in the particulars of breaches, of certain electric lamps, and that the filaments of such lamps were made in accordance with the invention protected by the letters patent, and, accordingly, that such sales were infringements. Upon the footing of these admissions the defendant company was not in a position at the trial to resist judgment. The defendant directors, however, contended that no relief in the circumstances of this case can be given against them. The statement of claim alleges that the defendant directors "are, and were, at all material times officials and/or directors of the defendant company and actively engaged in the affairs of the said company, and as such officials and/or directors authorised, permitted and/or took part in the said infringement." At the trials the facts as to the position of these two directors were admitted, but no other facts were alleged or proved.

Sir A. Colefax, K.C., and *Trevor Watson* for the plaintiffs.

F. W. Theeman for the defendant company.

Courtney Terrell for the defendant directors.

BRITISH THOMSON-HOUSTON CO., LTD. *v.* CROWTHER AND OSBORN, LTD.

The following statement of the facts is taken from the judgment. This action is by the same plaintiffs in respect of the same letters patent, but is against another company and its directors. The defendants make admissions in this action corresponding mutatis mutandis with those made by the defendants in the first action. The defendant company has, therefore, no defence, but the liability of the defendant directors is asserted, on the one hand, and denied, on the other hand, upon the same grounds as in the first action. In this case, however, the facts as to the position of the defendant directors are somewhat different. The capital of the defendant company is £25,000, divided into 25,000 shares of £1, of which 24,898 shares have been issued. These shares are held as to 24,398 by the defendant Porritt, as to fifty shares by the defendant Crowther, as to 400 shares by the defendant Osborn, and as to the remaining fifty shares by a person who is neither a director nor a party to the action. No other fact bearing upon the question of the liability of the defendant directors was proved or alleged except that an agreement was put in by the plaintiffs which is said to have some bearing on the matter. This agreement, which is dated Aug. 16, 1922, is made between the defendant company, of the one part, and a Scottish company, of the other part, and provides for the sale by the defendant company to the Scottish company of

electric lamps. The agreement is signed by the defendant directors "for and on behalf of" the defendant company, and the seal of the defendant company is affixed. The lamps, the subject-matter of the agreement, are defined as lamps manufactured by the defendant company "whether under patent specifications, licence from patentees, or where the patent protection rights have expired." The agreement also contains a guarantee by the defendant company that the lamps sold do not infringe any existing patent, and an indemnity by the defendant company to the Scottish company, their factors, members and customers, against claims by any party alleging infringement.

Sir A. Colefax, *K.C.*, and *Trevor Watson* for the plaintiffs.
Moritz for the defendant company.
Greene, *K.C.*, and *H. B. Vaisey* for the directors, Porritt and Crowther.
The defendant Osborn appeared in person.

Cur. adv. vult.

April 2. **TOMLIN, J.**, read a judgment in which, after stating the facts in the first action, he continued: I apprehend that where it is sought to fix a defendant with liability for a tort it must be established either that he is himself the tortfeasor or that he is the employer or principal of the tortfeasor, in relation to the act complained of, or, at any rate, the person on whose instructions the tort has been committed. In the first case with which I am concerned it is not alleged that the defendant directors were the actual tortfeasors. It is, therefore, sought to fix them with liability by contending, first, that in the circumstances of the case the defendant company was only a cloak under cover of which the infringements were committed by the defendant directors, or, in other words, that the defendant company was the agent of the defendant directors to commit the infringements, and, secondly, that the true inference from the facts is that the defendant directors authorised the acts of infringement.

There is no evidence of any fact pointing to the relation of principal and agent having been established between the defendant directors and the company, unless the fact that the defendant directors were the sole directors and the sole shareholders of the company can be properly regarded as a circumstance from which the relationship ought to be inferred. I do not think that any such inference can be, or ought to be, drawn. It has been made plain by the House of Lords that, for the purpose of establishing contractual liability, it is not possible, even in the case of the so-called one-man companies, to go behind the legal corporate entity of the company and treat the creator and controller of the company as the real contractor merely because he is the creator and controller. If he is to be fixed with liability as principal, the agency of the company must be established substantively and cannot be inferred from the holding of director's office and the control of the shares: see *Salomon* v. *Salomon & Co., Ltd.* (1). Any other conclusion would have nullified the purpose for which the creation of limited companies was authorised by the legislature. Now does the matter stand otherwise in regard to liability for tortious acts? This also has been made plain by the House of Lords in *Rainham Chemical Works, Ltd.* v. *Belvedere Fish Guano Co., Ltd.* (2), where Lord Buckmaster, in criticising the view of one of the lords justices in the court below to the effect that it was possible to look behind the company, states the position in this way:

> "It not infrequently happens in the course of legal proceedings that parties who find they have a limited company as debtor with all its paid-up capital issued in the form of fully paid shares, and no free capital for working suggest that the company is nothing but an alter ego for the people by whose hand it has been incorporated, and by whose action it is controlled. But in truth the Companies Acts expressly contemplate that people may substitute the limited liability of a company for the unlimited liability of the individual, with the object that by this means enterprise and adventure may be encouraged. A company, therefore, which is duly incorporated, cannot be disregarded on the

A ground that it is a sham, although it may be established by evidence that in its operations it does not act on its own behalf as an independent trading unit, but simply for and on behalf of the people by whom it has been called into existence. In *Salomon* v. *Salomon & Co., Ltd.* (1), parties who sought to disregard the existence of the company on these grounds were unable to establish this fact, and they, accordingly, failed, but the respondents urge that here the B position is quite plain. It seems to have been so regarded by SCRUTTON, L.J. The Master of the Rolls thought the same result was reached by considering that the company was in fact under the sole control of Messrs. Feldman and Partridge as governing directors, and ATKIN, L.J., by the analogy of cases such as *Penny* v. *Wimbledon U.D.C.* (5). I cannot accept either of these views. If the company was really trading independently on its own account, C the fact that it was directed by Messrs. Feldman and Partridge would not render them responsible for its tortious acts unless, indeed, they were acts expressly directed by them. If a company is formed for the express purpose of doing a wrongful act or if, when formed, those in control expressly direct that a wrongful thing be done, the individuals as well as the company are responsible for the consequences, but there is no evidence in the present case D to establish liability under either of these heads."

I have, however, had pressed upon me *Betts* v. *de Vitré* (3). The action there was one for infringement of patent rights against the company and its directors, and the decision was one of LORD CHELMSFORD'S, L.C., sitting on appeal from WOOD, V.-C. The decision is, therefore, binding on me so far as it is a decision E which is not overruled and which lays down any principle applicable to the circumstances of the present case. It may be that the decision is to-day open to criticism having regard to the principles more recently enunciated by the House of Lords in the cases to which I have referred. It was, I think, regarded by YOUNGER, L.J., in the *Rainham Case* (2) as a decision requiring some explanation, and he suggests that it turned on some special act of intervention on the part of the directors. At F any rate, the directors there pleaded that the infringement had been by their servants against their orders, and the reasoning of LORD CHELMSFORD was upon the footing that the actual infringers were the servants of the directors. That is a condition of things which has not been alleged in the present case, and, in my judgment, LORD CHELMSFORD'S decision has no application to the facts of the present case. I think, therefore, that the plaintiffs' first contention fails.

As to their second contention, the answer must be that there is no evidence G from which it ought or can be inferred that the defendant directors have authorised the wrongful acts. To draw that inference from the fact that they are sole directors and shareholders of the defendant company would be manifestly wrong and contrary to the principles enunciated by the House of Lords in the cases already referred to, and there is no evidence of any other facts at all in relation to the H matter. The decision in *Welsbach Incandescent Gas Light Co., Ltd.* v. *Daylight Incandescent Mantle Co., Ltd.* (4) before BYRNE, J., to which I have been referred, turned exclusively upon circumstances of pleading and of conduct at the trial, which are not present in this case, and, in my judgment, it affords no guidance on any question of principle. It follows that the plaintiffs' second contention also fails. The result, therefore, is that the action has succeeded against the defendant I company, but failed against the defendant directors. An injunction, an order for delivery up of infringing articles, and an inquiry as to damages, are the appropriate remedies against the defendant company, which must pay the costs of the action except so far as they have been increased by the joinder of the defendant directors, the costs of the inquiry being reserved. As against the defendant directors the action is dismissed with costs.

His Lordship then stated the facts in the second action, and, after referring to the agreement between the defendant company and the Scottish company, continued: Unless there is something in the fact of this agreement which distinguishes

this case from the first case, my judgment in the first case applies with equal or even greater force. I am unable to see that the agreement in question has any bearing upon this question at all. It seems to indicate : (i) that the defendant company was not in the transaction with the Scottish company contemplating the infringement of any patent rights, and (ii) that the Scottish company, with a prudence which cannot be regarded as otherwise than reasonable, required an indemnity against possible accidents. In my judgment, the plaintiffs' case receives no support from the existence of this agreement. The result, therefore, must be the same as in the first case, with this addition, that, as there was here a counterclaim for revocation (which was not, however, opened), this counterclaim will be dismissed with costs with the usual set-off so far as the defendant directors are concerned.

Solicitors : *Bristows, Cooke & Carpmael*; *C. R. A. Edmonds*; *Dehn & Lauderdale*, for *Dunderdale, Galloway & Co.*, Manchester; *Porritt & Crowther, Woodcock, Ryland & Parker*, for *Woodcock & Sons*, Haslingden.

[*Reported by* L. Morgan May, Esq., *Barrister-at-Law.*]

BOSWELL AND ANOTHER *v.* CRUCIBLE STEEL CO. OF AMERICA

[Court of Appeal (Bankes, Scrutton and Atkin, L.JJ.), October 20, 1924]

[Reported [1925] 1 K.B. 119; 94 L.J.K.B. 383; 132 L.T. 274; 69 Sol. Jo. 842]

Landlord and Tenant—Landlord's fixtures—Large plate-glass windows in business premises—Part of the premises.

In a lease of certain business premises the lessees covenanted to "keep the inside of the demised premises (including the landlord's fixtures) in good repair." Practically the whole of two sides of the premises consisted of plate-glass windows which were not made to open. Some of the windows became broken.

Held: the term "landlord's fixtures" meant things which were not removable since they were attached to and formed part of the freehold, but it was not apt to include chattels which had been made part of the demised premises in the course of their construction; the windows formed a substantial part of the structure of the demised premises; and, therefore, they were not "landlord's fixtures," and the lessees were not liable to repair them.

Notes. Referred to: *Taylor* v. *Webb*, [1937] 1 All E.R. 590; *Gray* v. *Fidler*, [1943] 2 All E.R. 289. Distinguished: *Holiday Fellowship, Ltd.* v. *Viscount Hereford*, [1959] 1 All E.R. 433.

As to landlord's fixtures, see 23 Halsbury's Laws (3rd Edn.) 489 et seq.; and for cases see 31 Digest (Repl.) 199 et seq.

Case referred to:

(1) *Ball* v. *Plummer* (1879), Times, June 17, C.A.; 31 Digest (Repl.) 344, *4756.*

Also referred to in argument:

Climie v. *Wood* (1869), L.R. 4 Exch. 328; 38 L.J.Ex. 223; 20 L.T. 1012, Ex. Ch.; 31 Digest (Repl.) 210, *3422.*

Pyot v. *Lady St. John* (1613), Cro. Jac. 329; 79 E.R. 281; affd. 2 Bulst. 102; 31 Digest (Repl.) 362, *4939.*

Appeal by the defendants from a decision of the Divisional Court.

By an indenture dated May 24, 1912, made between the plaintiffs, as landlords,

A and the defendants, as tenants, in consideration of the rent thereinafter reserved, the plaintiffs demised unto the defendants all the ground floor of the premises known as Nos. 31 and 32 Borough Road, and No. 69 Lancaster Street, Southwark, for the term of ten years from June 24, 1912. The term was subsequently extended for a further period of five years. The premises were let as a warehouse and office for the lessees' trade, and practically the whole side of the premises B fronting the above-mentioned streets was composed of large plate-glass windows which were not made to open. By the said indenture the lessees covenanted to

> "keep the inside of the demised premises (including all landlord's fixtures and additions thereto) in good decorative repair and condition . . . and once in every three years of the said term paint the outside of the window frames and doors of the demised premises with two coats at least of good oil colour."

C The lessors covenanted that they would

> "well and sufficiently repair, cleanse, maintain, amend, uphold and keep the demised premises and all additions thereto and appurtenances thereof . . . with all necessary reparations, cleansings and amendments (except such repairs as are hereby agreed to be executed by the lessees)."

D In August, 1923, seven of the windows were found to be broken, and the lessors accordingly served upon the lessees a notice to repair. The lessees having refused to comply with the notice, the present action was brought in the Southwark County Court to recover the cost of replacing the windows. The learned county court judge held that the windows were landlord's fixtures and gave judgment for the lessors. This decision having been affirmed by the Divisional Court (BAILHACHE E and ROCHE, JJ.) the lessees appealed.

Greaves-Lord, *K.C.*, and *Done* for the lessees.
Sir R. Coventry, *K.C.*, and *A. H. Woolf* for the lessors.

BANKES, L.J.—In my opinion, this appeal must be allowed. My view as to F the rights of the parties depends upon the consideration of what the original structure of these premises was. From the plan which was put in at the trial it appeared that the total height of the ground floor, which was enclosed in brick walls of a height of 3 ft. 6 in., was somewhere about 11 ft., of which 7 ft. 6 in. was occupied by plate-glass windows which were of a width of some 29 ft. out of a total width of 33 ft. on the Borough Road front, and in Lancaster Street of 23 ft. G out of a total width of 25 ft. Dealing then with a building the ground floor of which to a large extent is constructed of glass it is in one sense true to say that its walls consisted of different pieces of glass and it is also true to say that the ground floor of the building consists to a large extent of glass. Such, then, is the building to which this lease refers. The two covenants to repair which are material are these, namely, the covenant by the lessees to repair "the inside of the demised H premises including all landlord's fixtures"; and the covenant by the lessors to repair the whole of the demised premises "with all necessary reparations." If that last mentioned had stood by itself the obligation to repair would have fallen on the landlords and it is quite consistent with that that the tenant should have to paint the outside. Then we come to the exception, namely, "except such repairs as are hereby agreed to be executed by the lessees." The question therefore is: I Which party is to keep these windows in repair? Turning to the covenant, it is said on behalf of the lessors that these windows are landlord's fixtures and that the liability to repair, therefore, falls upon the lessees, but I do not think it is possible to say that windows such as these, which form part of the original building, could be said to be landlord's fixtures. In my judgment, the learned county court judge arrived at a wrong conclusion, and I think it is impossible to support his finding by reason of the fact that the windows form part of the original structure. I think that in *Ball* v. *Plummer* (1), BRAMWELL, J., uses a very appropriate expression when he speaks of the windows as being "the skin of the house." In

my judgment, there is, upon the facts, a clear obligation to repair which falls upon the landlord and not upon the tenant. The appeal therefore succeeds.

SCRUTTON, L.J.—This appeal raises a question, which may be of some importance, whether the landlords or the tenants are liable to repair certain broken windows. Large glass windows fixed in steel frames play an important part in present-day shop construction. The premises here consist of a ground floor used as a warehouse and offices, and it appears from the photographs and the plan which were put in that the greater portion of the exterior of the building consists of plate-glass windows, with the result that the building is practically enclosed in a wall of glass. By the lease the lessees covenanted to "keep the inside of the demised premises (including all landlord's fixtures . . .) in good repair" and the lessors covenanted to "repair . . . the demised premises . . . with all necessary reparations . . . (except such repairs as are hereby agreed to be executed by the lessees)." Some of the plate-glass windows having been broken, the landlords say that these windows are landlord's fixtures, and, therefore, the tenants must repair them. I think it is well understood what "tenant's fixtures" are. They are matters attached to the freehold which are easily removable and may be removed by the tenant during the currency of the term, but I am puzzled to know what is meant by "landlord's fixtures." I do not understand how something which forms part of the original building can be said to be a landlord's fixture, but if these windows are to be regarded as fixtures the landlord cannot impose the liability to repair them upon the tenant unless he can say it is a landlord's fixture. I do not think these windows can be appropriately described as fixtures. They plainly form part of the demised premises. For that reason it seems to me to be a misnomer to call these windows landlord's fixtures. We have had no report of the judgments in the Divisional Court, but we have the judgment of the learned county court judge. I think he makes a mistake when he describes the ground floor as a landlord's fixture and something different from the demised premises. It seems to me to be impossible to hold that these large windows were not part of the demised premises with the result that the landlord was bound to repair them.

ATKIN, L.J.—This is an action brought upon a covenant in a lease. The lessees covenanted to "keep the inside of the demised premises (including all landlord's fixtures . . .) in good repair." The lessors undertook the repairs "except such repairs as are hereby agreed to be executed by the lessees," and the question is whether the lessees covenanted to repair these windows which formed part of the external walls of the house. The obligation imposed by their covenant upon the lessees was, generally speaking, to repair the inside of the demised premises, but this obligation was to include the landlord's fixtures. I should be inclined to construe the covenant as being limited to landlord's fixtures inside the house, and not to extend to repairs necessary to the building as a whole and of which these plate windows form part. I am satisfied that these windows are not landlord's fixtures in the sense in which that term is generally understood. The term is generally used to negative tenant's fixtures, the reason being that they are not removable inasmuch as they are affixed to and form part of the freehold. The phrase is not apt to include chattels made part of the premises by the landlord in the course of constructing the house. No one would call these landlord's fixtures. The windows have become part of the original structure as representing the external walls of the house. Without them there would be nothing that could be described as a house at all. In my opinion, the county court judge misdirected himself upon a question of law. I can myself see no difficulty in construing the covenant. In my judgment, the demised premises included the windows and as the result of the covenant there is an obligation upon the landlords to do the repairs. The appeal must, therefore, be allowed.

Appeal allowed.

Solicitors: *Cardew Smith & Ross*; *H. Anderson.*

[*Reported by* E. J. M. Chaplin, Esq., *Barrister-at-Law.*]

R. *v.* COPE

[Court of Criminal Appeal (Lord Hewart, C.J., Roche and Talbot, JJ.), March 23, 24, 1924]

[Reported 94 L.J.K.B. 662; 132 L.T. 800; 89 J.P. 100; 41 T.L.R. 418; 27 Cox, C.C. 778; 18 Cr. App. Rep. 181]

Vagrancy—Incorrigible rogue—Appellant committed to quarter sessions for sentence—"Examination into circumstances of the case"—Co-prisoner tried on indictment at quarter sessions—Appellant not present at hearing—Sentence imposed on appellant without sufficient investigation—Vagrancy Act, 1824 (*5 Geo. 4, c. 83*), *s.* 10.

By s. 10 of the Vagrancy Act, 1824, it is provided: "When any incorrigible rogue shall have been committed to the house of correction, there to remain until the next general or quarter sessions, it shall be lawful for the justices of the peace there assembled to examine into the circumstances of the case, and to order, if they think fit, that such offender be further imprisoned. . . ."

Several persons were arrested on a charge of loitering with intent to commit a felony. One of them, the appellant, had previously been convicted of the same offence. He was, therefore, tried summarily and sent to quarter sessions for sentence. A fellow prisoner who was entitled to claim trial by jury was tried at quarter sessions where all the facts relating to the appellant and himself were investigated. The appellant, who was not present at this hearing, was later sentenced by the same justices without an investigation into the facts and without his conviction or identity being formally brought to the notice of the court.

Held: where a prisoner was committed to quarter sessions for sentence as an incorrigible rogue under s. 9 of the Vagrancy Act, 1824, it was essential that the "examination into the circumstances of the case" required by s. 10 should take place in the presence and hearing of the prisoner so sent to quarter sessions for sentence, and in his case and not some other case, in order that he or his counsel might have a proper opportunity of dealing with those circumstances.

Per **Curiam:** (i) it is desirable that the older practice of proving a conviction at petty sessions should be observed whereby a witness, ordinarily a police officer, is called who with the certificate of conviction before him identifies the defendant as being the person referred to in the conviction; (ii) where charges based upon the same facts are being brought against more than one prisoner, it is not desirable, unless there are special reasons to the contrary, that the charges should be so differentiated that one prisoner is tried by a jury, while another has no right to such mode of trial.

Notes. Followed: *R.* v. *Billington* (1942), 28 Cr. App. Rep. 180.

As to incorrigible rogues, see 10 Halsbury's Laws (3rd Edn.) 701, 702; and for cases see 15 Digest (Repl.) 929. For the Vagrancy Act, 1824, see 18 Halsbury's Statutes (2nd Edn.) 202.

Cases referred to:

(1) *R.* v. *Brown* (1908), 72 J.P. 427; 1 Cr. App. Rep. 85, C.C.A.; 14 Digest 605, *5989*.

(2) *R.* v. *Dean* (1924), 18 Cr. App. Rep. 133, C.C.A.; 14 Digest (Repl.) 605, *5991*.

Appeal against conviction and sentence.

The appellant, together with three other men, was arrested in Birmingham on a charge of loitering with intent to commit a felony. He had already been convicted as a "rogue and vagabond," and accordingly he was charged as an "incorrigible rogue" under s. 5 of the Vagrancy Act, 1824. When before the stipendiary magistrate at the Police Court, he expressed a desire to be tried by a jury, but

was told that, the charge being so framed, he had no right to trial by jury. He was convicted by the stipendiary magistrate of being an "incorrigible rogue," and accordingly, under s. 9 of the Vagrancy Act, 1824, was committed to the next Court of Quarter Sessions for sentence. One of his fellow-offenders, named Whitton, who had been arrested at the same time, was charged with loitering under s. 7 of the Prevention of Crime Act, 1871. He claimed to be tried by a jury, and was so tried at the quarter sessions; the case of Whitton was heard, and all the facts relating both to Whitton and to the appellant investigated, before the court dealt with the appellant. After a protracted hearing Whitton was acquitted by the jury. The court then dealt with the appellant, who had not been present in court during the hearing of Whitton's case. The court did not make any further investigations into the circumstances of the appellant's case before sentencing him, but proceeded forthwith to impose a sentence of twelve months' hard labour. The appellant appealed against both conviction and sentence; but the Court of Criminal Appeal, following its well-established rule, heard the appeal as against sentence only.

Sinclair Johnston for the appellant.
Dawson Sadler for the Crown.

The judgment of the court was delivered by

LORD HEWART, C.J.—The appellant, James Cope, was convicted at the Police Court, Birmingham, before the learned stipendiary for that he, being a suspected person, did loiter in Corporation Street with intent to commit a felony, that offence in itself causing the offender to become a rogue and vagabond within s. 4 of the Vagrancy Act, 1824, as amended by s. 7 of the Penal Servitude Act, 1891. As, however, he had already been convicted in a previous year as a rogue and vagabond, the effect of the new offence was that he became an incorrigible rogue and vagabond under s. 5 of the Vagrancy Act, and thereupon he was committed, under s. 9 of the Vagrancy Act, to the next quarter sessions for sentence. At the sessions he was sentenced to twelve months' hard labour, and he now applies for leave to appeal, and appeals against both conviction and sentence.

This court has held in a series of cases, for example, *R.* v. *Brown* (1) and *R.* v. *Dean* (2), that no appeal lies to this court against conviction as an incorrigible rogue and vagabond. That appeal lies to quarter sessions under s. 14 of the Vagrancy Act, 1824, but this court does hear an appeal against the sentence which is passed.

It appears, not from the depositions, but from the notes of evidence in the case, that some time after ten o'clock on Saturday night, Jan. 17, two detectives saw the appellant and three other men, named respectively Whitton, Baker, and Rushton, standing at a corner of Corporation Street, in Birmingham, where the trams and omnibuses stop. The detectives watched those four men pushing up against people who were getting into the vehicles, and the evidence was that those men were seen to behave in that way with reference to persons getting on to three omnibuses or tramcars, and it was said that in each case the appellant put his hand under a man's coat, towards either his hip pocket or his breast pocket. All four men were arrested and taken to the police station, but there nothing whatever was found in their pockets. The appellant was charged with being an incorrigible rogue and vagabond. On that charge he cannot claim, under s. 17 of the Summary Jurisdiction Act, 1879 [now s. 25 of the Magistrates Courts Act, 1952], to be tried by a jury. He applied to be tried by a jury, but was told correctly that upon that charge he could not be tried by a jury. His companion, Whitton, on the other hand, was charged under s. 7 of the Prevention of Crime Act, 1871, for that he, having been convicted of a crime, after a previous conviction of a crime, was found within seven years about to commit an offence punishable on indictment. On that charge, based upon exactly the same facts, Whitton could and did claim the right of trial by jury, and he was tried at quarter sessions just before this appellant was dealt with, and the jury, having heard the evidence against

Whitton, which was also the evidence against the appellant, acquitted Whitton. No doubt what was done was quite lawful in the sense that Whitton was charged under one statute and this appellant under another, but, unless there are good reasons for differentiating in that fashion, it seems desirable to this court that, where the same facts are being dealt with, the charges should not be differentiated so that one of the fellow culprits is tried by a jury and the other, though he wishes it, is not permitted trial by jury. It may be that there is some explanation not apparent on the face of these documents, but, speaking generally, one cannot help thinking that it was desirable that there should be one measure meted out to all in such a case. It is not, however, upon that point that this appeal turns.

Two grounds are raised here on behalf of the appellant. It is said in the first place that there was no jurisdiction in the Court of Quarter Sessions to order the further term of imprisonment which was ordered, inasmuch as the conviction of the appellant was not before the court, nor was the appellant identified as the person who had been convicted. In the opinion of the court that argument fails. We are told, and we accept the statement, that the conviction was, in fact, before the Court of Quarter Sessions, and as for the question of identity, it is apparent when one reads the transcript of what took place, that more than once, and quite unequivocally, the appellant admitted his identity. Nevertheless, it is highly desirable, in the opinion of this court, that the older practice should be observed, whereby in such case a witness, ordinarily a police officer, is called, who, with the certificate of conviction before him, identifies the defendant as being the person referred to in the conviction. That is the old and safe way. The second argument adduced on the part of the appellant is that there was a failure to comply with the provisions of the statute in quite a different way. The statute provides, by s. 10:

> "When any incorrigible rogue shall have been committed [that is, committed in manner described in the previous sections] it shall be lawful for the justices of the peace there assembled to examine into the circumstances of the case, and to order, if they think fit, that such offender be further imprisoned in the house of correction, and be kept there to hard labour for any time not exceeding one year from the time of making such order."

But, in the present case, it is clear that there was no examination into the circumstances of this case in the presence and hearing of the appellant. What had happened was that those circumstances had been explored at considerable length in proceedings lasting the better part of two days, when Whitton was on trial before the jury, and it may well be that the justices, having listened to all that evidence, although in the absence of the appellant, were of the opinion that their minds were sufficiently informed of the circumstances of the case relating to this appellant. It cannot, however, except for the purpose of maintaining a controversial position, be seriously argued that when the words "to examine into the circumstances of the case" are put into the statute, what is meant is that somehow, at some time, somewhere, however casually, and in the absence of the defendant, there shall be some investigation of the circumstances of the case. The examination of the circumstances of the case must be in that case, and not in some other case, and the examination must be in the presence and hearing of the defendant in order that he may have a proper opportunity of dealing with those circumstances himself, or by his counsel. Here there was no such examination. The blunder was natural enough, and one easily understood and easily explained; but, in the opinion of this court, it is a blunder which goes to the root of the matter, and, therefore, although no doubt there are no real merits in this case, the sentence which was passed by quarter sessions must be quashed, and, so far as that imprisonment is concerned, the appellant is discharged from it.

Sentence quashed.

Solicitors: *Registrar of the Court of Criminal Appeal*; *Director of Public Prosecutions.*

[*Reported by* T. R. F. Butler, Esq., *Barrister-at-Law.*]

A

R. *v.* LANCASHIRE JUSTICES. Ex parte TYRER

[KING'S BENCH DIVISION (Lord Hewart, C.J., Shearman and Salter, JJ.), November 11, 1924]

[Reported [1925] 1 K.B. 200; 94 L.J.K.B. 331; 132 L.T. 382; 89 J.P. 17; 41 T.L.R. 103; 69 Sol. Jo. 194; 23 L.G.R. 32; 27 Cox, C.C. 711] B

Bastardy—Affiliation order—Residence of applicant—Need to prove permanent or usual residence—Enforcement of order—Refusal of justices—Mandamus—Justices' Protection Act, 1848 (11 & 12 *Vict.*, *c.* 44), *s.* 5—*Bastardy Laws Amendment Act*, 1872 (35 & 36 *Vict.*, *c.* 65), *s.* 3, *s.* 4. C

The applicant, having given birth to a bastard child, took affiliation proceedings before the justices of the L. petty sessional division against the putative father under s. 3 of the Bastardy Laws Amendment Act, 1872, stating that she resided in that division. The justices made an order against the putative father, and he appealed to quarter sessions, but in his notice of appeal he took no point as to the jurisdiction of the justices who made the order, and the appeal was dismissed. No payments were made under the order, and the applicant took proceedings under s. 4 of the Act for its enforcement. In these proceedings the putative father alleged that the applicant was not resident in the L. petty sessional division at the time of the proceedings for the original order, and that, therefore, it had been made without jurisdiction. It appeared from the evidence that the applicant normally lived with her mother in a neighbouring petty sessional division where the child was, in fact, born, but that for some time before and after the birth and at the time of the application for the affiliation summons she was staying with her sister in the L. division. The justices held that at all material times the applicant was residing outside the L. division, and that, therefore, the original order was made without jurisdiction, and they refused to make an enforcement order. D E F

Held: (i) s. 3 of the Act of 1872 did not require that the applicant for a bastardy order should make her application to the justices of the petty sessional division in which she permanently or usually resided; it referred to the division "in which she may reside"; and in the circumstances of the present case the applicant had at the material time resided in the L. division within the meaning of s. 3, and the decision of the justices was wrong. G

(ii) the proper remedy of the applicant was to apply for a writ of mandamus directing the justices to hear and determine the applicant's application for enforcement according to law.

Notes. The Bastardy Laws Amendment Act, 1872, was repealed by the Affiliation Proceedings Act, 1957 (37 HALSBURY'S STATUTES (2nd Edn.) 36), of which s. 3 (1) (a) takes the place of s. 3 of the Act of 1872. For enforcement of a bastardy order, see Magistrates' Courts Act, 1952, s. 74; 32 HALSBURY'S STATUTES (2nd Edn.) 478. H

Referred to: *O'Connor* v. *Isaacs*, [1956] 1 All E.R. 513.

As to bastardy orders and their enforcement, see 3 HALSBURY'S LAWS (3rd Edn.) 122 et seq.; and for cases see 3 DIGEST 400 et seq. As to orders for mandamus generally, see 11 HALSBURY'S LAWS (3rd Edn.) 84 et seq.; and for cases see 16 DIGEST 276 et seq. I

Cases referred to:

(1) *R.* v. *Joint Stock Companies' Registrar* (1883), 21 Q.B.D. 131; 57 L.J.Q.B. 433; 59 L.T. 67; 52 J.P. 710; 36 W.R. 695; 4 T.L.R. 513, D.C.; 16 Digest 302, *1152*.

(2) *Vevers* v. *Mains* (1888), 4 T.L.R. 724; 3 Digest 390, *280*.

(3) *R.* v. *Swindon Justices* (1878), 42 J.P. 407, D.C.; 33 Digest 428, *1411*.

Rule Nisi for Mandamus directed to justices of the petty sessional division of Leyland in the county of Lancaster to hear and determine the matter of a complaint preferred by the applicant for the rule, Mary Ellen Tyrer, against Thomas Iddon under s. 4 of the Bastardy Laws Amendment Act, 1872, for that Iddon had neglected or refused to make payment of certain sums due from him under an order dated Feb. 18, 1924, whereby he was adjudged the putative father of the child of the applicant, and was ordered to pay 7s. 6d. a week for the maintenance and education of that child for a period of years.

On Dec. 19, 1923, Mary Ellen Tyrer gave birth to a bastard child. On Jan. 10, 1924, she commenced proceedings against a man named Iddon for the purpose of obtaining an order against him as the putative father of the child under the law of bastardy. For the purpose of making that application it was necessary for her to say where she resided, and she gave an address which was within the jurisdiction of the justices in the petty sessional division of Leyland. On Feb. 18, 1924, the matter came before the justices for determination. On that occasion Mary Ellen Tyrer gave the same address and added, although it was not necessary, that it was there that her child was born. The justices, having heard the evidence, made an order against Iddon. Thereupon Iddon appealed to the court of quarter sessions. His appeal was heard on April 10 and 11, 1924. He took various grounds in his notice of appeal, but he did not take, and attention was pointedly called by the chairman of quarter sessions to the fact that he did not take, any point as to the jurisdiction of the justices who made the order in bastardy. Some question as to the place of residence of Mary Ellen Tyrer was raised, but merely in cross-examination as to the credibility of the witness. The appeal to quarter sessions was dismissed. On June 2, 1924, under the provisions of s. 4 of the Bastardy Laws Amendment Act, 1872, Mary Ellen Tyrer caused Iddon to be brought up under warrant as he had failed to make the payments required by the order. The applicant's mother had lived for some time, not in the Leyland petty sessional division, but in a part of Lancashire called the hundred of Leyland, which was in a different petty sessional division. There the applicant normally lived with her mother, but some six miles away her married sister had a house which was in the petty sessional division of Leyland, and it had been the applicant's habit from time to time to visit and stay with that married sister. For some time before the birth of the child and for some time afterwards, and at the time when she in fact made the application for the affiliation summons, a period in all of something like thirty days, she was in fact living in this house of her married sister. The grounds upon which the rule was obtained were that in refusing to enforce the order in manner provided by s. 4 of the Bastardy Laws Amendment Act, 1872, the justices unlawfully permitted the validity of the order to be called in question and wrongfully held that, when Mary Ellen Tyrer applied for the order, she did not reside within the petty sessional division in which she obtained the order, and unlawfully held that the order was invalid, and refused to enforce it notwithstanding that the order had been affirmed by quarter sessions.

The justices came to the conclusion that the order of Feb. 18, 1924, had been made without jurisdiction, the ground for their decision being that Mary Ellen Tyrer did not then reside within the jurisdiction of their court, and they refused to enforce the order against Iddon as provided by s. 4.

By the Bastardy Laws Amendment Act, 1872, s. 3:

> "Any single woman who may be with child or who may be delivered of a bastard child after the passing of this Act may either before the birth or at any time within twelve months from the birth of such child, or at any time thereafter, upon proof that the man alleged to be the father of such child has within the twelve months next after the birth of such child paid money for its maintenance, or at any time within the twelve months next after the return to England of the man alleged to be the father of such child, upon proof that he ceased to reside in England within the twelve months next after the birth of

such child, make application to any one justice of the peace acting for the petty sessional division of the county, or for the city, borough, or place in which she may reside, for a summons to be served on the man alleged by her to be the father of the child, and if such application be made before the birth of the child the woman shall make a deposition upon oath stating who is the father of such child, and such justice of the peace shall thereupon issue his summons to the person alleged to be the father of such child to appear at a petty session to be holden after the expiration of six days at least for the petty sessional division, city, borough, or other place in which such justice usually acts."

By s. 4

". . . if at any time after the expiration of one calendar month from the making of [a bastardy order] it be made to appear to any one justice, upon oath or affirmation, that any sum to be paid in pursuance of such order has not been paid, such justice may, by warrant under his hand and seal, cause such putative father to be brought before any two justices, and in case such putative father neglect or refuse to make payment of the sums due from him under such order . . . such two justices may, by warrant under their hands and seals, direct the sum so appearing to be due . . . to be recovered by distress and sale of the goods and chattels of such putative father . . ."

Gilbert Jordan showed cause for the justices.
H. D. Roome showed cause for Iddon.
Clifford Mortimer in support of the rule.

LORD HEWART, C.J.—It is said that in the present case the justices, having the putative father before them upon a warrant of the kind in question, refused to enter upon the question whether they should give the direction which s. 4 of the Act of 1872 contemplates, that is to say, a direction that the sum appearing to be due be recovered by distress, and so forth, and instead, permitted themselves to be led into a discussion whether the order itself, which had been made upon Feb. 18, 1924, was a valid order. No doubt under s. 30 (3) of the Criminal Justice Administration Act, 1914 [see now Magistrates' Courts Act, 1952, s. 53], provision is made for the review in proper proceedings and in a proper case, of an order for the payment of money made by a court of summary jurisdiction. The subsection provides:

"Any order made either before or after the commencement of this Act by a court of summary jurisdiction for the periodical payment of money may, upon cause being shown upon fresh evidence to the satisfaction of the court, be revoked, revived, or varied by a subsequent order."

No such steps were taken in this case. There had been an appeal by Iddon to quarter sessions in which the question of jurisdiction was not raised by the notice of appeal. There had been no proceedings commenced by him or upon his behalf to have the order revoked, or varied by a subsequent order. But when he was in default under the order he sought to defend an application for a distress warrant by attacking the validity of the order upon the question of jurisdiction.

With regard to the merits of that question, it is not necessary to utter many words. Under the statute the application for a summons to be served upon the man alleged to be the father of the child is to be made to a justice of the peace acting for the petty sessional division of the county or the city, borough, or place in which the mother may reside. The statute does not say "in which her permanent place of abode is", nor does it say "her most usual place of abode"; it says that she may apply to a justice of the peace acting for the petty sessional division of the county or for the city, borough, or place in which she may reside. In the circumstances, it is, I think, tolerably obvious that the applicant resided in Leyland within the meaning of the law relating to bastardy. Nor is it seriously suggested that she had fraudulently gone upon a visit at that period of the year and in her extremity to her married sister in order that she might obtain at the hands

of the Leyland justices an order which she apprehended she might not obtain at the hands of the justices for the hundred of Leyland. There is in this case no substantial suggestion of anything of the kind which is necessary to make the de facto residence of the mother something less than the residence which is required by the bastardy law.

What is sought here in those circumstances (the justices having at a late stage entertained the question whether the original order was made without jurisdiction and having refused to enter upon the question whether or no a distress warrant should be directed to be issued) is the remedy provided for by s. 5 of the Justices' Protection Act, 1848. [See now the Administration of Justice (Miscellaneous Provisions) Act, 1938, Sched. II, by which Act an order of mandamus was substituted for the prerogative writ: see s. 7.] It is not necessary that I should read that section. It is a section providing that in a proper case, if a justice refuses to do an act, this court may, by rule, order him to do it, and no action is to be brought against him for doing it. It has been said, and said truly, that in giving effect to the remedy contemplated by that section this court acts upon the principles which guide it where it is asked to grant, in the ordinary sense, a writ of mandamus. The circumstances in which this court will not exercise its discretion to grant a writ of mandamus are sufficiently familiar. As was said by Field, J., in *R.* v. *Joint Stock Companies' Registrar* (1) (21 Q.B.D. at p. 135), a mandamus ought not to be granted where another remedy is provided which is not less convenient, beneficial, and effectual. It is said that in the present case there was another remedy not less convenient, beneficial, and effectual than mandamus or proceedings in lieu of mandamus. That other remedy is said to be an appeal by way of Case Stated. I pass over the fact that the time has now gone by within which the Case might have been stated. It is right that the matter should be considered from the point of view of the date at which an appeal by way of Case Stated was still practicable. But, speaking for myself, I fail to appreciate how it can be said that an appeal by way of Case Stated is equally convenient, beneficial, and effectual on the particular facts of this case. There is before this court the whole of the evidence (and there is not much of it) upon the question of the applicant's residence at the crucial date. How inconvenient it would be that those matters should come before this court on some other occasion together with other matters, including findings of fact, the result of which might conceivably be that the real question would not be effectively raised.

Reference has been made to *Vevers* v. *Mains* (2), but in that case the two things were one. The objection had been taken that the original order, an order in bastardy, was without jurisdiction, and that objection had been overruled upon two grounds, one because the woman was within the jurisdiction of the justices when the order was made, and the other that the objection had not been taken when the order was applied for. The warrant, accordingly, had been issued and the man had been arrested and a judge in chambers had refused an application for a writ of habeas corpus. The matter then came before this court and the materials upon the question where the residence of the woman was were to be found in the affidavits upon the one side and the other, and Bowen, L.J., said that it was plain that the woman did not reside in the division in which the order was made, and that, therefore, the magistrates had acted beyond their jurisdiction. Lord Coleridge, C.J., expressed himself to the same effect, and in the result a writ of habeas corpus was issued. The court did not think it right that a Case should be stated in order that in proceedings of that kind the matter might be contested. The court took the materials which were before it, and upon those materials, being satisfied that the original order was made without jurisdiction, granted a writ of habeas corpus; and it may well be that in a proper case (and for the reasons which I have mentioned I cannot conceive that this is a proper case), if an order for imprisonment were made founded upon an order granted without jurisdiction, a writ of habeas corpus might be obtained, and that would involve an examination by this court of the materials upon which the issue of jurisdiction depended.

A case more relevant to the matter now under consideration is *R.* v. *Swindon Justices* (3), where a member of a friendly society had become insane and chargeable to the union and was sent to a certain county lunatic asylum. The guardians applied to the justices under the statute for an order on the trustees to pay out of the arrears of his annuity the cost of his maintenance in relief of the union. The trustees opposed that order upon the ground not only that the rules forbade them so to apply those funds, but also that the annuity was needed for the member's family. The justices made the order, but refused to issue the warrant. It was held by this court that the justices were bound to issue the warrant inasmuch as the trustees ought to have appealed or applied to quash the order, and that it was now no defence that the order was invalid or made without jurisdiction. It was suggested that in cases where the court had been satisfied on hearing the facts that the order was properly made, the court would grant the rule as a matter of course. COCKBURN, C.J., said:

> "I have sat here a long time but I have never heard of that before. Where an order has been made by a competent authority in a matter within the jurisdiction of that authority, you must give effect to the process of the court. You cannot go back behind the order to see whether, upon the merits, it was properly made. There are other modes of trying that. You cannot pass by the other matter, and then, in the last stage, propose to rip up the whole inquiry and begin de novo. It would be most inconvenient."

Those words, I venture to think, are peculiarly applicable to what is sought to be done by the putative father in the present case. Having had the order made against him, having appealed in vain to quarter sessions, having omitted at quarter sessions to make a point of the question of jurisdiction, having thereafter made default in the payments which the order required him to make, and being brought upon a warrant before the justices in order that a distress might be levied, he proposes to rip up the whole inquiry and begin de novo.

In my opinion, these justices did not hear and determine according to law the matter of the complaint under s. 4 of the statute. They were asked to hear and determine the matter of that complaint. Instead of that they were led by an unfortunate misuse of the judgment in *Vevers* v. *Mains* (2) into a plan for ripping up the whole inquiry and beginning de novo. I think, therefore, that on the facts of this case, it is plain—if I may adopt the phrase of BOWEN, L.J.—that this woman resided, within the meaning of the bastardy law, at the place where she said she resided when she made the application. Secondly, in my opinion, this remedy under s. 5 of the Justices' Protection Act, 1848, is, in the circumstances, the appropriate remedy; and, thirdly, the justices, on June 2, 1924, upon the hearing of a complaint that the putative father had made a default in his payments, had no jurisdiction to consider the validity of the order which had been made against him on Feb. 18, 1924. For these reasons, and in these circumstances, I think that this rule ought to be made absolute.

SHEARMAN, J.—I am of the same opinion. The applicant applied for an order under the Bastardy Laws Amendment Act, 1872, against the respondent, and she obtained an order. He appealed against it and the order was dismissed. He paid her nothing, and she applied for a warrant and an order to enforce payment. I have no doubt that she went into the box to prove she had not been paid anything. Thereupon the following facts were elicited from her in cross-examination—that she had resided with her sister at a spot within the jurisdiction of the magistrates for some time—a week or more before her child was born—and she had gone back again to her mother's home, where she lived regularly and for the most part, to have the birth, and a fortnight after the birth she had gone back to her sister's house where she lived for a month, and it was during that month's residence that she had taken out the summons before the magistrates in the place in which she was then residing. Thereupon counsel for the respondent had the assurance to argue before the magistrates that on those facts being admitted the original order

was without jurisdiction. I agree with every word said by my Lord, that that was not a matter the justices could go into. They can, in rare circumstances, on proper application and new evidence, rescind an order which they have made or which their predecessors have made. It was said on the facts that there was no jurisdiction and the original order was a piece of waste paper, and the magistrates were, I am afraid, alarmed by the case put before them, with the result that they declined to enforce the order. In the result, they declined to use a discretion which, by law, they were bidden to use. They declined to hear the case, and the appropriate remedy is a remedy in the nature of a mandamus. Although I agree with my lord that the magistrates, in those circumstances, had no right to go into any inquiry as to the original order, I should be loth to think that in the High Court no such inquiry can be instituted. When people come for an application in the nature of a mandamus in the High Court, if, on the admitted and undisputed evidence, it appears to the High Court that the order ought not to have been made, I can understand that the High Court in its general inherent jurisdiction in doing justice might decline to use the discretionary remedy of mandamus; but, when we get to the facts of the case, I agree with my Lord that it is perfectly clear that the applicant had a residence within the meaning of the Act, and that there was no want of jurisdiction in the original order. There were, therefore, no merits whatever in the objection taken. I agree that this order must be made absolute.

SALTER, J.—I agree.

Rule absolute.

Solicitors: *Stanton & Sons*, Chorley; *Walbrook & Hosken*, for *Brighouse, Jones & Co.*, Ormskirk; *Sturges & Co.*, for *Smith, Fazackerley & Ashton*, Preston.

[*Reported by* J. F. WALKER, ESQ., *Barrister-at-Law.*]

DURNFORD *v.* BAKER

[COURT OF APPEAL (Bankes, Scrutton and Atkin, L.JJ.), June 25, 26, 1924]

[Reported [1924] 2 K.B. 587, 596; 93 L.J.K.B. 866; 132 L.T. 35; 40 T.L.R. 757; 68 Sol. Jo. 790]

Husband and Wife—"Necessaries"—Right of wife to pledge husband's credit—Costs of matrimonial proceedings—Non-disclosure of misconduct by wife to solicitor—Abandonment of petition—Liability of husband for wife's costs.

The defendant's wife instructed the plaintiff, a solicitor, to present a petition for divorce on the grounds of her husband's adultery and cruelty. The plaintiff, having ascertained that the defendant had committed adultery, and having obtained evidence which made it reasonable to suppose that cruelty would be proved, presented a divorce petition on behalf of the wife. The defendant admitted adultery, but denied cruelty. The plaintiff subsequently became aware that the wife had committed adultery, and the petition was not proceeded with. The plaintiff claimed to recover from the defendant a bill of costs for professional services rendered by him to the defendant's wife in the divorce proceedings.

Held: although the defendant's wife had presumptive authority to pledge her husband's credit, she was not entitled to do so in the present case as she had committed adultery, and, therefore, the plaintiff was not entitled to recover from the defendant the costs in question.

Michael Abrahams, Sons & Co. v. *Buckley* (1), post, p. 634, distinguished.

Decision of ROWLATT, J., [1924] 2 K.B. 587, affirmed.

Notes. Divorce Rule 159 has now been replaced by the Matrimonial Causes Rules, 1957, r. 69.

Followed and extended: *H. S. Wright and Webb* v. *Annandale*, [1930] All E.R. Rep. 409. Considered: *Bullock* v. *Bullock and Vargolici*, [1942] 2 All E.R. 259; *J. N. Nabarro & Sons* v. *Kennedy*, [1954] 2 All E.R. 605. Referred to: *Welton* v. *Welton*, [1927] All E.R.Rep. 431; *Arnold and Weaver* v. *Amari*, [1928] 1 K.B. 584.

As to revocation by a wife's adultery of her right to pledge her husband's credit, and as to such pledging for costs, see 19 HALSBURY'S LAWS (3rd Edn.) 866–869; and for cases see 27 DIGEST (Repl.) 193 et seq.

Cases referred to:

(1) *Michael Abrahams, Sons & Co.* v. *Buckley*, post, p. 634, [1924] 1 K.B. 903; 93 L.J.K.B. 603; 131 L.T. 412; 68 Sol. Jo. 596; 27 Digest (Repl.) 199, *1578.*

(2) *Brown* v. *Ackroyd* (1856), 5 E. & B. 819; 25 L.J.Q.B. 193; 26 L.T.O.S. 215; 2 Jur.N.S. 283; 4 W.R. 229; 119 E.R. 686; 27 Digest (Repl.) 197, *1568.*

(3) *Russell* v. *Russell*, [1892] P. 152; 61 L.J.P. 45; 66 L.T. 436; 8 T.L.R. 442; 36 Sol. Jo. 346, C.A.; 27 Digest (Repl.) 510, *4525.*

(4) *Atkyns* v. *Pearce* (1857), 2 C.B.N.S. 763; 26 L.J.C.P. 252; 29 L.T.O.S. 212; 3 Jur.N.S. 1180; 140 E.R. 616; 27 Digest (Repl.) 193, *1522.*

(5) *Cooper* v. *Lloyd* (1859), 6 C.B.N.S. 519; 33 L.T.O.S. 149; 6 Jur.N.S. 125; 141 E.R. 559; 27 Digest (Repl.) 194, *1530.*

(6) *Cale* v. *James*, [1897] 1 Q.B. 418; 66 L.J.Q.B. 249; 76 L.T. 119; 61 J.P. 230; 45 W.R. 317; 13 T.L.R. 169, D.C.; 27 Digest (Repl.) 200, *1589.*

Also referred to in argument:

Kemp-Welch v. *Kemp-Welch and Crymes*, [1910] P. 233; 79 L.J.P. 92; 102 L.T. 787; 26 T.L.R. 464, C.A.; 27 Digest (Repl.) 534, *4795.*

Franklin v. *Franklin and Minshall*, [1921] P. 407; 90 L.J.P. 306; 126 L.T. 110; 37 T.L.R. 894; 27 Digest (Repl.) 509, *4522.*

Ash v. *Ash*, [1893] P. 222; 62 L.J.P. 97; 68 L.T. 500; 1 R. 524; 27 Digest (Repl.) 563, *5165.*

Walker v. *Walker and Lawson* (1897), 76 L.T. 234; 27 Digest (Repl.) 199, *1583.*

Jovier v. *Hancock* (1796), 2 C. & P. 25, n.; 6 Term Rep. 603; 101 E.R. 726; 27 Digest (Repl.) 193, *1518.*

Ottaway v. *Hamilton* (1878), 3 C.P.D. 393; 47 L.J.Q.B. 725; 38 L.T. 925; 42 J.P. 660; 26 W.R. 783, C.A.; 27 Digest (Repl.) 198, *1575.*

Appeal from the decision of ROWLATT, J.

The plaintiff, Mr. Durnford, claimed to recover from the defendant, Mr. Baker, a bill of costs for services as a solicitor rendered by him to the defendant's wife in divorce proceedings instituted by the plaintiff on the instructions of the wife. ROWLATT, J., found for the defendant, and the plaintiff appealed. The facts are set out in the judgment of BANKES, L.J.

Sir Henry Maddocks, K.C., and *L. J. Acton Pile* for the plaintiff.

F. Hinde and *A. C. D. Jackson* for the defendant.

BANKES, L.J.—This is an appeal from a judgment of ROWLATT, J., and, so far as the researches of counsel seem to show, it raises a point which does not seem to have been raised in any of the decided cases. A married woman, who was at the time living in adultery, instructed a solicitor to present a petition for divorce against her husband on the ground of his alleged adultery and cruelty. At the time of the giving of the instructions the solicitor did not know, and, had no reason to believe, that the wife was not an innocent party. The proceedings continued up to a certain point when, owing to a communication made to the husband, it became known that the wife was living an adulterous life. In those circumstances, the wife determined not to proceed with the suit and, at the instance of the husband, the petition was dismissed. No application for security for costs had been made by the solicitor, and, so far as the Divorce Court was concerned, the

petition was dismissed for want of prosecution, and no order was made as to the wife's costs. The solicitor then commenced this action and the defence of the husband was that his wife was not his agent so as to have authority to pledge his credit for necessaries—that is, for the wife's costs; and ROWLATT, J., held, and rightly held, that that defence was established.

We have been referred to a decision of MCCARDIE, J., in *Michael Abrahams, Sons & Co.* v. *Buckley* (1), which was said to raise the same point as that raised in the present case. All I desire to say is that the point raised there was quite a different one and has nothing to do with the question raised in the present case. The question there was whether a solicitor, acting on behalf of an innocent wife who had commenced proceedings in the Divorce Court—which terminated before trial —against the husband, was entitled to recover in the King's Bench Division his costs from the husband; and the only question there was whether it was necessary to prove that the solicitor believed that the wife was entitled to a decree or whether it was necessary to show that her right had been established in the proceedings. That question has, in my opinion, nothing to do with the present case. If the matter rests on the solicitor's common law rights, it seems to me that there can be no question as to the correctness of the learned judge's decision in this case, for this reason, that it has been more than once pointed out that the solicitor's right to costs is in principle no different from the right of a tradesman seeking to recover from a husband on the ground of her being his agent for necessaries. In *Brown* v. *Ackroyd* (2), which was an action brought by solicitors against the husband to recover the balance of their bill of costs incurred on the retainer of the defendant's wife conducting for her a suit in the Consistory Court at York for a divorce a mensa et thoro on the ground of alleged cruelty, that principle was pointed out and CROMPTON, J., said (5 E. & B. at p. 829):

> "As the case is here put, the plaintiff was bound to show a probability of such personal violence as rendered necessary the protection of a divorce: he is in a position corresponding to that of a tradesman suing the husband for goods furnished to the wife."

In *Russell* v. *Russell* (3), LINDLEY, L.J., said ([1892] P. at p. 157):

> "The wife's solicitor has no right to an order giving him costs as against the husband; her solicitor has no independent right of his own against the husband; the solicitor, in point of law, claims through the wife; and if the court will not give her any costs against her husband, her solicitor can get none."

That was a statement as to the practice in the Divorce Court, but the present claim is made in a common law action in which the solicitor seeks to recover his costs from the husband on the ground that the wife was his agent for necessaries. The short answer to that claim is that a guilty wife has no authority to pledge her husband's credit for anything. That principle is well established by *Atkyns* v. *Pearce* (4), where a medical man made a claim for medicine supplied to, and attendance on, a guilty wife, he not knowing, and having no reason to believe, that she was other than an innocent woman. COCKBURN, C.J., there says this (2 C.B.N.S. at p. 767):

> "The question is, whether under these circumstances she had authority to bind her husband. It seems to me that she had not. The fact of her living in a state of adultery divests her of all the authority which arises out of the marital relation."

It seems to me that those dicta establish a complete answer to a common law action brought by a solicitor, who contends that he has a cause of action on the ground that the wife has implied authority to pledge her husband's credit.

In these circumstances it is not necessary for me to say anything more in support of the learned judge's decision in the court below, except this. We have listened to an argument as to the practice in the Divorce Court and a suggestion based thereon that we ought to come to a different conclusion on the facts of this case

from that of the learned judge, but, in my opinion, the practice in the Divorce Court is of no assistance in deciding the question we have to decide, which depends on the common law doctrine, and if the plaintiff is to succeed at all it must be on the common law doctrine. The authorities, so far as they go, seem to show this, that, when you are dealing with the practice in the Divorce Court, it rests partly on the old law of the husband taking his wife's property on marriage, and partly on the common law doctrine that the husband is bound to provide his wife with necessaries, and the result of those two doctrines is that the Divorce Court, in actions where the wife had to defend herself, regarded the necessity of defence as a necessary in respect of which the wife was in a position to pledge her husband's credit.

It has been pointed out that the solicitor in the Divorce Court could formerly draw his costs from day to day, on the assumption that the proceedings were properly commenced and carried on, so that the court could say that the case was one in which the carrying on of the prosecution or defence to the suit was in fact a necessary. Then came the stage where the taxation took place every term, and, finally, the practice of giving security for costs and not making payment immediately. Under the last rule of practice, the solicitor, even if the wife was unsuccessful, would be entitled to recover her costs up to the amount of the security, on the ground that they were necessaries. At all material times the court exercised a discretion in the matter of costs and r. 159 of the divorce rules expressly provides for the payment of costs, when a wife is unsuccessful. When, however, a solicitor comes in a common law action and endeavours to support his case by the practice in the Divorce Court, he must stand in a hopeless position when he discloses facts which in all human probability would prevent him from obtaining his costs in the Divorce Court itself.

I finish my judgment as I commenced it by saying that this case depends on the fact whether the solicitor has brought himself within the common law rule, under which a solicitor or tradesman is entitled to recover his costs from the husband for necessaries provided to the wife as his agent. In my opinion, the appeal fails and must be dismissed.

SCRUTTON, L.J.—I have listened very carefully to the argument which has been addressed to us. In my opinion, this case should be decided on one very short point. The claim is made by a solicitor against a husband to recover his costs of prosecuting the wife's suit in the Divorce Court, on the ground that the wife, who was living apart from the husband, was, in the circumstances, the husband's agent for necessaries. The right was not in any way one which could be maintained in the Divorce Court, and, in my opinion, the practice in that court has nothing to do with the present case. The case depends on the ordinary common law principle under which a wife can, in certain circumstances, bind her husband for necessaries. The one fact which disposes of the case is this, that the wife, when she retained the solicitor, was living in adultery. I take the law applicable to this case as being contained in the judgment of WILLES, J., in *Cooper* v. *Lloyd* (5), which was an action for necessaries supplied to a wife, who was living apart from her husband and who had been guilty of adultery. The learned judge said (6 C.B.N.S. at p. 524):

> "It appearing that at the time of the supply she was living apart from him, my brother WILLIAMS told the jury that, if the wife had been guilty of adultery, and there had been no subsequent condonation, the husband would not be liable upon the implied obligation which the law imposes upon him to support his wife when living apart from him either in consequence of his misconduct or by his consent; for, that the implied authority of a wife who is not living with her husband as a part of his family, to charge him for necessaries, is put an end to by the effect of her adultery. That seems to have been the substance of the decision; and it appears to me that it is perfectly good law."

In that case the plaintiff claimed as an ordinary tradesman for the supply of

A necessaries, not knowing, however, that the wife was living in adultery. In the case of *Atkyns* v. *Pearce* (4), the plaintiff was a doctor attending the wife and children, but he knew nothing as to the facts about the wife's life, and it was held that the common law authority to pledge the husband's credit for necessaries was destroyed by the fact that the wife had broken her matrimonial obligation of chastity.

B It may be that there is an exception to the rule in the case of a solicitor acting for a wife who is defending a suit and having reasonable grounds for believing his client to be an innocent woman. There may be some such sort of exception, but I cannot find any authority that an exception to the rule applies to a case where a wife is bringing an action against her husband and living in adultery at the time. If there is no authority for the exception, I certainly will not make one, and I C think it would be a pity to alter the law. If, then, the law is, as I suppose it to be, that the wife, guilty of adultery, ceases to be the agent of her husband for necessaries, that adultery destroys the agency, it is, from that point of view, unnecessary to say anything about *Michael Abrahams, Sons & Co.* v. *Buckley* (1) because that was a case of an innocent wife, and the present case is not touched by that decision.

I rest my decision in this case simply on the fact that the wife's adultery, D although unknown to the solicitor, has destroyed her right to pledge her husband's credit for necessaries.

ATKIN, L.J.—This action is brought by a solicitor against a husband on the footing that he is entitled to act for the wife as agent for the husband and that the husband has impliedly contracted to pay the costs incurred by her. That contract E depends on the question whether in fact the wife has authority to pledge her husband's credit. The solicitor in this case acting for the wife has no direct right against the husband, except as derived from the wife. It was held in *Cale* v. *James* (6) that the solicitor's rights were derivative. That was an action brought against a husband by a solicitor who had acted for the wife in a court of summary jurisdiction in a claim against the husband and then sued for his costs, and it was F held that the statutory provision for costs prevented the solicitor claiming them from the husband.

In the absence of any statutory provision for costs, a solicitor must show that the wife was pledging her husband's credit for necessaries; and her right to necessaries is lost if, in fact, she is guilty of adultery. In the present case, the wife was guilty of adultery, and it follows that the solicitor, who has only a common law G right—a right derived from the wife—must prove her authority. I do not propose to deal with the cases cited, except by saying this, that, in my view, the authority of the wife has ceased. I can see nothing which tends to show that the common law principle does not apply to a case of this kind, as it would to the case of a tradesman suing the husband. In *Michael Abrahams, Sons & Co.* v. *Buckley* (1), the only question raised before MCCARDIE, J., was as to the proof required of the H solicitor bringing his claim for costs incurred by an innocent wife. In the circumstances of this case, I need not consider whether the costs incurred by the solicitor would be necessaries. If the rule as to the effect of adultery should not apply to a case of this kind, a guilty wife might very well, by inventing a plot against her husband, deceive the solicitor whom she instructs, with the result that the husband would have to pay the solicitor's costs. That would be a remarkable result and I very unsatisfactory at the present time. The suit must be reasonably instituted by the wife and not only by the solicitor, but all I decide in these proceedings is that the authority of the wife to pledge her husband's credit for necessaries is put an end to by her adultery.

I desire to make this point clear, that nothing we have said in this case has anything to do with the question of costs in matrimonial suits in the Divorce Division—the power over costs depends on the rules laid down as to the exercise of discretion by that court. It may be that, in the exercise of that discretion, rights are given to guilty wives which enable them to bring and defend proceedings

in matrimonial cases, but those rights have no bearing on the common law right of a wife to claim against her husband for necessaries. I should like to reserve the question in a case where the wife finds it necessary to defend herself in matrimonial proceedings. At the present time we have had nothing put before us which shows any exception to the common law rule, except that it must depend on the discretion exercised by the matrimonial court. I am of opinion that the judgment of ROWLATT, J., was right and the appeal must be dismissed.

Appeal dismissed.

Solicitors: *Durnford & Son*; *Bentley & Jenkins*, for *R. Thurlow Baker*, Southend-on-Sea.

[*Reported by* EDWARD J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

BEATTY *v.* BEATTY

[COURT OF APPEAL (Bankes, Scrutton and Sargant, L.JJ.), February 13, 14, 1924]

[Reported [1924] 1 K.B. 807; 93 L.J.K.B. 750; 131 L.T. 226]

Foreign Judgment—Enforcement—Judgment for payment of alimony—Final judgment—Inability of foreign court to vary judgment as to arrears—Action for arrears in this country—Competency.

By the law of the State of New York, a court which has pronounced a judgment for payment of alimony has no power to modify that judgment as to instalments due and in arrear;

Held: such a judgment was a final judgment, and, therefore, an action for payment of the arrears due under such judgment was maintainable in this country.

Notes. Considered: *Simons* v. *Simons*, [1938] 4 All E.R. 436.

As to the enforcement of foreign judgments in personam, see 7 HALSBURY'S LAWS (3rd Edn.) 140 et seq.; and for cases see 11 DIGEST (Repl.) 502 et seq.

Cases referred to:

(1) *Sistare* v. *Sistare* (1910), 218 U.S. 1.
(2) *Bailey* v. *Bailey* (1884), 13 Q.B.D. 855; 53 L.J.Q.B. 583, C.A.; 27 Digest (Repl.) 682, *6515.*
(3) *Robins* v. *Robins*, [1907] 2 K.B. 13; 76 L.J.K.B. 649; 96 L.T. 787; 23 T.L.R. 428; 27 Digest (Repl.) 682, *6516.*
(4) *M'Donnell* v. *M'Donnell*, [1921] 2 I.R. 148; 11 Digest (Repl.) 514, **791.*
(5) *Harrop* v. *Harrop*, [1920] 3 K.B. 386; 90 L.J.K.B. 101; 123 L.T. 580; 36 T.L.R. 635; 64 Sol. Jo. 586; 84 J.P.Jo. 249; 11 Digest (Repl.) 513, *1286.*
(6) *Nouvion* v. *Freeman* (1889), 15 App. Cas. 1; 59 L.J.Ch. 337; 62 L.T. 189; 38 W.R. 581, H.L.; 11 Digest (Repl.) 513, *1282.*
(7) *Sadler* v. *Robins* (1808), 1 Camp. 253; 11 Digest (Repl.) 514, *1289.*
(8) *Re Macartney*, *Macfarlane* v. *Macartney*, [1921] 1 Ch. 522; 90 L.J.Ch. 314; 124 L.T. 658; 65 Sol. Jo. 435; 11 Digest (Repl.) 513, *1287.*

Appeal from a decision of HORRIDGE, J.

On Oct. 19, 1911, the Supreme Court of the State of New York, in a matrimonial suit between the parties, decreed the marriage between the plaintiff and her husband, G. W. Beatty, to be dissolved. The judgment was silent as to the payment of alimony but it provided that

"the plaintiff have liberty to apply for a modification of this decree in case of any event materially changing the circumstances of the parties."

In January, 1912, the plaintiff, who had been employed as a linotype operator, and was earning $12 a week, lost her position and became unemployed. She therefore applied to the court for a modification of its decree by making an order for the payment of alimony to her. On Oct. 4, 1912, the original judgment of the court was amended by decreeing

> "that the defendant pay to the plaintiff the sum of $20 a week, as and for the support and maintenance of the issue of the said marriage and of the plaintiff,"

with liberty to apply for a further modification of the decree in the event of a change of circumstances, and it then stated,

> "And it is further ordered that the said final judgment as hereby amended shall be and is the final judgment of this court in this action."

Up to the date of the action, which was brought in December, 1915, there had accrued due 208 weekly instalments of $20, amounting to $4,160, and in respect of which the defendant had only paid some $360. The plaintiff accordingly brought an action in December, 1915, to recover the balance of the arrears due under the decree, amounting to £818 19s. 4d. By his defence, the defendant denied the fact of the judgment and its amendment; alternatively, he alleged that it had been obtained by fraud. On Dec. 2, 1921, an order was made for the issue of a commission to examine the plaintiff's witnesses in New York, and that evidence was taken in October, 1922. At the trial of the action before HORRIDGE, J., on April 26, 1923, the evidence taken on commission in New York was not tendered, and the plea of fraud was abandoned, but no evidence was given to show that the judgment sued on was a final judgment. In the absence of such evidence, HORRIDGE, J., assumed that the English law was applicable, namely, that no action would lie for a claim for arrears of maintenance, and dismissed the action. The plaintiff appealed, and, on the appeal coming on for hearing on Nov. 11, 1923, the attention of the court was called to the decision of the American Supreme Court in *Sistare* v. *Sistare* (1), as showing that HORRIDGE, J., was wrong in assuming that the judgment sued on was not a final judgment. The further hearing of the appeal was, therefore, adjourned for the purpose of obtaining the evidence of an American lawyer as to the law of New York. On Feb. 13, 1924, the appeal came on for hearing again without the expert evidence, and the court was asked to decide the question on their own view as to the effect of the judgment sued on, having regard also to the American decision mentioned above.

Clement Davies (*Wingate Saul, K.C.*, with him) for the wife.
Sir Henry Maddocks, K.C., and *Moresby* for the husband.

BANKES, L.J.—This is an appeal in an action on a specially endorsed writ. The action is brought by the former wife of the defendant, from whom she has been divorced, and the claim is for £818 19s. 4d. on a judgment of the Supreme Court of the State of New York, dated Oct. 19, 1911, as amended by an order of the court dated Oct. 4, 1912. The particulars of the claim are set out as being an amount due at the rate of $20 per week, less a sum paid on account, leaving the balance as stated above. The defendant put the judgment in issue, and, under those circumstances, it became necessary for the plaintiff to establish that the judgment sued on was a final judgment. For this purpose, evidence was taken on commission of an American lawyer, and he deposed that the judgment was, under the law of the State of New York, a final judgment and enforceable as such. When the case came on for trial before HORRIDGE, J., for some reason which I do not understand the evidence of the American lawyer was not referred to, nor were any of the reported American decisions on the subject cited. In the absence of evidence, the learned judge decided that the judgment was not final. When, in the first instance, the appeal came before this court, the evidence of the American lawyer was still not referred to, and we adjourned the hearing in order that the wife might obtain some evidence as to the finality of the judgment. The case afterwards came back to us, and still the necessary evidence was not forthcoming, and we were invited by the

parties to dispense with evidence and to decide the matter on our own view of the judgment, coupled with an American decision, *Sistare* v. *Sistare* (1), to which our attention has been called. The judgment in the present action was a judgment in a suit for divorce instituted by the wife in the Supreme Court of New York, whereby it was adjudged that the marriage was dissolved. It concluded with this provision:

> "It is ordered, adjudged and decreed that the plaintiff have leave to apply for a modification of this decree in case of any event materially changing the circumstances of the parties, and for such other and further relief as it may be just and proper to grant."

On July 5, 1912, notice of motion was given of an application to the court to modify the judgment by directing payment of alimony, and on the motion coming on for hearing on Oct. 4, 1912, an order was made varying the judgment of Oct. 19, 1911, by including in it this clause:

> "It is ordered, adjudged and decreed that the defendant pay to the plaintiff the sum of $20 a week as and for the support and maintenance of the issue of the said marriage and of the plaintiff."

Then followed a clause giving the plaintiff leave to apply for a modification of the decree, the clause being in the same terms as in the original judgment. There is also a clause at the end:

> "It is hereby further ordered that the said final judgment, as hereby amended, shall be and is the final judgment of this court in this action."

The question to be considered by this court is whether the judgment of October, 1911, as amended, is a final judgment in the sense that an action can be maintained in this country to recover arrears of alimony due thereunder, but I wish at once to point out the distinction between this action and the attempts which have been made on more than one occasion to sue in the King's Bench Division on an order for the payment of alimony made by the English Divorce Court, a proceeding which, as has been held, cannot be allowed. By the law of this country, an order for the payment of alimony can be varied at any time at the discretion of the court which made it, not only with regard to future payments, but also with regard to past instalments which have accrued due. For this reason, GROVE, J., refused to allow judgment to be signed for arrears of alimony under Ord. 14 in *Bailey* v. *Bailey* (2), when he said (13 Q.B.D. at p. 857):

> "It may well be that there are cases in which the court might interfere with respect to future but not with respect to past payments, but no case has been cited to show that the Divorce Court has not the power to interfere with respect to past payments."

In *Robins* v. *Robins* (3), JOYCE, J., took the same view that an order for permanent alimony is not a final judgment. He said there, speaking of the order ([1907] 2 K.B. at p. 17):

> "It was, and still remains, subject to the control of the Divorce Division, which may vary it from time to time, and there is a discretion even as to arrears."

Although that is the rule in this country, it is otherwise in the State of New York, for it seems clear, not only from the evidence of the American lawyer, but also from the decision of the Supreme Court of the United States in *Sistare* v. *Sistare* (1), that, by the law of the State of New York, it is not permissible for the court to interfere with accrued instalments of alimony, though it may vary its order with respect to future payments. If that is the case, it seems to be plain that the judgment sued on in the present case is a final judgment, and that the action can be maintained. Counsel for the husband went so far as to contend that to constitute a final judgment within the meaning of the rule it must be so complete and final that it cannot be varied at all, but for that proposition there is no authority, and the fact that a foreign judgment may be sued on, although it is under appeal, at once disposes of that contention.

Two cases have been cited to us to which I desire to refer, *M'Donnell* v. *M'Donnell* (4) and *Harrop* v. *Harrop* (5). The former, which is an Irish case, at first sight seems to afford some support to the contention that arrears of alimony under a foreign judgment cannot be sued for here, but when the facts of that case are more closely examined, it is plain that no evidence as to foreign law was given, and the majority of the court decided the case on the assumption that the law of the State of Montana, where the order for alimony was made, was the same as the law of this country. From that assumption it followed that the order sought to be enforced was not a final order. The same observations apply to the decision in *Harrop* v. *Harrop* (5), the headnote of which clearly and concisely summarises the law on the subject. It runs thus ([1920] 3 K.B. 386):

> "In order that a foreign judgment may be enforceable in an English court, it must be a final and conclusive judgment of the court by which it was pronounced, and it is not a final and conclusive judgment of that court if an order has to be obtained in that court for its enforcement,"

and that is not the present case,

> "or if on application to that court for an order to enforce it the original judgment is liable to be abrogated or varied,"

and that is not the case here,

> "but it is not prevented from being a final judgment by reason of the fact that it may be the subject of an appeal to a higher court."

In my opinion, the appeal must be allowed and judgment entered for the plaintiff.

SCRUTTON, L.J., stated the facts, and continued: The learned judge, from whose judgment the present appeal is brought and who is very familiar with the practice of the English divorce courts, according to which actions cannot be brought on orders for the payment of alimony because such orders are not final judgments, was of opinion that this judgment of the court of the State of New York was not a final judgment in this sense, that an action could be brought on it. For some reason which at present I do not understand, the learned judge was not referred to the expert's evidence which had been taken in New York to the effect that, according to the law of the State, this was a final judgment. When the appeal first came before this court, we were told that the decision of the Supreme Court of the United States in *Sistare* v. *Sistare* (1) was in conflict with the view of the learned judge, and the further hearing of the appeal was, accordingly, adjourned in order that evidence of the law of New York on the point might be given in the ordinary way. For another reason which I do not understand, the legal advisers of the parties returned to this court without the necessary evidence, and proposed to discuss the effect of the decision in *Sistare* v. *Sistare* (1). But in our courts the question what is the law of a foreign State on a particular matter is treated as a question, not of law, but of fact. We may not look at an American report, and say, on the authority of that report, that the American law is so and so; it must be proved by the evidence of experts in the law. In those circumstances the question arose: What was this court to do? The regular course would have been to send the case down for a re-trial in order that evidence of the facts might be given. But as we were not desirous of putting the parties to further expense, we asked them to agree to this court deciding the matter as arbitrators on the materials before it, and that is how we are now deciding it. Whether the effect of this will be that our decision will be of no authority as a reported case is a matter on which I express no opinion.

The question is: Is this judgment of the court of the State of New York a final judgment which this court will enforce in an action brought for that purpose? The principle which is to be applied is stated by LORD HERSCHELL in *Nouvion* v. *Freeman* (6) when he says (15 App. Cas. at p. 9):

> "I think that in order to establish that such a judgment has been pronounced [that is, a final judgment which this court can enforce] it must be shown that in the court by which it was pronounced it conclusively, finally, and for ever

established the existence of the debt on which it is sought to be made conclusive evidence in this country, so as to make it res judicata between the parties. If it is not conclusive in the same court which pronounced it, so that notwithstanding such a judgment the existence of the debt may between the same parties be afterwards contested in that court, and upon proper proceedings being taken and such contest being adjudicated upon, it may be declared that there existed no obligation to pay the debt at all, then I do not think that a judgment which is of that character can be regarded as finally and conclusively evidencing the debt, and so entitling the person who has obtained the judgment to claim a decree from our courts for the payment of that debt."

That statement of the principle, however, although very widely expressed, must not be understood as meaning that the fact that a judgment may be reversed on appeal, or even that an appeal is pending at the time, makes the judgment the less final, if it is final in the particular court in which it is pronounced. What is the evidence as to the effect of this judgment in the State of New York, where it was pronounced? As I have already said, in England an order for the payment of alimony is not a final judgment within the rule, for it is always open to the court to vary its order even in respect of instalments accrued due, and if that had been the position in New York, this order could not now be sued on, but the evidence of the New York lawyer and the decision in *Sistare* v. *Sistare* (1) show this, that, in the State of New York, where an order for alimony has been made and instalments have accrued due, the court has no power to vary the order as regards the instalments in arrear, however much the position of the parties may have changed, and, consequently, the order in respect of those arrears is a final judgment.

It was, however, contended that a judgment, although it cannot be varied, is not final in the sense that it can be enforced by action, unless it appears on the face of the judgment itself what is the amount to be sued for, and that, as the order in this case was to pay at the rate of twenty dollars a week, you have first to ascertain the number of weeks that the instalments have been in arrear and then do a sum in arithmetic in calculating the amount due. I cannot accept that contention. No doubt, in order to be final, a judgment must be for a sum certain, but a sum is sufficiently certain for that purpose if it can be determined and fixed by a simple arithmetical calculation. We were referred by counsel for the husband to *Sadler* v. *Robins* (7) where the judgment was for £3,370 1s. 9¼d., first deducting thereout the defendant's taxed costs in the suit, and it appeared that no attempt had been made to tax the costs. Lord Ellenborough expressed himself of opinion that the action was not maintainable, as it did not appear what sum was actually due to the plaintiff according to the terms of the decree, but both he and the court in banc. said that when once the costs had been taxed there would be a final judgment, because nothing would remain to be done except to deduct the amount allowed in taxation from the £3,370 1s. 9¼d. It was, however, further suggested that there are certain recent decisions which go to show that an action such as this is not maintainable. In *Re Macartney*, *Macfarlane* v. *Macartney* (8), which was an action brought for arrears due under an affiliation order made by the Court of Appeal in Malta, Astbury, J., held that the judgment was not final and conclusive, and he did so on the evidence of an expert in Maltese law, that the amount of maintenance awarded by the judgments might be varied from time to time or even terminated according to the circumstances of the child. It did not, however, appear whether he was referring only to future maintenance, or also to instalments already due, and I must take it that the case was decided on the principle applicable to an English order of alimony, namely, that a power to vary the order prevents it from being final, even as regards arrears. The same observation applies to the judgment of Sankey, J., in *Harrop* v. *Harrop* (5), where no evidence was given to the court that the State of Perak had no power to alter its order as to instalments accrued and due. *M'Donnell* v. *M'Donnell* (4) proceeded on the same grounds, namely, that there was no evidence as to the law of the State of Montana. There

the court expressly said that, in the absence of evidence as to the foreign laws, they took the order of the foreign court to be analogous to our orders for alimony, and to be liable to variation whether instalments had accrued due or not. It seems to me that none of those cases are in conflict with the view we are taking in the present case. For these reasons, I agree that the appeal should be allowed.

SARGANT, L.J.—In this case, we are dealing with the matter on fuller materials than were brought to the attention of the learned judge in the court below. In the first place, BANKES, L.J., has found in the depositions which were taken on commission in New York, direct evidence as to the law of that State, and in the second place, the parties have agreed to our looking at the American case of *Sistare* v. *Sistare* (1), and forming the best opinion we can in the capacity, I think, of arbitrators as to what the law is. Now the evidence of the American lawyer and the decision in *Sistare* v. *Sistare* (1) seem to me to establish this, that orders for alimony made in the State of New York differ from similar orders made in this country in this respect, that they are final and unalterable as regards arrears accrued due. Therefore, the effect of an order for alimony in that State is that it affords clear evidence as to a definite debt being due, in accordance with what was laid down by LORD HERSCHELL in *Nouvion* v. *Freeman* (6), that it can, as such, be enforced by action. It was said, indeed, that there does not appear on the face of the order itself that any definite sum is due, but I think that the maxim "Id certum est quod certum reddi potest" applies, and if, by working out a simple sum in arithmetic, it can be ascertained that, at the date of the bringing of the action, a definite sum was due and in arrear, it appears to me that this is as final and conclusive an order for the payment of that particular sum as if there had been a definite order for the payment of a named sum on a future date.

I agree that the appeal should be allowed.

Appeal allowed.

Solicitors: *Watkins, Pulleyn & Ellison*; *E. H. Coopman.*

[*Reported by* EDWARD J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

WARD *v.* LAVERTY AND ANOTHER

[HOUSE OF LORDS (Viscount Cave, Viscount Finlay, Lord Atkinson and Lord Sumner), May 5, 6, 1924]

[Reported [1925] A.C. 101; 94 L.J.P.C. 17; 131 L.T. 614; 40 T.L.R. 600; 68 Sol. Jo. 629]

Infant—Custody—Welfare of infant paramount consideration—Death of parents—Father's wish that children be brought up in Roman Catholic religion—Children resident with mother's Protestant relatives.

Three children, the eldest of whom was twelve years of age, were orphans. The mother had been brought up as a Presbyterian, but was received into the Roman Catholic Church before her marriage to the father who was a Roman Catholic. The children had been baptised according to the rites of the Roman Catholic Church and were brought up in that faith. The husband was an habitual drunkard and eventually the wife left him taking the three children with her to reside with her parents. For many years she supported herself and her children, without any financial assistance from her husband. She reverted to the Presbyterian faith and on her death was buried as a Presbyterian. The eldest child, who went to a Protestant school and attended the Presbyterian Church, had decided convictions in favour of the Presbyterian religion. The father took no interest in the children up to his death, but in

his will he expressed a wish that they should be brought up in the Roman Catholic faith. The paternal relatives, who had never shown any interest in the children and did not profess affection for them, sought their custody so that they might be brought up in the religion of their father.

Held: in deciding to whom custody should be given the paramount consideration must be for the welfare of the children although the father's wishes on the question of religion should be taken into account; in view of the fact that the eldest child had gained a firm conviction in favour of the Presbyterian religion the court would not confuse her by forcing on her a change of religion and since she knew and was fond of the grandparents with whom she had lived for many years she might be unhappy if she was removed; as regards the two younger children it would be unwise to separate them from their sister and create a division of religion in the family; and these considerations must prevail over the wishes of the father.

Notes. Section 1 of the Guardianship of Infants Act, 1925 [12 HALSBURY'S STATUTES (2nd Edn.) 954], lays down that the rights of the mother in the matter of custody, care, guardianship, etc., of children should be equal to that of the father but that the welfare of the child should be the first and paramount consideration.

Referred to: *McKee* v. *McKee*, [1951] A.C. 352.

As to right of father to determine religion of child, see 21 HALSBURY'S LAWS (3rd Edn.) 198, para. 437; and for cases see 28 DIGEST (Repl.) 644–647.

Cases referred to:

(1) *Stourton* v. *Stourton* (1857), 8 De G.M. & G. 760; 26 L.J.Ch. 354; 29 L.T.O.S. 33; 21 J.P. 261; 3 Jur.N.S. 527; 5 W.R. 418; 44 E.R. 583, L.JJ.; 28 Digest (Repl.) 658, *1542*.

(2) *Re McGrath* (*Infants*), [1893] 1 Ch. 143; 62 L.J.Ch. 208; 67 L.T. 636; 41 W.R. 97; 9 T.L.R. 65; 37 Sol. Jo. 45; 2 R. 137, C.A.; 28 Digest (Repl.) 644, *1373*.

Appeal from an order of the Court of Appeal in Northern Ireland varying an order of the King's Bench Division in Northern Ireland, reported [1924] 2 I.R. 19.

The question raised by the appeal was whether the custody of any or all of the three infant children of Matthew Joseph and Elizabeth Ward, both of whom were dead, should be entrusted to the appellant, Miss Brigid Ward, an aunt of the husband's, and the children be brought up in the Roman Catholic religion, or to the respondents, Mr. and Mrs. Laverty, the parents of the wife, and the children be brought up as Presbyterians. The parents were married in Belfast in February, 1911, according to the rites of the Roman Catholic Church. The mother was brought up as a Presbyterian, but had been received into the Roman Catholic Church shortly before her marriage. There were three children of the marriage: Mary born on Jan. 10, 1912, Lila born on April 26, 1917, and Peggy born on May 28, 1919. All three children were baptised according to the rites of the Roman Catholic Church and were brought up in that faith by their father. Mary made her first Communion in May, 1920. From the time of their marriage the parents lived with their children in various houses in Belfast, and attended Mass. The father from an early period in his married life gave way to habits of intemperance and treated his wife with cruelty. He was dismissed from his employment as a traveller for Allsopp's Brewery owing to his intemperate habits; he was convicted of an assault on his wife and was found to be an habitual drunkard; on several occasions the wife was compelled to take the children with her and to seek the protection of her parents' house, and for many years she supported herself and her children without any financial assistance from her husband. Finally, in June, 1920, she left the public-house in which she had resided with her husband and, taking the children with her, went to live with her parents, the respondents, where she lived up to the date of her death in May, 1923. The mother, after returning to her parents, reverted to her original religion and she was buried as a Presby-

A terian. From June, 1920, Mary, the eldest daughter, went to a Protestant national school and attended a Presbyterian church, the minister of which gave evidence that in his opinion she had acquired a definite attachment to the Presbyterian faith. The father, from the time that his wife and children left him in June, 1920, appeared to take no further interest in them up to his death in October, 1920. By his will, dated in July, 1920, he left certain freehold property for the benefit of B his children, and appointed the mother trustee of the proceeds of the sale of the property, and he expressed the wish that the three children should be brought up in the Roman Catholic faith. Upon an application by the appellant for a writ of habeas corpus to have before the court the bodies of the three children, the King's Bench Division ordered the writ to issue in respect of the two younger children, but made no order with regard to the eldest child. The Court of Appeal (MOORE C and ANDREWS, L.JJ.) reversed this order with regard to the two younger children and affirmed the order with regard to the eldest child.

There was an appeal and a cross-appeal from this order.

M'Gonigal, K.C., *T. J. Campbell, K.C.*, and *P. McCorry* (all of the Irish Bar) for the appellant.

D *Babington, K.C.*, *Murphy, K.C.*, and *William Lowry* (all of the Irish Bar) for the respondents.

VISCOUNT CAVE.—This is an appeal from an order of the Court of Appeal in Northern Ireland, partly affirming and partly reversing an order made by a Divisional Court of the King's Bench Division. The order under appeal relates to the three orphan daughters of the late Matthew Joseph Ward and Elizabeth, his E wife, the daughters being Mary, who is now aged twelve and a quarter, Lila, who is now aged seven, and Peggy, who will be five at the end of this month. These children are now and have for some time been in the care of their maternal grandparents, Mr. and Mrs. Laverty, the respondents to this appeal. The grandparents are Presbyterians, and the children are being or will be brought up as Presbyterians. The order under appeal was made upon an application of Miss Brigid Ward, an F aunt of the children's father, and, therefore, a grand-aunt of the children, for the issue of a writ of habeas corpus with a view to the children being placed in the custody of their paternal relatives, who are Roman Catholics, and being brought up in the Roman Catholic faith. The Divisional Court refused a rule as regards the eldest child, Mary, but granted it as regards the two younger children, and cross-appeals having been lodged, the Court of Appeal affirmed the decision as regards G Mary, but as regards the younger children reversed the decision of the Divisional Court and refused a rule; hence the present appeal.

The facts, when the affidavits are carefully looked into, are not seriously in dispute. Matthew Joseph Ward, who was a Roman Catholic, was married on Feb. 22, 1911, to Elizabeth Laverty, a daughter of the respondents, who are Presbyterians. Elizabeth Laverty, the wife, had until that time been a Protestant, H but just before, and probably with a view to the marriage, she was received into the Roman Catholic Church. The couple lived in Belfast, and these three children were born to them, one in January, 1912, one in April, 1917, and the third in May, 1919. The daughter Mary, when she was old enough, attended a Roman Catholic school in Belfast, and at the age of seven years or thereabouts made her first Communion in accordance with the practice of the Roman Catholic Church. I The other two children were quite young when their father died, one being then only three years old and the other one year old, and, of course, no question of religion had arisen as to those two young children. The marriage was not a happy one, and certainly it was not a fortunate one for the wife. The husband constantly drank to excess, and in April, 1912, three months after the birth of the first child, was discharged for intemperance from his employment. After that time the habit of intemperance continued, and he was constantly drunk. He was also cruel and violent to his wife, and on one occasion (in the year 1915) he was convicted of an assault upon his wife and of habitual drunkenness. He failed to support his wife

and children properly, so that the wife had to keep herself and children and at times (as I gather from the affidavits) her husband also from what she could earn at dressmaking. On several occasions she was forced to leave her husband and, with her children, to take refuge with her parents, the respondents, who apparently were always ready to receive and to succour her. In the month of June, 1920, the final rupture occurred. At that date the wife left her husband, with the children, and went to live with her parents. The husband went to live with his brother at a place called Gargory, about thirty miles from Belfast, and from that time until his death he neither supported his family nor, so far as the evidence shows, took any interest in them at all. The husband, the father of the children, died somewhat suddenly on Oct. 27, 1920. He left a will, which has been proved, by which he gave his freehold property to be sold and the proceeds to be distributed among his children equally, and he desired his wife to be trustee of the proceeds; and he added:

> "I also wish and desire that those three children be brought up in the Roman Catholic faith, in which they were baptised and of which they are at present members."

It is said that the value of the property was about £2,000.

I now turn to the history of these children since the separation of their parents in June, 1920. It would appear that at, or soon after, that time the mother of the children ceased to conform to the Roman Catholic faith, for it is proved that immediately after leaving her husband she took the child Mary away from the Roman Catholic school which she had attended, and caused her to attend a national school connected with the Baptist denomination. Mary would then be about eight and a half years old, and she continued to attend that school until the commencement of these proceedings. It is suggested in one affidavit that the father approved of her being sent to that school. I doubt whether that is established, and I think the more probable view of the evidence is that he neither inquired nor cared how or where the child was receiving her education. At about the same time, or soon afterwards, Mary began to attend the Presbyterian Church, St. Enoch's Church, with her grandparents and their family, for, in addition to the grandparents, there were two unmarried daughters living with them, and I have no doubt, on a fair reading of the evidence, that the wife, Mrs. Ward, also attended that church. At all events, it is proved that before her death she reverted to her former faith, became again a Presbyterian, and died in that communion. The Rev. John Pollock, who is the minister of St. Enoch's Church, said in evidence that the little girl Mary came regularly to the church with her grandfather, that he conversed with her on religious matters once or twice and that his opinion was that she had decided convictions in favour of the church she was then attending. He based that opinion upon what he knew of her mind in the matter. During this period—that is to say, from June, 1920, to the date of the mother's death in March, 1923—it is not proved that any member of the father's family took sufficient interest in the children to find out in what religion they were being brought up, or where the eldest girl went to school. That is some vague evidence that they endeavoured to see the children, and that from time to time the mother of the children visited the great-aunts, but there is nothing to show that the great-aunt who applies. Brigid Ward, or her sister, Mrs. Jordan, who makes an affidavit, made any real attempt to find out how the children were being brought up. The mother of the children, Mrs. Ward, died on Mar. 23, 1923, and thereupon their paternal relatives began to make some inquiries, and in April, 1923, they took these proceedings with the result which I have stated. To make the story complete, I should add that it is not disputed that the children are happy in their present home, and that the grandparents are fond of them—their conduct during the past twelve years is sufficient evidence of that—and the grandparents say that they are ready and willing to care for the welfare and happiness of the children if they are left with them. On the other hand, the paternal relatives, who have shown little interest in

A the children in the past, do not now in their evidence profess any affection for them —probably they are little known to the children—and the only reason for the application given in the affidavit of the appellant is that the paternal relatives desire that they should be brought up in the religion of their father. For that reason they say they are willing to take the custody of the children and to keep them at their place, which is an upper floor above some licensed premises, where the two B great-aunts, Mrs. Jordan and Miss Ward, reside, and there is some suggestion that the children may be sent to a school or institution connected with the Roman Catholic religion. There is, further, the important fact that the learned judges of the King's Bench Division saw the eldest child, Mary, as they were, of course, entitled to do, and the Lord Chief Justice gives his account of the interview. He says: "We saw the child ourselves. She is a bright, intelligent child, between C eleven and twelve, and the opinion we have formed of her coincides with that of the reverend gentleman—that is to say, the Rev. Mr. Pollock—who had stated that she had decided convictions in favour of the Presbyterian Church." That statement about her convictions is confirmed by the evidence of the grandparents.

On those facts the question is, What ought to be done as regards these children? The law in these cases is well settled, and indeed is not contested by the learned D counsel who argued the case before this House. On the question of the religion in which a young child is to be brought up, the wishes of the father of the child are to be considered, and, if there is no other matter to be taken into account, then, according to the practice of our courts, the wishes of the father prevail. But that rule is subject to this condition, that the wishes of the father only prevail if they are not displaced by considerations relating to the welfare E of the children themselves. It is the welfare of the children which, according to rules which are now well accepted, forms the paramount consideration in these cases. Some of the earlier judgments contain sentences in which perhaps greater stress is laid upon the father's wishes than would be placed upon them now, but in the more recent decisions, and especially since the passing of the Guardianship of Infants Act, 1886, s. 5 of which shows the F modern feeling in these matters, the greater stress is laid upon the welfare and happiness of the children. It is, of course, still true, as the learned counsel who argued the case quite properly said, that a sufficient case must be made for going contrary to the father's wishes; but, if such a case is made, then the courts have no hesitation in deciding upon the whole facts of the case. Looking at the matter in that light, what is the true conclusion in this case? I take first the G daughter Mary. She is a child of twelve, bright and intelligent, and the evidence and the statement of the learned judges of the King's Bench Division shows that she is interested in religious matters and has decided convictions in favour of the Presbyterian Church. For nearly four years she has attended a Protestant church. No doubt she is still young, but the growth in character and in conviction during the years from eight to twelve is infinitely swifter and of more importance than it H would be in the tender years up to the age of eight, and in view of what the learned judges have said, I think your Lordships will have no difficulty in accepting the view that this child has acquired settled, or, at all events, strong convictions in favour of the Protestant faith and of the Presbyterian church which she is attending. Now, if that is so, to force a change of religion upon this young child now would be a serious matter. It might, as a distinguished judge said in I *Stourton* v. *Stourton* (1), which has been cited, have the result that, assuming tares to have been sown, the wheat would be pulled up with the tares—that is to say, it might wholly confuse her religious beliefs, and the ultimate effect might be that she would cease to have any religious convictions at all. There is a danger, as LINDLEY, L.J., said in *Re McGrath (Infants)* (2), in allowing relatives on one side or the other to play "battledore and shuttlecock" with the religious training of a child of that age. Where a conviction in favour of a particular faith is found to exist, then I think any court would hesitate long before permitting it to be subjected to that risk.

There is also the question of the welfare and the future happiness of the child in other respects. As to the question of means, there is, as the learned judges have said, not much to choose between the relations on the one side and on the other. But there is this further fact that the child knows and is fond of her grandparents with whom she has lived now for some years; that she relies and is justified in relying upon their tried affection, and that if she were now moved to a new home where she would be among strangers she might become unhappy, and she would not be in a position, as she is now, to take her troubles to those whom she knows and for whom she has conceived affection. Against these considerations there are to be set the wishes of the child's father. I do not think the evidence is sufficient to show, in the words of some of the cases, that he abandoned his right to be heard upon the matter. I think that his wishes must still be considered, and that he has expressed them, not only in his will, but in the fact that throughout his life these children were brought up as Roman Catholics. At the same time I do not think it is right to put entirely out of account the character of the father, the way in which he himself behaved, and especially the way in which he treated his wife, and the fact that he failed to support both his wife and his children. The wishes of such a father are not entitled to the same weight as those of one who had been called in the cases "a good and honest father." There is also the fact that some months before his death he permitted the home to be broken up and the children to be taken to a Protestant home, and at all events made no attempt to inquire in what faith the children were, from that time, being brought up. It is also to be remembered that for nearly three years after his death—namely, from October, 1920, to March, 1923—his relatives appear to have taken no steps either to find out in what religion the children were being brought up, or to ensure that they should be brought up in the faith of their father. If the considerations on both sides are weighed, there can, I think, be no doubt that it will be for the welfare of the daughter Mary that so far as she is concerned things should be left as they are, and that it would be most injurious to her welfare to take her away now from the custody of her grandparents, or to remove her from a Protestant to a Roman Catholic household. With regard to Mary, therefore, I entertain no doubt at all that the decision of the Court of Appeal was right and should be affirmed. As regards the two younger children, Lila and Peggy, the case, of course, is different. As regards these children no question of religious convictions arises; they are far too young to have formed any such convictions. But the decision of the Court of Appeal proceeds upon this footing, that it would be wrong to separate them from their elder sister and to deprive them, not only of the care of their grandparents, but of the care which an elder sister, even of the age of twelve, can give to her little sisters, and also that, from a spiritual point of view, it would be wrong in this case to create a division in religion between these members of one family, to have the eldest child brought up as a Protestant and the two younger ones brought up as Roman Catholics. That point was mentioned, but, so far as the judgment shows, was not very much considered by the learned judges of the King's Bench Division. It was fully considered by the Court of Appeal, and they came to the conclusion that, for the reasons which I have stated briefly, but which are stated at much greater length in their judgment, it would not be for the welfare of the younger children to remove them from the care of their grandparents, and to remove them to the care of their paternal great-aunt. I have carefully considered this matter, and I find myself on this point also in agreement with the Court of Appeal. It is admitted quite frankly that, if the children remain where they are they will be brought up as Protestants; but the applicants have disclaimed any desire to have directions given as to the religion in which the children shall be brought up apart from the question of custody. They ask for custody, and not for any special order as to religious faith. That being so, one must consider the question as a whole. I do not think it would be for the good of these little girls that they should be separated in residence from their elder sister, that they should lose her companionship and care, or that in their future life they should be

divided from her by what has been referred to as "the chasm of different religious opinions"; nor do I think it is good for them that they should now be deprived of the affectionate care of their grandparents and the other members of the household in which they are now living. These considerations, which relate to the welfare of the younger children, appear to me to prevail over the wishes of the father, especially such a father as this; and accordingly I have come to the conclusion that in this case also the decision of the Court of Appeal is the right one. I move that this appeal be dismissed with costs.

VISCOUNT FINLAY.—I have arrived at the same conclusion, and for precisely the same reasons as those which have just been stated from the Woolsack.

LORD ATKINSON.—I concur for the same reasons.

LORD SUMNER.—I agree.

Appeal dismissed.

Solicitors: *John B. & F. Purchase & Clark*, for *Daniel O'Rorke & Son*, Belfast; *Barlow, Lyde & Yates*, for *C. & H. Jefferson*, Belfast.

[*Reported by* EDWARD J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

PARKINSON *v.* COLLEGE OF AMBULANCE, LTD., AND ANOTHER

[KING'S BENCH DIVISION (Lush, J.), July 29, 30, 31, 1924]

[Reported [1925] 2 K.B. 1; 93 L.J.K.B. 1066; 133 L.T. 135; 40 T.L.R. 886; 69 Sol. Jo. 107]

Contract—Illegality—Public policy—Agreement to procure knighthood in return for payment—Failure to procure title—Claim to recover money paid or for damages.

The secretary of the defendant company fraudulently represented to the plaintiff that he or the company had power to nominate persons to receive titles of honour and would arrange for the grant to the plaintiff of a knighthood if he made a substantial donation to the funds of the company. The plaintiff gave the sum of £3,000 to the company on the faith of these representations, but he did not receive a knighthood. In an action brought by him against the company and its secretary to recover the money he had paid as money had and received or as damages for deceit or breach of contract,

Held: a contract for the purchase of a title was illegal as being contrary to public policy however the money was to be expended, and, as the plaintiff knew he was entering into an illegal contract, he could not recover the money he had paid on the ground that it was money had and received by the company to his use; nor could he recover the money as damages since where the parties were in pari delicto an action for damages could not be maintained by the party defrauded; nor could he claim to repudiate the contract as being still executory since he had never resiled from it; and, therefore, the action failed.

Notes. Referred to: *Re Maundy Gregory, Ex parte Norton*, [1934] All E.R.Rep. 429; *Harry Parker, Ltd.* v. *Mason* (1940), 164 L.T. 161.

As to agreements relating to titles and for recovery of money paid under illegal contracts, see 8 HALSBURY'S LAWS (3rd Edn.) 150, para. 258, and 132, para. 227; and for cases see 12 DIGEST (Repl.) 275, 315–317.

Cases referred to:

(1) *Taylor* v. *Chester* (1869), L.R. 4 Q.B. 309; 10 B. & S. 237; 38 L.J.Q.B. 225; 21 L.T. 359; 33 J.P. 709; 12 Digest (Repl.) 311, *2401.*

(2) *Fivaz* v. *Nicholls* (1846), 2 C.B. 501; 15 L.J.C.P. 125; 6 L.T.O.S. 319; 135 E.R. 1042; sub nom. *Finan* v. *Nicholls*, 10 Jur. 50; 12 Digest (Repl.) 323, *2494*.

(3) *Hughes* v. *Liverpool Victoria Legal Friendly Society*, [1916] 2 K.B. 482; 85 L.J.K.B. 1643; 115 L.T. 40; 32 T.L.R. 525, C.A.; 12 Digest (Repl.) 321, *2479*.

(4) *Kettlewell* v. *Refuge Assurance Co., Ltd.*, [1908] 1 K.B. 545; 77 L.J.K.B. 421; 97 L.T. 896; 24 T.L.R. 216; 52 Sol. Jo. 158, C.A.; affirmed, [1909] A.C. 243; 78 L.J.K.B. 519; 100 L.T. 306; 25 T.L.R. 395; 53 Sol. Jo. 339, H.L.; 35 Digest 71, *690*.

(5) *Hermann* v. *Charlesworth*, [1905] 2 K.B. 123; 74 L.J.K.B. 620; 93 L.T. 284; 54 W.R. 22; 21 T.L.R. 368, C.A.; 12 Digest (Repl.) 317, *2444*.

Also referred to in argument:

Kearley v. *Thomson* (1890), 24 Q.B.D. 742; 59 L.J.Q.B. 288; 63 L.T. 150; 54 J.P. 804; 38 W.R. 614; 6 T.L.R. 267, C.A.; 12 Digest (Repl.) 318, *2453*.

Re Wallace, Champion v. *Wallace*, [1920] 2 Ch. 274; 89 L.J.Ch. 450; 123 L.T. 343; 36 T.L.R. 481; 64 Sol. Jo. 478, C.A.; 12 Digest (Repl.) 275. *2112*.

Aubert v. *Walsh* (1810), 3 Taunt. 277; 128 E.R. 110; 25 Digest 404, *79*.

Tappenden v. *Randall* (1801), 2 Bos. & P. 467; 126 E.R. 1388; 12 Digest (Repl.) 316, *2437*.

Egerton v. *Earl Brownlow* (1853), 4 H.L.Cas. 1; 8 State Tr.N.S. 193; 23 L.J.Ch. 348; 21 L.T.O.S. 306; 18 Jur. 71; 10 E.R. 359, H.L.; 12 Digest (Repl.) 269, *2072*.

Gordon v. *Metropolitan Police Chief Comr.*, [1910] 2 K.B. 1080; 79 L.J.K.B. 957; 103 L.T. 338; 74 J.P. 437; 26 T.L.R. 645; 54 Sol. Jo. 719, C.A.; 12 Digest (Repl.) 313, *2414*.

Lowry v. *Bourdieu* (1780), 2 Doug.K.B. 468; 99 E.R. 299; 12 Digest (Repl.) 318, *2446*.

Harse v. *Pearl Life Assurance Co.*, [1904] 1 K.B. 558; 73 L.J.K.B. 373; 90 L.T. 245; 52 W.R. 457; 20 T.L.R. 264; 48 Sol. Jo. 275, C.A.; 12 Digest (Repl.) 321, *2477*.

Reynell v. *Sprye*, *Sprye* v. *Reynell* (1852), 1 De G.M. & G. 660; 21 L.J.Ch. 633; 42 E.R. 710, L.JJ.; 12 Digest (Repl.) 320, *2472*.

Re Mahmoud and Ispahani, [1921] 2 K.B. 716; 90 L.J.K.B. 821; 125 L.T. 161; 37 T.L.R. 489; 26 Com. Cas. 215, C.A.; 12 Digest (Repl.) 303, *2333*.

Further Consideration of action tried with a special jury.

The plaintiff, George Westhead Parkinson, claimed from the defendants, the College of Ambulance, Ltd., and Ernest Harrison, the secretary of that company, £3,000 as damages for deceit, or, alternatively, as money had and received by the defendants to the use of the plaintiff, or, in the further alternative, as damages for breach of warranty of authority. The plaintiff alleged that on or about Oct. 10, 1921, the defendant, Harrison, on his own behalf and on behalf of the defendant company, represented to the plaintiff that the defendant company and/or himself had power to nominate persons to receive titles of honour, and that the defendant company and/or himself could and would arrange for the grant to the plaintiff of the honour of a knighthood provided that the plaintiff would make a substantial donation to the defendant company. The plaintiff further alleged that he paid £3,000 to the defendant company on the faith of these representations which were false and fraudulent. The defendant company denied that the defendant, Harrison, had any authority from it to make the alleged representations, and said that it received the £3,000 from the plaintiff in good faith and without knowledge of the representations. The defendant, Harrison, denied the alleged representations and said that the donation was made by the plaintiff unconditionally. Both defendants pleaded that if the allegations made by the plaintiff were true the plaintiff paid the £3,000 on an agreement and consideration which were illegal and against public policy and that, in consequence, the plaintiff was not entitled to recover that sum.

A The jury, in answer to questions, found that the defendant, Harrison, represented to the plaintiff that he was in a position to undertake that the plaintiff would receive a knighthood, and that he did not merely promise to use his influence for that purpose; that that representation was false and fraudulent; that the plaintiff was induced thereby to part with his £3,000; that the plaintiff contracted not with the defendant, Harrison, personally, but in the belief that he had the authority B of the college in giving the undertaking; that the defendant, Harrison, was so authorised and was held out by the defendant company as so authorised; that the plaintiff did not knowingly mislead the council of the defendant company into thinking that he was making a voluntary contribution; and that the damages to which he was entitled were £3,000.

C *F. Boyd Merriman, K.C.*, and *St. John Field* for the plaintiff.
Stewart Bevan, K.C., and *D. N. Pritt* for the defendant company.
Rayner Goddard, K.C., and *Croom-Johnson* for the defendant, Harrison.

Cur. adv. vult.

July 31. **LUSH, J.**, read the following judgment.—This case raises questions of considerable public importance. Before discussing them and stating what my D view is with regard to them, there is a finding of the jury with regard to authority with which I must deal. I asked the jury whether the College of Ambulance, in fact, authorised, or held Harrison out as authorised, to give an undertaking to the plaintiff that he would receive the honour of knighthood if he contributed £10,000 to the college. I do not think that the question of authority is really a material one; if the contract which the plaintiff made was a lawful one, he does not need E to rely on it. If it was unlawful, his case is not strengthened by the jury's finding, as I will point out later. But I thought it better to take the jury's opinion. I reserved the question whether there was any evidence to support such findings, should the jury answer the questions in the plaintiff's favour. I had grave doubts whether the facts on which counsel for the plaintiff relied, and which I told the jury to consider, afforded any sufficient evidence. I told the jury that I thought F that there was very little, if any, evidence of holding out, and that I thought that the question of actual authority was rather a question of law for me rather than a question of fact for them. After hearing arguments on the question, I am of opinion that there was no sufficient evidence, either of holding out or of actual authority. I do not think that the council who control the affairs of the college or the committee did anything to mislead the plaintiff. There is no evidence at G all that they held Harrison out as their ostensible agent. Nor do I think that the facts on which counsel for the plaintiff relied, the minute which he put in, the fact that the letter of Dec. 23, 1921, claiming a return of the £3,000, was on the file, the statement by Mr. Pritchard that Harrison had been over-zealous, but that he had not been suspended, or the letter of Princess Christian, the President of the College, are sufficient to justify the finding that there was an actual authority. H In law there clearly was no implied authority. Harrison's duty was to collect subscriptions, not to make contracts or give undertakings as to securing titles for subscribers. So far as the evidence is concerned, the utmost that it does is to suggest that some of those who were interested in the affairs of the college—possibly the committee—know that Harrison was telling subscribers that the conferring of an honour might follow. But that is entirely different from under- I taking to secure it. I must, therefore, deal with the case on the footing that Harrison acted throughout without the authority, actual or ostensible, of the college.

I come, then, to the main questions in the case and first I will deal with the question whether the contract was against public policy and therefore illegal. In spite of the able argument of counsel for the plaintiff, I cannot feel any doubt that a contract to guarantee or undertake that an honour will be conferred by the Sovereign, if a certain contribution is made to a public charity, or if some other service is rendered, is against public policy, and, therefore, an unlawful contract

to make. Apart from being derogatory to the dignity of the Sovereign who bestows the honour, it would produce, or might produce, mischievous consequences. It would tend to induce the person who was to procure the title to use improper means to obtain it, because he had his own interests to consider. It would tend to make him conceal facts regarding the fitness of the proposed recipient. Moreover, if the contract was lawful, an action could be brought if the stipulated title was not obtained or if the money was not paid. A person in the position of this plaintiff could claim and be awarded damages for the loss of a title and for obtaining one of a less degree than that for which he had bargained; a person in the position of the defendants in this case could claim and be awarded damages for not receiving the promised contribution, although the title had been obtained. No court could try such an action and allow such damages to be awarded with any propriety or decency. The contract, in my opinion, is one that could not be sanctioned or recognised in a Court of Justice. Such a contract as that which the plaintiff and Harrison made is, in my judgment, an illegal and improper contract to enter into. I do not, of course, say that it involves the same degree of moral turpitude that an actually immoral contract involves; still less a contract to commit a crime such, for example, as a contract between a man and woman that, in consideration of money paid to her, the woman should commit an act of immorality with the man, or, to use the illustration which counsel for the defendant, Harrison, suggested in the course of the trial, a contract with a procurer that he should procure a woman for an immoral purpose. The money paid by the plaintiff was not paid as the price or "wages" of immorality. It was not paid as a bribe to Harrison. It was paid to a public charity, a meritorious service in itself. But the contract which was entered into is not a contract which one can describe as innocent in itself. There are contracts of that description which the law prohibits. To take the case which I put to counsel for the defendant company during the argument, the law does not allow an employer to bind his servant, after the service is over, not to carry on a competing business except within a reasonable area. If it is unduly extended, the contract is in restraint of trade, and therefore against public policy, and therefore illegal. But it is not in itself an improper contract to make. The same may be said of a contract for the sale of certain classes of articles which are prohibited by statute unless certain conditions are fulfilled. But a contract for the purchase of a title, however the money is to be expended, is in itself an improper contract.

The first question to consider is this. The contract being against public policy, and being of the character that I have described, can the plaintiff still rely on the fraud of Harrison and recover damages against him; and can he, as against the college, recover the £3,000 which the college has received through that fraud, as money had and received to his use? I am not prepared to hold—it is not necessary that I should decide the question—that in every case where a contract is against public policy, where one of the parties to it is defrauded by the other, he is prevented from recovering. It may be that whenever one party to a contract which is not improper in itself is unaware that it is illegal and is defrauded, the parties may not be in pari delicto. However that may be, I am of opinion that if the contract has any element of turpitude in it the parties are in pari delicto and no action for damages can be maintained by the party defrauded. It is not correct to say, as was contended before me, that it is only if the contract is of a criminal nature that the plaintiff is precluded from recovering. *Taylor* v. *Chester* (1) is an authority against this proposition. No criminal offence was committed there; and in *Fivaz* v. *Nicholls* (2), although a criminal offence was committed, the decision was not founded on that fact, but on the illegality and impropriety of the contract. It was also contended that fraud has the same effect as duress, and that it would be contrary to public policy to allow a party who has defrauded another to retain the fruits of his fraud. I cannot agree with that contention. *Hughes* v. *Liverpool Victoria Legal Friendly Society* (3), which appears to support it, does not do so when the facts are considered. The fraud there was committed

by an agent of the defendants who deceived the plaintiff into believing that an insurance could be properly effected and would be valid, although there was no insurable interest. The fraud there related to the validity of the contract. The agent of the insurance company, who knew that the contract was illegal, deceived the policyholder regarding its validity. It was held that the parties were not in pari delicto, and that an action would lie to recover the premiums which the plaintiff had paid. The decision of the Court of Appeal in *Kettlewell* v. *Refuge Assurance Co.* (4) is another illustration of the same principle. These cases are very different from the present case. In the present case the plaintiff knew that he was entering into an illegal and improper contract. He was not deceived about the legality of the contract which he was making. How, then, can he say that he is excused? How can he say that he has suffered a loss through being defrauded into making a contract which he knew he ought never to have made? The answer is that he ought not to have made it. Where he was deceived was that he thought he would make a profit, derive a benefit from his unlawful act. He cannot be heard to say that. He has himself to blame for the loss that he has incurred. It is no excuse to say that Harrison was more blameworthy than he, which is all that he really can say. That being the position the plaintiff is in this difficulty. He cannot recover damages either against Harrison or the college because he is disclosing or setting up a contract which is unlawful and which he had no right to make. For the same reason he cannot recover the £3,000 from the college as money had and received. It is quite true that a principal cannot benefit by his agent's fraud, or a master by that of his servant. But the plaintiff is not in a position to rely on the fact that the college have benefited by their servant's fraud. He cannot reach that part of his case. He is precluded, by the illegality of the contract, from relying on it.

Then can he rely on the principle which has been acted on in the cases that were cited to me that the contract being executory he can claim back from the college or Harrison the £3,000 that he has paid? Can he resile from the contract, abandon it, and sue for the £3,000? The first difficulty in the plaintiff's way is that he is not in truth resiling from the contract at all. He is really bringing this action because he has failed to obtain the promised title. It seems to be something like an abuse of language to say that he is resiling from the contract, as the plaintiff did in *Hermann* v. *Charlesworth* (5). If there is any locus pœnitentiæ in a case like this, which I do not think there is, there has been no pœnitentia. But if there has been, the plaintiff still cannot recover on the ground that the contract is executory. He cannot get back the £3,000 from Harrison. He did not receive the £3,000; the college received it and the college were never parties to an executory contract. Harrison was the contractor. Even if the college had authorised the contract, the other answer that I have given to the plaintiff's contention is, I think, complete. He never has resiled from an executory contract at all. But, further than that, the £3,000 was given to the college as a donation. The plaintiff received his letter of thanks for it from Princess Christian; his name would be in the list of donors, and the matter was at an end so far as the college was concerned. How can the plaintiff recall the gift and claim back the money?

In the result, I must dismiss the action. The plaintiff has said that he brought it to put a stop to an improper practice, and not to recover the money for himself. Be that as it may, I am compelled to hold that it is not maintainable. I must give judgment for the defendants. As regards Harrison, he has increased the costs of the litigation by denying the fraud, having a long cross-examination administered to the plaintiff, and by not going into the witness-box or calling any witnesses to meet it. He has acted oppressively. I make an order depriving him of his costs.

Solicitors: *H. S. Wright & Webb*; *Vizard, Oldham, Crowder & Cash*; *Harrison, Speechly, Mumford & Craig.*

[*Reported by* T. W. MORGAN, ESQ., *Barrister-at-Law.*]

A

Re SCORER. BURT *v.* HARRISON

[CHANCERY DIVISION (P. O. Lawrence, J.), December 18, 1924]

[Reported 94 L.J.Ch. 196; 132 L.T. 529]

Will—Class gift—"To my brother and sisters in equal shares I give three-parts of all I possess"—Testatrix looking to body as a whole rather than to individuals constituting it—Construction—"Securities"—Holograph will—Inclusion of investments.

A holograph will provided: "The last will and testament of Rosaline Isabel Scorer . . . this 14th Oct. 1913. To my brother and sisters in equal shares I give and bequeath three-parts of all I possess in money and securities, trusting to them to provide for Ruth Lewis Maggie Allbutt and other poor in whom I have been interested. The remaining quarter of my estate in money and securities to be given to charities including some for poor of Crockham Hill." The testatrix died on Jan. 3, 1924, leaving real estate, furniture, jewellery, and personal effects, cash at the bank, and investments to the value of about £50,000, four-fifths of which consisted of stocks and shares in companies and the remaining one-fifth of debentures and securities for money. The testatrix's brother and two of her four sisters predeceased her. A summons was taken out to determine whether the gift in the will of the three-parts of "all I possess in money and securities" was a gift to a class or to personæ designatæ, and what the word "securities" included.

Held: (i) the gift was a class gift as the persons mentioned were not only united by a common tie but the testatrix was looking to the body as a whole rather than to the individuals constituting that body, and it, therefore, took effect in favour of the surviving sisters.

Kingsbury v. *Walter* (1), [1901] A.C. 187, applied.

(ii) in view of the fact that this was a home-made will there was sufficient indication that the testatrix did not attach to the word "securities" the strict primary meaning of security for money and not investments such as stocks and shares other than debenture stock, but had used it in the popular sense, and, consequently, all investments would pass under the gift.

Notes. Referred to: *Re Smithers, Watts* v. *Smithers*, [1939] 3 All E.R. 689.

As to gifts and individuals, see 34 HALSBURY'S LAWS (2nd Edn.) 144, para. 188, and for construction of word securities, see ibid., p. 259, para. 310; and for cases see 44 DIGEST 514–516, 760 et seq., and 705–708.

Case referred to:

(1) *Kingsbury* v. *Walter*, [1901] A.C. 187; 70 L.J.Ch. 546; 84 L.T. 697, H.L.; 44 Digest 762, *6212*.

Also referred to in argument:

Havergal v. *Harrison* (1843), 7 Beav. 49; 13 L.J.Ch. 36; 7 Jur. 1100; 49 E.R. 980; 44 Digest 511, *3303*.

Viner v. *Francis* (1789), 2 Bro.C.C. 658; 2 Cox, Eq. Cas. 190; 29 E.R. 365; 44 Digest 763, *6218*.

Dimond v. *Bostock* (1875), 10 Ch. App. 358; 33 L.T. 217; 23 W.R. 554, L.JJ.; 44 Digest 764, *6230*.

Aspinall v. *Duckworth* (1866), 35 Beav. 307; 14 W.R. 527; 55 E.R. 914; 44 Digest 501, *3211*.

Drakeford v. *Drakeford* (1863), 33 Beav. 43; 9 L.T. 10; 11 W.R. 977; 55 E.R. 282; 44 Digest 512, *3309*.

Re Rayner, Rayner v. *Rayner*, [1904] 1 Ch. 176; 73 L.J.Ch. 111; 89 L.T. 681; 52 W.R. 273; 48 Sol. Jo. 178, C.A.; 44 Digest 705, *5484*.

Re Hutchinson, Crispin v. *Hadden* (1919), 88 L.J.Ch. 352; 121 L.T. 239; 44 Digest 707, *5509*.

Singer v. *Williams*, [1921] 1 A.C. 41; 89 L.J.K.B. 1218; 123 L.T. 625; 36 T.L.R. 659; 64 Sol. Jo. 659; 7 Tax Cas. 419, H.L.; 28 Digest (Repl.) 203, *854*.

Re Gent and Eason's Contract, [1905] 1 Ch. 386; 74 L.J.Ch. 333; 92 L.T. 356; 53 W.R. 330; 44 Digest 706, *5485*.

Re Johnson, Greenwood v. *Greenwood and Robinson* (1903), 89 L.T. 84; affirmed 89 L.T. 520, C.A.; 44 Digest 707, *5508*.

Originating Summons.

The will of Rosaline Isabel Scorer, a widow, which was drawn up by herself and was dated Oct. 14, 1913, will be found set out in the headnote.

At the date of her will the testatrix had one brother and four sisters, of whom the brother and two of the sisters predeceased the testatrix, each leaving surviving them and the testatrix children. The testatrix died on Jan. 3, 1924, a widow without issue, and Emma Florence Harrison, one of the two sisters who survived her, was granted administration with the will annexed of the estate of the testatrix. The estate of the testatrix included household furniture, jewellery, and personal effects valued at about £2,000; cash at the bank, £682 18s. 5d.; and certain investments of the value of £50,000 or thereabouts, of which about £10,000 consisted of securities strictly so-called, and the remainder were stocks and shares in companies. The testatrix was also absolutely entitled to certain freehold property, to which, if undisposed of by the will, the two children of her brother who predeceased her were entitled as the heiresses-at-law of the testatrix. On the hearing of the summons it was admitted by all parties that the testatrix having died intestate, so far as concerned any real estate which she possessed the two daughters of her brother who predeceased her became entitled to such real property as the heiresses-at-law of the testatrix. The plaintiff, Emma Florence Harrison, as administratrix with the will annexed, issued this summons, the respondents being her sister, who survived the testatrix, the children of the brother of the testatrix and the children of the testatrix's two sisters who predeceased her and the next-of-kin of the testatrix, to determine, inter alia, whether the bequest in favour of the brother and sisters of the testatrix operated in favour of the two sisters of the testatrix who survived her, or in favour of her brother and four sisters living at the date of her will as personæ designatæ, and whether in the latter event the testatrix died intestate as to the shares which the brother and two sisters of the testatrix who predeceased her would have taken if they had survived her, and whether, under the name of "money and securities," the bequest included all the investments of which the testatrix died possessed.

Other questions relating to the trusts of the charities in the will were adjourned.

W. H. Draper for the plaintiff.

C. E. E. Jenkins, K.C., and *J. H. Stamp* for the defendant, one of the two sisters who survived the testatrix.

Owen Thompson, K.C., and *H. T. Method* for the children of the brother and two sisters who predeceased the testatrix also claiming as next-of-kin.

W. P. Spens for one of the next-of-kin.

Dighton Pollock for the Attorney-General, on behalf of charities.

P. O. LAWRENCE, J.—In this case at the date of her will the testatrix had one brother and four sisters, and in making her will, which seems to me to be inartificially drawn, she gives "all she possesses in money and securities" to "my brother and sisters" in equal shares. After the date of her will two of her sisters and her brother died, in all cases leaving either a child or children. The question now is whether the gift "to my brother and sisters in equal shares" is a class gift, in which case the two surviving sisters take the whole, or whether it is a gift to personæ designatæ, in which case there will be an intestacy as regards three out of the five shares. I do not propose in this case to go through the decided cases. That has been done already by the House of Lords in *Kingsbury* v. *Walter* (1), and it would be idle for me to go through again all the cases of what is or what is not a class gift. I propose, as far as I can, in deciding this case to be guided by

what was said in the addresses of the learned Law Lords in that case, and in particular I would mention what was said by LORD MACNAGHTEN and by LORD DAVEY. LORD MACNAGHTEN says:

> "In my opinion, the principle is clear enough. Where there is a gift to a number of persons who are united or connected by some common tie, and you can see that the testator was looking to the body as a whole rather than to the members constituting the body as individuals, and so you can see that he intended that if one or more of that body died in his lifetime the survivors should take the gift between them, there is nothing to prevent your giving effect to the wishes of the testator."

LORD DAVEY, saying very much the same thing, after dealing with the gift to a named individual and a class properly so-called, says this:

> "It is perfectly plain that a gift in the form which I have mentioned may be a class gift, if there is to be found in the will a context which will show that the testator intended it to be a class gift."

And then he goes on:

> "I think the same result may be arrived at if the court, putting itself into the same position as the testator occupied, with the same knowledge as the testator had when he was writing his will, comes to the conclusion that the gift, although expressed in the form of a gift to an individual and the children of A., was intended to operate as a class gift."

Applying the principle there laid down, what I have to determine in this case is whether, putting myself in the place of the testatrix, I can say that she was looking to the body constituted by her brother and four sisters as a whole, or whether she intended to designate the individuals in that body.

Now the first thing that strikes me in this case is that she has not named any of them. She had mentioned them by the relationship which they bear to her, and the possessive pronoun is used to cover both. They are given equal shares, and their interests are to pass at the same time. They are united by a common tie, and they are described by that relationship. It is quite true if one analyses the gift, it is a gift to "my brother" in the singular, which must point to her brother Albert and to her sisters, but the way in which it is framed is, I think, an indication that she was looking at the body as a whole, and that she was intending to provide for that body constituted by her brother and sisters. In this case I think that if she had been asked whether she intended the survivors to take, she would have said: Yes. I can only arrive at that conclusion by endeavouring to do what LORD DAVEY said I ought to do: that is, to put myself in the same position as the testatrix occupied, with that knowledge which she had when she was writing her will. I therefore, in this will, think that there is that indication which LORD MACNAGHTEN was speaking of, that the persons were not only united by a common tie, but that the testatrix was looking to the body as a whole rather than to the individuals constituting that body. I have dealt with the indications which have been urged to the contrary, except one, which was the distinction pointed out by counsel for the children of the brother and two sisters who predeceased the testatrix. The testatrix shows that she was trusting her brother and sisters to provide for certain poor relations. In my view, that trust she reposed in them does not in any way conflict with the notion that she was looking to her brother and sisters as a body. I cannot conceive that if she had been asked whether she trusted the surviving brother and sisters to do that which she hoped they would do, supposing one or other of them died, that she intended to say: No; whom she did trust was only the five individuals whom she had previously mentioned. I think, on the contrary, it rather shows to my mind that she was placing the body composite of her brother and sisters in her place in providing for these poor relations.

In the circumstances which exist in this will I have endeavoured to follow the instructions which were laid down in the House of Lords in construing the will,

and I come to the conclusion that the gift is a class gift, and that it goes to the surviving two sisters.

Argument then took place on the question what was included under the words "money and securities."

P. O. LAWRENCE, J.—The further question which now falls for determination is, What passed under the testatrix's will by the use of the expression "all I possess in money and securities" and "all my estate in money and securities" which I think are used synonymously in this will? The facts which are material are these: that the testatrix at the date of making her will was possessed of real estate to the value of about £6,000, furniture and other articles of domestic use and ornament to the value of about £2,000, and securities strictly so-called to the value of about £10,000, and other investments which do not strictly fall within the strict meaning of securities to the extent of about £40,000 to £50,000. That is a picture of her estate when she sits down to write her will, which I think in this case is a holograph will. [His Lordship read the will and concluded:] It has been rightly contended on behalf of the next-of-kin that the word "securities," when used in an instrument, including a will, has a primary meaning attached to it by virtue of the authorities which have been cited, that is to say, it means securities for money, and not an investment such as stocks or shares other than debenture stock. In the present case the question arises whether in the context of this will there is anything to show that the testatrix used the word "securities" in other than its primary meaning. There can be no dispute that at the present day the word "securities" has a flexible meaning, and is used frequently, if not universally, in the extended meaning of investments. I think I am justified in the first instance in relying on the fact that this is an inartificial will drawn up by the lady herself. In most of the wills to which my attention has been called in a review of the authorities the will has obviously been a will drawn up by a lawyer. In the next place I think I am entitled to take the word "securities" in the context in which it is used as being used in the extended sense—"all I possess in money and securities" in the mouth of a layman or a laywoman, to my mind, has a very much more extended meaning than it might have if it were used by a conveyancing counsel in Lincoln's Inn. Counsel for the children of the brother and two sisters who predeceased the testatrix is perfectly right in saying "all I possess" can be simply translated into the word "my": but then the testatrix has not used the expression "my money and my securities." She has used a phrase which, to my mind, was intended to embrace all that she possessed which she might have in cash or securities, and those securities there I think are shown to embrace investments from the fact that she thereafter refers to the previous disposition as being three parts of her "estate" in money and securities. The conviction which is brought home to my mind on reading this particular will is that the testatrix intended to give to her brother and sisters not those strictly so-called securities, but intended to give them all the money which she had either in cash or on deposit at the bank, or invested in securities, and that she intended a quarter of that to be given to charities. It is perfectly true that she seems to have deliberately chosen to die intestate as to her real estate, and as to her articles of personal use and ornament, and as to her household effects. My impression of the will, reading it as a whole, is this: that she intended by this will to dispose of such part of her estate, including investments, as could be transferred and dealt with readily both by the charity and by her brother and sisters, and for these reasons, possibly quite inadequately expressed, I have come to the conclusion in this case that the strict meaning of "securities" ought not to be given to the expression used in the will, but that it ought to be construed as including all the investments.

Solicitors: *Rye & Eyre*; *Taylor & Humbert*.

[*Reported by* G. P. LANGWORTHY, ESQ., *Barrister-at-Law*.]

A

THE PRESIDENT VAN BUREN

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Hill, J.), June 17, 1924]

[Reported 132 L.T. 253; 16 Asp.M.L.C. 444]

Shipping—Towage—Negligence—Condition relieving tug from liability—Public policy—Tug under control of tow—Tug owner's monopoly in port.

B

The defendants engaged the plaintiffs, the Port of London Authority, who supplied tugs for dock work in the port and would not allow anyone else to do the work, to assist their vessel to dock. While the towage was in progress a collision occurred between the tug and the defendants' vessel and both vessels were damaged. The towage contract provided that ". . . the masters and crews of the tugs . . . shall cease to be under the control of the [plaintiffs] during and for all purposes connected with the towage . . . and shall become subject in all things to the orders and control of the master or person in charge of the vessel . . . towed and are the servants of the . . . owners thereof, who hereby undertake to pay for any damage caused to any of the [plaintiffs'] property . . . and to bear, satisfy, and indemnify the [plaintiffs] against liability for all claims for . . . loss or damage by collision or otherwise to the vessel or to or by the vessel . . . towed, or to or by any . . . vessel . . . of any other person . . . or to the tug or tugs supplied, whether such damage, loss, or injury arise or be occasioned by any . . . negligence . . . of any servant of the [plaintiffs]." The plaintiffs claimed for damage caused to their tug by the collision and set up the towage contract while the defendants disclaimed liability and counterclaimed for damage sustained by their vessel, alleging that the towage contract was void as being against public policy.

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Held: (i) there was no principle of public policy which compelled the court to hold that the towage contract was void; (ii) on construction of the contract the defendants were liable for the damage caused by the collision even if the collision had occurred solely by the negligence of the plaintiffs' tug, and, therefore, the plaintiffs' were entitled to succeed on both claim and counterclaim.

F

Notes. Referred to: *The Carlton*, [1931] P. 186.

As to liability of tugs, see 30 HALSBURY'S LAWS (2nd Edn.) 660, para. 841; and for cases see 41 DIGEST 793 et seq.

Trial of Preliminary Issues.

G

The plaintiffs, the Port of London Authority, claimed for damage sustained by their tug *Sirdar* in a collision between the *Sirdar* and the defendants' steamship *President Van Buren* (formerly *Old North State*), which took place on April 24, 1922, in the Tilbury Main Dock at a time when the *Sirdar* was engaged in assisting the *President Van Buren*, which was inward bound from New York to the Thames. The defendants, by their defence, denied negligence, alleged that the collision was solely caused by the negligence of those navigating the *Sirdar*, and counterclaimed for the damage sustained in the collision by the *President Van Buren*. The plaintiffs, by their reply, joined issue on the defence and further alleged that at all material times the *President Van Buren* was being transported and the services of the *Sirdar* were supplied under an agreement dated April 24, 1922, addressed to the plaintiffs' superintendent and signed on behalf of the agents for the defendants. By the terms of the agreement it was provided, inter alia, that:

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"The masters and crews of the tugs and transport men shall cease to be under the control of the Port Authority during and for all purposes connected with the towage or transport and shall become subject in all things to the orders and control of the master or person in charge of the vessel or craft towed or transported and are the servants of the owner or owners thereof who hereby undertake to pay for any damage caused to any of the Port

A Authority's property or premises and to bear, satisfy and indemnify the Port Authority against liability for all claims for loss of life or injury to persons or loss or damage by collision or otherwise to the vessel or to or by the vessel or craft towed . . . or to the tug or tugs supplied whether such damage loss or injury arise or be occasioned by any accident or by any omission breach of duty mismanagement negligence or default of any of such masters crew or B men or any servant of the Authority or any other person or from or by any defect or imperfection in the tug or tugs supplied or the machinery or ropes or tackle or any other part of them or any delay stoppage or slackness of the speed of the same however occasioned or for what purpose or wheresoever taking place or by any other cause of any kind arising out of or directly or indirectly connected with the towage or transport."

C The defendants, by their rejoinder, denied the allegations set out in the reply, but on their admitting that the contract of April 24, 1922, set out in the reply was made an order for a preliminary trial of the action on the following issues was made: (i) Whether the agreement is valid and not void as against public policy; (ii) whether, if those on board the *Sirdar* were negligent in (a) solely causing or (b) partly contributing to the said collision the defendants nevertheD less are not liable to the plaintiffs for the whole of the damage occasioned by the said collision on the assumption that the answer to issue (i) is in the affirmative.

Batten, *K.C.*, and *Stenham* for the defendants.
Dunlop, *K.C.*, and *Noad* for the plaintiffs.

HILL, J.—Two preliminary questions of law have to be determined. The E action is by the Port of London Authority, owners of the tug *Sirdar*; the defendants being the owners of the American steamship *President Van Buren*, which was formerly known by the name *Old North State*. The action arises out of a collision between the *Sirdar* and the *President Van Buren* at a time when the *Sirdar* was acting as one of the tugs engaged in the work of towing the *President Van Buren* in the Tilbury Main Dock. For the purposes of the two issues of F law, it is assumed that there was negligence on the part of those in charge of the *Sirdar*, although, of course, the plaintiffs' case is that the negligence which caused the collision was solely that of those in charge of the *President Van Buren*. There is a counterclaim by the defendants in respect of damage to their vessel on the basis that the collision was solely caused by those in charge of the *Sirdar*. But, assuming it should ultimately be found that there was negligence on the part of G those in charge of the *Sirdar*, the plaintiffs set up a contract under which the *Sirdar* and a second tug were engaged by the agents of the owners of the *President Van Buren*; and they say that by the terms of that contract they are not liable for any damage done by reason of negligence of those in charge of the *Sirdar*, but that, on the contrary, though there might have been negligence on the part of those in charge of the *Sirdar*, nevertheless they are entitled to claim against the H defendants in respect of the damage to the *Sirdar*.

It was in these circumstances that the defendants asked that the two preliminary questions should be tried. The first is whether the agreement set up by the plaintiffs is valid and not void as against public policy. The second is, assuming the agreement to be valid, whether, if the collision was solely caused or partly contributed to by negligence on the part of those in charge of the *Sirdar*, the I defendants are nevertheless liable for the whole of the damage occasioned by the collision. The contract which was sent in and signed by Moxon, Salt & Co., Ltd., as agents for the owners of the *President Van Buren*, on the face of it, asked for the supply of tugs on the terms and conditions endorsed, which terms and conditions they agreed to be bound by. The conditions endorsed, so far as material, were in the following terms:

"The masters and crews of the tugs and transport men shall cease to be under the control of the Port Authority during and for all purposes connected

with the towage or transport and shall become subject in all things to the orders and control of the master or person in charge of the vessel or craft towed or transported and are the servants of the owner or owners thereof who hereby undertake to pay for any damage caused to any of the Port Authority's property or premises and to bear, satisfy and indemnify the Port Authority against liability for all claims for loss of life or injury to person or loss or damage by collision or otherwise to the vessel or to or by the vessel or craft towed or to or by any cargo or other thing on board the same or to or by any vessel cargo or property of any other person or persons or to the tug or tugs supplied, whether such damage loss or injury arise or be occasioned by any accident or by any omission, breach of duty, mismanagement, negligence or default of any of such masters, crew or men or any servant of the Authority or any other person or from or by any defect or imperfection in the tug or tugs supplied. . . ."

Before considering the conditions, I should mention that the Port of London Authority are in control of the docks; that they own or hire the tugs used in the docks, the *Sirdar* being one of the tugs owned by them; that they supply all tugs for dock work and will not allow any outsider to do the work; and that wherever they do supply tugs they insist upon the terms contained in this contract. The United States Shipping Board, the defendants, had an appropriated berth in the Tilbury Dock and were in the habit of using the Port Authority's tugs in that connection; and the *Sirdar* was one of the tugs they usually employed. On the first point as to whether the agreement is valid and not void as against public policy, I think the answer on this matter is that the English law fortunately regards business men as capable of knowing their own business and of making contracts for themselves and is very unwilling to limit the power of capable people to make what bargains they like. In truth, as we know, a contract in this form, or in a practically similar form, has become for a good many years past of almost universal use by tug owners; and whether a tug owner supplies a tug on these terms or on terms which reserve liability to himself (where he does it) it is only a question of price. If he is to have no liability, he can do the work very cheaply; if he is to run all the risks, then of course his reward must be sufficient not only to compensate him for the work he does, but to cover the insurance and, in fact, all the risks he runs. I can conceive no principle of public policy which should lead the courts to say: "We ought to step in and say, 'This or that contract ought not to be made by competent people,'" when the people making it are competent people. It is said that the Port of London Authority is a monopoly. It is said that everybody has a right to the use of the tugs on equal terms, but here, it is said, one cannot employ any other tugs than the Port of London Authority's tugs. There it is. If one does not like these terms and if they are too onerous, nobody forces one to use the Port of London Authority's docks. I do not like to enlarge upon it because it seems to me to be so clear that, if one is talking of public policy, the highest interest of public policy is that the law should not interfere with the transactions of business men when it can help it. Counsel for the plaintiffs has pointed out that there is a section—s. 195, I think—in the Port of London Authority (Consolidation) Act, 1920, which may give any person, who feels himself aggrieved by being asked to enter into contracts of this kind, power to appeal to the Board of Trade, who may direct an inquiry; and it may be that if there is a grievance there is a means of getting the matter considered and remedied, if there is something to remedy.

The form of contract aims, in the first place, at making the master and crew of a tug for the time being the servants of the ship which is being towed; in the second place its aim is to deal with damage caused to the Port Authority's own property; and in the third place its aim is to deal with liabilities which may be incurred by the Port Authority by reason of damage to other people's property or to life. If the first section, which begins: "The masters and crews of the tugs"

A and ends "are the servants of the owner or owners" of the vessel towed, is effectual to do that which it sets out to do, it does not much matter what the rest of the conditions provide, because it will be that the Port of London Authority contemplates; and if it effectually makes the masters and crews of tugs servants of the ship which is being towed—servants for the time being—then it will follow that the owner of the tow cannot claim for damage brought about by B people who for the time being are his own servants; and he must also be liable for damage caused to the authority's property by persons who for the time being are his servants, the servants of the owners of the tow. I have considered the criticism of counsel for the defendants. I think that clause does what it sets out to do; and I think it sets out in terms that for all purposes connected with the towage the masters and crews of tugs are the servants of the owners of the tow. C I do not think that can be limited in the way counsel for the defendants suggests. I think it provided that for the purposes of the towage and for all purposes connected with the towage they are the servants of the owners of the tow. That, I think, is enough to show that for any negligence of those in charge of the *Sirdar* —the master and crew of the *Sirdar*—the owners of the *President Van Buren* are liable to the authority, that is to say, for any damage to the *Sirdar*, and cannot D themselves claim in respect of any damage done to the *President Van Buren*. I think it is also made quite clear by what follows that the owners of the tow undertake to pay for any damage caused to any of the Port of London Authority's property or premises. Thinking, as I do, that a portion of the conditions deals with the Port of London Authority's own property and is in contrast with the following part which deal with the liability of the Authority to other people, I E see no reason for excluding from the general description of the Port of London Authority's property their tugs; and, in my view, therefore, the owners of the tow, the *President Van Buren*, have undertaken to pay for damage caused to the Port of London Authority's property, the tug *Sirdar*. In the third portion of the conditions they likewise undertake to bear loss or damage by collision to the vessel towed; and that includes all damage to the *President Van Buren*.

F I must, therefore, answer the issues by finding (i) that the agreement is valid; and (ii) that, if those on board the *Sirdar* were negligent by solely causing the collision or contributing to the collision, the defendants are liable to the plaintiffs for the whole of the damage occasioned by them. I think that is the right way to answer the question as it is submitted; and, that being so, there will be judgment for the plaintiffs on the claim and counterclaim.

G Solicitors: *J. D. Ritchie*; *Thomas Cooper & Co.*

[*Reported by* GEOFFREY HUTCHINSON, ESQ., *Barrister-at-Law.*]

A

W. P. GREENHALGH & SONS *v.* UNION BANK OF MANCHESTER, LTD.

[KING'S BENCH DIVISION (Swift, J.), April 15, 1924]

[Reported [1924] 2 K.B. 153; 93 L.J.K.B. 844; 131 L.T. 637] B

Bank—Two accounts in customer's name—Payment of bills into one account—Appropriation by customer to meet specific liabilities—Right of banker to transfer proceeds of bills to other account.

If a banker agrees with his customer to open two or more accounts, the banker has not, without the assent of the customer, any right to remove either assets or liabilities from the one account to the other. Therefore, if the C customer pays bills, not into his general account, where they will be discounted and he will receive the benefit of being able to draw against them, but into an account in which they will only be used to pay bills which they are specifically appropriated to meet, and the banker has notice of such specific appropriation, the banker is not entitled to transfer the proceeds of the bills from one account to the other account without the customer's consent. D

Notes. As to receipt by a banker of money on current account, see 2 HALSBURY'S LAWS (3rd Edn.) 166 et seq.; and for cases see 3 DIGEST 179 et seq.

Case referred to:

(1) *Hyams* v. *Stuart King*, [1908] 2 K.B. 696; 77 L.J.K.B. 794; 99 L.T. 424; 24 T.L.R. 675; 52 Sol. Jo. 551, C.A.; Digest Practice 94, *794*. E

Action tried by SWIFT, J., at Manchester Assizes.

The plaintiffs, who carried on business as cotton brokers at Liverpool, brought this action against the defendant bank to recover from them a sum of money representing the proceeds of certain spinners' bills which had been paid into the defendant bank and specifically appropriated to meet the plaintiffs' bills. The bank had transferred the proceeds of the bills in question from the bills pro- F visional account to the customer's general account, where they had been swamped by an overdraft. The facts are set out in the judgment.

Cyril Atkinson, K.C., and *Lustgarten* for the plaintiffs.
Eastham, K.C., and *Laski* for the defendants.

Cur. adv. vult.

April 15. **SWIFT, J.,** read the following judgment.—On Oct. 13, 1922, Messrs. G W. P. Greenhalgh & Sons, who carry on business as cotton brokers at Liverpool, sold to Messrs. Winson & Co., cotton merchants, of Manchester, twenty-five bales of Sakel Egyptian cotton, marked f.o.k., to be shipped by steamer from Alexandria to Manchester. The contract note of the sale was dated Oct. 13, and provided for payment in the following terms: H

"Reimbursement by our draft for invoice amount on your good selves at three months from date of bill of lading, or by cash less rebate at bank rate of discount not to exceed 5 per cent. for the unexpired term of draft at buyers' option. Documents to be given up in exchange for acceptance."

On Oct. 24, 1922, the plaintiffs sold a further 100 bales of Sakel Egyptian cotton to Messrs. Winson & Co. The terms of the contract again provided for reimburse- I ment in the same way. Of the 100 bales agreed to be sold by this last contract only fifty were delivered, and it is only as to the twenty-five bales in the contract of Oct. 13 and the fifty bales in the contract of Oct. 24 that any question arises in this action between the plaintiffs and the defendants, the Union Bank of Manchester, Ltd. Having bought the two lots of cotton from the plaintiffs, Messrs. Winson & Co. sold fifty bales to the Tulketh Mill, and twenty-five bales to the Ocean Spinning Co.

The bills of lading for the two consignments reached this country some time

in November, 1922, and, having learnt the dates of the bills of lading, it became desirable for the plaintiffs to ascertain how Messrs. Winson & Co. proposed to pay for that which they had purchased. Accordingly they wrote on Nov. 13 a letter advising shipment, and proceeding: "Kindly inform us how you require the reimbursement arranging for your various c.i.f. purchases." In reply to that letter, Messrs. Winson & Co. stated:

> "It is our intention to accept your drafts for all c.i.f. transactions, unless you can see your way to accept a rebate of 5 per cent."

The meaning of this correspondence is that unless Messrs. Winson & Co. could obtain better terms for cash than those arranged for in the contracts, they would insist on their right under the contracts to pay for the cotton by bills. Following immediately on that interchange of letters, an interview took place between Mr. Smith, of Messrs. Winson & Co., and Mr. Lyon, the representative of the plaintiffs. The result of that interview is in no doubt. Mr. Lyon's statement as to it is very clear, and Mr. Smith in no way contradicts it. I find as a fact that, in substance, the result of that interview was that an agreement was made that Messrs. Winson & Co. should accept bills drawn by the plaintiffs and that they should pay into the Union Bank of Manchester, Ltd., specifically appropriated to meet those bills, bills drawn by them and accepted by the Tulketh Mills and the Ocean Spinning Co. in payment for this cotton. Unfortunately, Mr. Smith did not do what he had promised to do, what he had led the plaintiffs to believe that he would do, and what I think he honestly intended to do, in pursuance of his bargain with Mr. Lyon. But, through sheer inadvertence, I think, he used printed forms which were quite inappropriate for the purpose he had in view. When, on Nov. 21 and Dec. 5, he paid the Tulketh Mills' and the Ocean Spinning Co.'s bills into his bank, instead of saying, either verbally or in writing:

> "These bills are paid in specifically for the purpose of meeting bills of [the plaintiffs], accepted by us in payment for seventy-five bales of cotton marked f.o.k. and steamship *Armarna* and steamship *Black Prince*,"

he filled up forms appropriate to a request to the bank to accept on behalf of Messrs. Winson & Co. certain bills drawn by the plaintiffs which were said to be coming forward. The forms he used—which are dated Nov. 21 and Dec. 5—had never been designed for, and were quite inappropriate to effect, a specific appropriation of the proceeds of the bills which were paid in. They had been printed and supplied by the bank to Messrs. Winson & Co. for use for quite a different purpose, and they ought not to have been used to carry out, and were quite useless for the purpose of carrying out, Mr. Smith's arrangement with Mr. Lyon. Equally, they were quite useless for the purpose of effecting any transaction which was actually taking place between Messrs. Winson & Co. and the defendant bank. The first form which was used requested the defendant bank to accept on Messrs. Winson & Co.'s account a bill of exchange drawn on the bank by W. P. Greenhalgh, of Liverpool, against transfer of a bill of lading for twenty-five bales of cotton marked "w.c./f.o.k., Tulketh—by steamship *Armarna*." No bill of exchange was drawn, or was to be drawn, by the plaintiffs on the bank; there was no cotton of the description "Tulketh"; and no documents of title were to be taken up by the bank.

There must have come a time, earlier or later, when the officials at the bank knew that inappropriate forms for any transaction which anybody contemplated with regard to this cotton had been used. That time I have not ascertained. It may have been directly the bank's responsible officials saw the documents—it may not have been until later—but it is clear, and I find it as a fact, that, at an interview towards the end of December between Mr. Smith of Messrs. Winson & Co., and Mr. Shanklin, the manager of the defendant bank, the bank learnt—if they had not already discovered—that a mistake had been made, and that it had been intended by Mr. Smith specifically to appropriate the three bills in question to meet bills drawn by the plaintiffs and accepted by Messrs. Winson & Co., and

not to request the bank to accept bills drawn by the plaintiffs. Before considering that interview, it is necessary to follow the history of the three bills drawn by Messrs. Winson & Co., and accepted by the Tulketh Mill and the Ocean Spinning Co., after they were handed by Messrs. Winson & Co. to the defendant bank on Nov. 21 and Dec. 5 respectively. They were paid into the bank along with paying-in slips, which were marked in the first case, "Bill Provisional, 25 Bales f.o.k. 'Armarna,' Credit Winson & Co., Bill Provisional Account"; and in the second case, "Bill Provisional 50 Bales w.c./f.o.k. 'Black Prince,' Credit Winson & Co., Bill Provisional Account." They were entered by the officials of the bank in an account called the "Bills Provisional Account," and they remained in that account until the dates on which they became due for payment, namely, Feb. 7 and Feb. 19, 1923, respectively. At this time there were in the books of the defendant bank two, and possibly three, accounts of Messrs. Winson & Co. There was the general account into which all cash, cheques, drafts and bills to be discounted were entered and from which Messrs. Winson & Co. drew in the ordinary way. There was the bills provisional account, and there was also possibly—although as to this I am not certain—a third account, in which were entered bills which had been paid in, with notice that the proceeds were specifically appropriated to meet specified bills which, in due course, would be presented to the bank for payment by Messrs. Winson & Co. I say that as to this third suggested account I am not certain; for I am not clear whether any separate account was kept of such bills, or whether they were merely marked in some way so as to show the object with which they were handed to the bank. But it is quite immaterial; for it is clear that, if there were such an account, or if such bills were only marked for specific appropriation, they were treated by the bank as being earmarked and their proceeds payable only to honour the specified bills which they were paid in to meet. I am satisfied that, as to the three bills in question, they were not so earmarked by the defendant bank, and that, although Mr. Smith intended that they should be, the bank did not appreciate that intention until a later date which, as I have said, I cannot definitely fix, but which was certainly not later than an interview between Mr. Smith and Mr. Shanklin in December. The paying-in slips which accompanied these three bills to the bank were marked by Mr. Smith "Bill Provl.," and were entered by the bank in the bills provisional account.

The bills provisional account of Messrs. Winson & Co. at the bank was defined by Mr. Edward Roberts, the chief of the securities department of the bank, as an account to which bills are credited to provide cover for bills accepted by the bank. He further said that it was an account to which bills would be credited which were not to be discounted, and so go into the general account, but that the bills would be collected at maturity and the proceeds would then be transferred to the general account unless there were special instructions. I understand from the evidence, and I find as a fact, that the bills provisional account is an entirely distinct account from a customer's general account; that bills are placed in it which have been handed to the bank to meet acceptances which the bank has given, unless there were special instructions for dealing otherwise with particular bills; and that, until such bills arrive at maturity, they are not to be credited to, or in any way dealt with, as part of the customer's general account, but that, when the bills arrive at maturity, the bank should transfer the proceeds of these bills either to the general account or pay them for any particular purpose for which they have been specifically appropriated.

The bills under discussion were credited, and rightly credited, to the bills provisional account. Mr. Smith, by marking the paying-in slips "25 bales f.o.k. 'Armarna,'" and "50 bales w.c./f.o.k. 'Black Prince,'" intended to give instructions that they should be appropriated to the plaintiffs' bills, but, by sending to the bank at the same time the inappropriate forms of request to accept bills, he did not make his intention to appropriate clear to the bank. Consequently, they rightly credited them to the bills provisional account, and they had no idea that

such credit without the special instruction, was contrary to their customer's intention. They remained in ignorance of that intention until a date between Dec. 19 and Christmas. They then learnt as the result of an interview between Mr. Smith and Mr. Shanklin that the intention in paying these bills into the bills provisional account had been, and still was, that they should be specifically appropriated to meet the plaintiffs' bills. The object of that interview was to enable Mr. Smith to obtain the return of those bills to him by the bank. Why he wanted them I do not need to determine. His explanation is not too clear, but I do not need to express the impression left on my mind. He wanted the bills, and he tried to get Mr. Shanklin to let him have them. Whatever his object was, it became clear to the bank at that interview that, whatever language he had used in paying in these bills and however inapt his expressions had been he had intended, and he still intended, if the bank retained the bills, that they should be specifically earmarked so that their proceeds should be paid, and only paid, to honour the bills drawn by the plaintiffs which Messrs. Winson & Co. had accepted to reimburse for the cotton ex steamship *Armarna* and steamship *Black Prince*, which they had sold again to the Tulketh Mill and the Ocean Spinning Co. At that time the bills in question were in an account at the bank quite distinct from Messrs. Winson & Co.'s general account. They had been placed in an account from which they could not be removed until maturity some weeks later, and from which their proceeds would then be removed either into Messrs. Winson & Co.'s general account or to carry out some specific instruction. The bank refused to return the bills to Mr. Smith. They remained in the bills provisional account until they matured. Before that event, the plaintiffs had heard some rumours as to Messrs. Winson & Co.'s financial position. As the result of an interview which took place in January, after Mr. Smith had had his interview with Mr. Shanklin, Messrs. Winson & Co. wrote to the plaintiffs on Jan. 12 as follows:

> "We beg to inform you that against our acceptance of £1,125 17s. 4d. and £2,282 11s. 3d., for 25 bales and 50 bales f.o.k. due Feb. 7 and Feb. 19, 1923, which you held, we specifically paid against them to our bank, the Union Bank of Manchester, Ltd., York Street, Manchester, the undermentioned bills: £1,176 18s., Tulketh Spinning Co., Ltd.; £1159 13s. 2d., Ocean Spinning Co., Ltd.; £1,163 1s. 7d., Tulketh Spinning Co., Ltd. Yours faithfully, Winson & Co."

When the bills were paid on Feb. 7 and 19 respectively, the proceeds thereof were transferred by the bank to the general account of Messrs. Winson & Co., where they were swallowed by a large debit balance awaiting them there, and, in due course, the plaintiffs' bills, which Messrs. Winson & Co. had promised and intended should be met by those proceeds, were dishonoured.

The plaintiffs then brought their action against the bank. The pleadings in the action do not entirely meet the facts as they emerged from the evidence. As sometimes happens, neither party had a very clear and definite view as to the real position until the witnesses had been examined and cross-examined and the documents had been criticised in open court. I am strongly of the opinion that if the true points at issue are to be determined and real justice is to be done, the pleadings of neither party should be too rigidly adhered to. I am satisfied that neither party is injuriously affected by the form of pleading of the other; that neither party was taken by surprise at the trial; and that neither party has suffered by the facts disclosed by the evidence not having been more specifically or appropriately pleaded; and I am convinced that, in this action, justice will not be done if either party is strictly tied down to the specific form in which their case was originally stated. I was not, as far as I remember, asked to allow any specific amendment by either party. But I am treating this action now as one in which, all the facts having been disclosed, and all the contentions of law having been made, it is open to me to decide what are the rights of the parties without regard to the particular forms in which these rights were originally claimed or

denied. I am not unaware of *Hyams* v. *Stuart King* (1), and if my decision involves something which entails an infringement of the principle of practice therein laid down by FARWELL, L.J. ([1908] 2 K.B. at pp. 717, 718), the Court of Appeal will decide what should be done. In my opinion, the parties ought not to be bound by the phraseology of their pleadings, and, if I were asked, I should allow any amendment necessary to justify the proper adjustment to-day of the rights of the plaintiffs and the defendant bank; and I should allow it in the confidence that neither party had suffered either in being unable to meet the supposed new case or being put to any extra expense in meeting it.

The allegations of the plaintiffs in substance are: (i) That the proceeds of the three spinners' bills were specifically appropriated to meet their bills, and that such appropriation was (a) done in pursuance of agreement with them, and (b) that notice of such appropriation had been given to them; and that, therefore, (c) they were entitled to claim the proceeds from the defendant bank as money received to their use; and (ii) that they were equitable assignees of the proceeds of those bills; and that the defendant bank, taking those proceeds with notice of their claim, could not acquire any legal title to them paramount to the plaintiffs' title. Many cases, and some text-books, were cited to me as to the law pertinent to these contentions, and I have considered them all. It is not necessary for me to review these authorities, or to endeavour to distinguish those which I think are applicable and those which, in my view, are not. In my opinion, the law relating to the contentions raised before me is clear, and it is this:

As to the first contention: If a person making a payment of money—or handing a document or goods, the proceeds of which will become a payment of money—to another, states definitely that such payment is to be used for a particular purpose, and the person to whom it is made does not dissent, he accepts it for the purpose and must use it—unless and until otherwise instructed by the person who makes it to him—only for the purpose for which he receives it. And if the purpose for which he receives it is to pay the money to a third party, and that third party, to whom he is told to pay it, is informed of the fact that the payment has been made, and that the payee is instructed to pay it to him, he is in law entitled to recover the money from the person into whose hands it has been put as money had and received for his benefit.

As to the second contention: Where two parties have contracted that the money—or the proceeds of something which will ultimately become money—of one in the hands of a third party shall belong to the other, there is an equitable assignment of that money, and such assignment is binding on any third party—including the holder of the money at the time the bargain is made—who takes that money knowing of the equitable right of the party to whom it has been assigned, and such third party can only take it subject to the right of the equitable assignee. These views as to the law are subject, no doubt, to qualification, but on these views I proceed to decide this case.

I find as facts, and I base my decision on the facts, that: (i) Before the plaintiffs drew the bills of Nov. 4 and 16, 1922, Mr. Smith had promised that he would pay the spinners' bills into the bank specifically charged to meet them, and that the plaintiffs would not have parted with the documents of title to their cotton unless they got such promise. (ii) When Mr. Smith paid the spinners' bills into the bank he honestly intended specifically to appropriate them to the plaintiffs' bills. (iii) He did not do so because he inadvertently used inappropriate forms, which did not, at the time they received them, inform the bank of his intention. (iv) The bank on receiving the bills did not pay them into Messrs. Winson & Co.'s general account, in which, at their discount value, they would be available for Messrs. Winson & Co. or their creditors, but into the bills provisional account in which they could not be dealt with in any way until maturity, and then only if no special instructions had been given with regard to them. (v) Before the bills reached maturity the bank knew that Messrs. Winson & Co.'s agent—Mr. Smith—had handed them to the bank with the intention of appropriating them to meet

the plaintiffs' bills; for the bank learnt at the interview in December that Mr. Smith had promised the plaintiffs to pay these bills in to meet their bills. (vi) After the bank knew in December that the bills had been given to them to be specifically appropriated to meet the plaintiffs' bills, they took no steps to rectify the position although they must have known that the plaintiffs must then have regarded them as holding the proceeds to their use. They did nothing; but they left Messrs. Winson & Co. in the position of being able to write the letter of Jan. 12 to the plaintiffs. (vii) Knowing of the plaintiffs' interest in this matter, and knowing that Mr. Smith had promised specifically to appropriate the proceeds of the bills in the hands of the bank for the plaintiffs' benefit, the bank on Feb. 7 and Feb. 19 received the proceeds of the three spinners' bills and paid those proceeds into the general account of Messrs. Winson & Co., in which, as I have said, they were promptly swallowed by a large overdraft.

Having regard to these facts, and applying the law as I conceive it to be, I am of opinion that the defendant bank, having on Nov. 21 and Dec. 5 received these three bills without any definite instructions as to appropriation to particular bills, credited them to the bills provisional account. Whilst they were in that account the bank had full information as to the payers' intention as to their ultimate destination. Whilst they were still in that account the bank also knew the bargain which had been made between Messrs. Winson & Co., and the plaintiffs, but that notwithstanding, the bank transferred the proceeds to the general account, knowing that Messrs. Winson & Co. had all along intended that they should be specifically appropriated to the plaintiffs' bills and knowing that Messrs. Winson & Co. had so promised the plaintiffs. On these facts and in my view of the law I have come to these conclusions: (i) There was an equitable assignment of the proceeds of the spinners' bills by Messrs Winson & Co. to the plaintiffs before they paid the spinners' bills into the bank. (ii) Before the bank paid the proceeds of the spinners' bills into the general account they knew of the arrangement between Mr. Smith and Mr. Lyon, and, therefore, they paid that money into the general account subject to that equitable assignment. (iii) That in December the bank knew that Messrs. Winson & Co. were claiming to appropriate the proceeds of these bills to meet the plaintiffs' bills, and that they should then have claimed the right to have already appropriated themselves, which they did not do; or should have returned the bills to Messrs. Winson & Co., which they refused to do; or they must be taken to have assented then to Messrs. Winson & Co.'s appropriation.

These findings would, in my view, have finally disposed of this action were it not for a very lucid and valuable argument addressed to me by junior counsel for the defendant bank. That argument was addressed to the question whether a banker, having two accounts open for a customer, and having bills appropriated to one, was entitled to transfer their proceeds to the other without the customer's permission and even against his wishes. Counsel contended, in substance, that the relation of banker and customer entitled the banker to deal with both accounts as being one whole and entirely under his control, he alleging that he had a lien over all assets so that he might remove assets from the one account to meet deficiencies in the other. I cannot accept this proposition. If a banker agrees with his customer to open two or more accounts, he has not, in my opinion, without the assent of the customer, any right to remove either assets or liabilities from the one account to the other; the very basis of his agreement with his customer is that the two accounts shall be kept separate, and if the customer pays bills, not into his general account, where they will be discounted and he will receive the benefit of being able to draw against them, but into an account in which they will only be used either to pay bills accepted by the bank or bills drawn by the customer which they are specifically to meet, I do not think a banker, any more than any other individual, can change them from the one account into the other without the customer's assent. On this point it seems to me that the only question to be decided is,

what is the agreement between the banker and the customer? And if that agreement is, as I find it to be in this case, that there shall be a general account into which bills are paid as cash, and that there shall be an account into which bills shall be paid for some other purpose, bills or their proceeds cannot be moved from one account to the other at the whim of the banker, without the consent, express or implied, of the customer. Counsel, in terms, admitted that a banker could have no lien over assets of which there was a specific appropriation. I think equally there can be none if the bills are specifically appropriated to a special account which has to be dealt with in a particular way. Having regard to all the arguments addressed to me and the evidence adduced, I am of opinion that the defendant bank, having received these bills without notice of any specific appropriation paid them into the bills provisional account, which was quite a separate and distinct account from Messrs. Winson & Co.'s general account; that the bank knew, before they paid the proceeds into the general account, of the claims of the plaintiffs and of the desire of Messrs. Winson & Co. to appropriate the proceeds of these bills to the plaintiffs' claim; and that the bank received these bills with notice of the plaintiffs' claim; and with notice, which they did not repudiate, of Messrs. Winson & Co.'s intention to appropriate the proceeds of these bills to meet that claim.

I find, therefore, that, before the defendant bank paid the proceeds of these bills into Messrs. Winson & Co.'s general account, they had received notice of specific appropriation and of an equitable assignment of those proceeds, and I, therefore, give judgment for the plaintiffs for the amount claimed with costs.

Judgment for plaintiffs.

Solicitors: *Grundy, Kershaw, Samson & Co.*; *Tatham, Worthington & Co.*

[*Reported by* T. W. Morgan, Esq., *Barrister-at-Law.*]

HEWITT *v.* ROWLANDS

[Court of Appeal (Bankes, Scrutton and Atkin, L.JJ.), May 12, 26, 1924]

[Reported 93 L.J.K.B. 1080; 131 L.T. 757]

Landlord and Tenant—Repair—Breach of covenant by landlord to keep dwelling "dry and outside in repair"—Right of statutory tenant to recover damages before executing repairs—Measure of damages.

By an agreement in writing, dated Mar. 8, 1875, the plaintiff became the tenant of a dwelling-house for a term of five years at an annual rent of £60. It was agreed that the landlord should "keep the cottage dry and the outside in repair." On the termination of five years' tenancy the tenant remained in occupation as a yearly tenant. The present landlord purchased the property in 1920. In 1921 the tenant received from the landlord a notice to quit the premises on Oct. 1, 1921, but, as the premises were within the operation of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, he remained in possession after the expiry of the notice as a statutory tenant. During 1921 the tenant complained to the landlord of the house being damp, and on Nov. 25, 1921, a written notice was given to the landlord's solicitors that the premises were "very damp," the landlord being requested "to take immediate steps to make the premises damp proof." The landlord having failed to execute the repairs in accordance with the notice, the tenant commenced an action to recover damages for breach of the agreement. The tenant had not incurred any expenditure in connection with the repairs.

Held: (i) in assessing the damages the tenant was not entitled to complain of any damage suffered before the notice of want of repair was given, but, the breach being a continuing breach, the damages should be assessed down to the date of assessment; (ii) the measure of damages was the difference between the value to the tenant of the premises from the date of the notice to repair down to the date of the assessment of damages in their present condition and their value if the landlord on receipt of the notice to repair had fulfilled the obligations of the covenant to repair; but so much of the damages as were due to defects which the landlord was not bound to remedy must be excluded from the assessment; (iii) the fact that the tenant was a statutory tenant in no way affected the landlord's liability under his covenant.

Notes. Referred to: *Pembery* v. *Lamdin*, [1940] 2 All E.R. 434.

As to remedies for breach of a covenant to repair, see 23 HALSBURY'S LAWS (3rd Edn.) 587 et seq.; and for cases see 31 DIGEST (Repl.) 344 et seq.

Cases referred to:

(1) *Lister* v. *Lane and Nesham*, [1893] 2 Q.B. 212; 62 L.J.Q.B. 583; 69 L.T. 176; 57 J.P. 725; 41 W.R. 626; 9 T.L.R. 503; 37 Sol. Jo. 558; 4 R. 474, C.A.; 31 Digest (Repl.) 358, *4893*.

(2) *Lurcott* v. *Wakeley and Wheeler*, [1911] 1 K.B. 905; 80 L.J.K.B. 713; 104 L.T. 290; 55 Sol. Jo. 290, C.A.; 31 Digest (Repl.) 363, *4953*.

Appeal from a decision of the Divisional Court (HORRIDGE and SANKEY, JJ.).

The plaintiff claimed to recover from the defendant damages for alleged breach of agreement to repair a dwelling-house. In 1875 the plaintiff became the tenant of a dwelling-house at Aigburth, known as Woodlands Cottage, for a term of five years at an annual rent of £60, subject to the terms of a written agreement dated Mar. 8, 1876. That agreement provided that the landlord should "keep the cottage dry and the outside in repair." On the termination of the five years' tenancy the tenant remained in occupation as a yearly tenant, and continued to reside there down to the date of the commencement of these proceedings. The defendant was the landlord, having purchased the property in 1920. The cottage was formerly a farmhouse to which additions had been made on two occasions. The oldest portion was probably about 150 years old, and the other portions were built about 80 and 60 years ago respectively. The outside walls of the original building were of red sandstone, and those of the additions were of brick or brickwork covered with plaster. On Mar. 31, 1921, the tenant received from the landlord notice to quit the premises on Oct. 1, 1921. After the termination of the notice to quit the tenant remained in occupation as a statutory tenant, the premises being within the provisions of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. During 1921, the tenant complained to the landlord of the house being damp, and on Nov. 25, 1921, a written notice was given to the landlord's solicitors that the premises were "very damp," and the landlord was requested "to take immediate steps to make the premises damp proof." The landlord not having executed any repairs in accordance with the notice, the tenant issued a writ claiming (inter alia) damages for breach of the agreement. The action was tried by ACTON, J., who gave judgment for the landlord. This judgment was reversed by the Court of Appeal, who directed judgment to be entered for the tenant for damages to be assessed by the district registrar of the High Court of Justice at Liverpool. None of the repairs had been executed, and the tenant had not incurred any expenditure in connection therewith. The dampness in the house arose chiefly from the old sandstone walls having become in course of time saturated with moisture owing to the absence of a damp course. The defective condition of the roof and gutters had also been contributory causes. The cost of providing a damp course and of making good the roof and gutters and doing all work necessary to put the house in proper repair was estimated by both sides at about £600. It was admitted by one of the tenant's expert witnesses that the house was worn out and

that it would not be worth while to make the expenditure on repairs if there was no obligation to do so. Evidence was called by the tenant as to damage caused by the damp to certain pictures, a piano, and to a carpet. The district registrar stated in his certificate that in assessing the amount of damages payable by the landlord to the tenant, he had directed himself that a tenant was only entitled to recover in an action against his landlord for damages for breach of an agreement to repair the actual amount properly expended by him on the property in executing the repairs for which the landlord was responsible, together with any pecuniary loss or damage which the tenant had suffered from the landlord's default. He had, therefore, not included in the amount of damages any sum in respect of repairs to the property. He assessed the damages which the tenant was entitled to recover from the landlord in the sum of £30.

The tenant appealed to the Divisional Court who ordered that the matter must go back to the Registrar who must, or might, take into consideration, as assisting him in arriving at the proper amount of damages, the estimated costs of repairs. The landlord appealed to the Court of Appeal. When the appeal came on for hearing on May 12, the Court of Appeal sent the case back to the registrar, directing him to indicate for the information of the court the heads of damage which he had taken into account in arriving at the assessed damages of £30, and also what matters he had taken into consideration in assessing them. In his reply, he stated that the amount was made up as follows: Damage to piano, £9 10s.; to pictures, £12 12s. 6d.; to carpet, £2 17s. 6d.; general damages, £5 = £30, and he further said: "In the view taken by me of the facts it was not in the contemplation of the parties when the agreement of tenancy was entered into that the tenant should be entitled to recover from the landlord in respect of his agreement 'to keep the cottage dry and the outside in repair,' any damages beyond the actual loss and/or expense to which the tenant might be put through the landlord's default, nor were such damages to be increased by any such act on the part of the tenant as remaining in occupation of the premises after the tenancy had been determined by notice in accordance with the agreement. The claim in respect of alleged illness having been withdrawn, and it being admitted that the [tenant] had not done any repairs to the premises for which the [landlord] was responsible, nor incurred any expense in connection therewith, it seemed to me that, in the absence of any evidence of any other loss or damage beyond the first three items above mentioned, and allowed for, the sum of £5 was adequate to allow for all other damage, if any, which the [tenant] may have suffered in consequence of the breach of agreement by the [landlord]. In arriving at that figure I took into consideration the fact that the written notice of want of repair was not given on behalf of the [tenant] until after the expiration of the notice to quit which he had received from the [landlord]."

The matter was now further argued.

Singleton, *K.C.*, and *Crosthwaite* for the landlord.
Jowitt, *K.C.*, and *Arthur Ward* for the tenant.

BANKES, L.J., stated the facts, and continued: As it seems to me, every point that could be taken on either side has been discussed during the argument. On the first occasion when the matter came before us it seemed very likely that the registrar, in arriving at the amount of damages, had not only misdirected himself in reference to the actual matter of the expenditure by the tenant of the money necessary to do the repairs, but that he had also misdirected himself in reference to the position which the tenant occupied in law as a statutory tenant remaining in possession by virtue of the provisions of the Rent Restriction Act after the expiration of the notice to quit. The court thought it was more satisfactory to send the matter back to the registrar in order that he might state the grounds on which the heads of damage in respect of which he awarded the £30 were based. He has now stated very fully and very clearly exactly what he did. I must say I entirely sympathise with the view which he took, and I think it is a view which

A a great many people would take who did not realise the extraordinary position in which the Rent Restriction Act has placed many landlords and many tenants; because he has now explained that his view is that the tenant, staying on as a statutory tenant, was really not entitled to any damages at all beyond what he actually suffered as tenant under notice to quit on the terms of the original agreement, and he also stated as his view that the measure of damages in respect of this B covenant to repair would not include anything except what the tenant might pay out of pocket in doing the repairs which the landlord ought to have done. In my opinion, he has taken an incorrect view on both those points, and, in the circumstances, I think the matter must go back to him for reconsideration.

I will endeavour to explain the grounds on which I think he ought to proceed in assessing the damages to which the tenant is entitled. First of all, the tenant C is not entitled to complain until he has given his landlord notice to do the repairs, and that notice was given in November, 1921. Next, the breach here complained of being a breach of the continuing covenant, the damages will have to be assessed down to the date of assessment, so that the period which the registrar will have to consider is the period between the date when the notice to repair was given and the date when he in fact assesses the damage. Primâ facie the measure of D damages for breach of the obligation to repair is the difference in value to the tenant during that period between the house in its then condition, and its value if the landlord on receipt of the tenant's notice had fulfilled the obligation to repair. But, in considering that value, it is necessary to consider what the extent of the landlord's obligation to repair was, and in reference to this matter a difficult question arises which is a matter for the registrar to decide on the facts. He must E consider whether, having regard to the age and structure of this house, the damage complained of is the result of a failure on the part of the landlord to do anything which he was under an obligation to do. It appears, according to his statement, that the main cause of the dampness is the saturation of the stone which composes part of the house owing to the absence of a damp course, and he must consider whether, on the facts, the case falls within the class of cases of which *Lister* v. F *Lane and Nesham* (1) is one, and there are others to the same effect. *Lister* v. *Lane and Nesham* (1) was explained by FLETCHER MOULTON, L.J., in *Lurcott* v. *Wakeley and Wheeler* (2) ([1911] 1 K.B. at pp. 921, 922); and to the extent to which the registrar may find, after directing himself properly with reference to those decisions, that the dampness is caused by a state of things which the landlord is under no obligation to remedy under this covenant, he will, of course, exclude that G from his consideration in assessing the damages.

I hope I have expressed sufficiently clearly the view which the registrar must take in assessing the damages. Perhaps I could express it shortly in this way: that the measure of damages is the difference in value to the tenant of the premises from the date of the notice to repair down to the date of the assessment of damages, between the premises in their present condition and their value if the landlord on H receipt of the tenant's notice to repair had fulfilled the obligations of the covenant.

As I say I regret that there has been all this litigation about this comparatively small matter, and I should still hope that the parties might see their way to come to some final settlement of it. We can only deal with it on the facts as they come before us, and our decision is that the matter must go back to the registrar for his reconsideration and for an assessment of such damages as he thinks proper after J this direction to award. We think the tenant must have the costs because the landlord's contention has been really from the first that, under the circumstances, all that the tenant was entitled to was nominal damages. I think, having regard to the amount which the registrar has now said he has given as general damages, that that is really the argument he accepted and on which he based his decision.

SCRUTTON, L.J.—I agree.

ATKIN, L.J.—I agree. I should just like to add one or two matters in respect of it. A great deal has been said about the effect of the Rent Restrictions Act,

but to my mind that has no bearing at all on the actual legal liability of the parties in the circumstances of this case. On the expiration of the notice to quit, the tenant was entitled to what has been called the statutory tenancy and entitled during the continuance of that tenancy to the performance by the landlord of his covenant. Therefore, as far as legal liability is concerned, the legal position seems to be precisely what it would have been if the term had not expired. Then the obligation of the landlord does not arise until the giving of the notice of want of repair, and that is in November, 1921. The obligation then is an obligation to keep the house dry and the outside in repair. That appears to me, on the authorities, to be an obligation to make and keep the house dry and to put and keep the outside in repair, and it is for breach of that obligation that damages are sought to be recovered. Now the measure of damages, I agree, would be the measure of damages as stated by BANKES, L.J. It was not argued and it was not necessary to deal with it; but in addition to that there would be the damage to chattels caused during the period between November, 1921, by reason of the failure to perform the covenant and the assessment of damages. I think in that respect—I do not know whether the question has in fact been considered by the registrar—the question would arise whether the damage to the piano and the carpets all arose during that period or whether part of it is in respect of a dampness which arose before the liability of the landlord arose on the covenant.

The only other question is the question that BANKES, L.J., has dealt with and as to which I desire to say nothing more, namely the question whether or not the ordinary obligation of the landlord is affected by such considerations as those which arose in *Lister* v. *Lane and Nesham* (1) and that class of case. The learned registrar no doubt will deal with that in considering how far the obligation of the landlord to put in repair and to make dry extends, but in dealing with that point it seems to me to be quite irrelevant to consider whether or not performance of the contract would, or would not, be to the commercial advantage of the landlord. If, in fact, he had broken his obligation he must pay damages on that footing, regardless of the question whether or not it would be for him commercially expedient to fulfil it. That, of course, is not to say that the registrar may not take into account the considerations that have been mentioned by BANKES, L.J., that arise if the state of facts is proved to be such as that which became relevant in such a case as *Lister* v. *Lane and Nesham* (1).

BANKES, L.J.—I agree with ATKIN, L.J. I ought to have mentioned any possible damage to chattels. I did not know that that was in question, but of course that ought to be included in the matters which the registrar will take into consideration.

Case remitted to the district registrar.

Solicitors: *Gasquet, Metcalfe & Walton*, for *Radcliffe, Smith, Abercromby & Co.*, Liverpool; *Church, Rendell, Bird & Co.*, for *Talbots*, Birmingham.

[*Reported by* EDWARD J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

A

MILLS *v.* LONDON COUNTY COUNCIL

[KING'S BENCH DIVISION (Lord Hewart, C.J., Shearman and Salter, JJ.), November 14, 1924]

B [Reported [1925] 1 K.B. 213; 94 L.J.K.B. 216; 132 L.T. 386; 89 J.P. 6; 41 T.L.R. 122; 69 Sol. Jo. 254; 23 L.G.R. 43; 27 Cox, C.C. 720]

Cinematograph—Licence—Condition—Exhibition of film—Approval by unofficial body—Right of review reserved to licensing authority—Vagueness and unreasonableness of condition—Cinematograph Act, 1909 (9 *Edw.* 7, *c.* 30), *s.* 2 (1).

C The appellant, who was the occupier of a cinematograph theatre, was granted a licence for the premises by the respondent council under the Cinematograph Act, 1909, one of the conditions of the licence, imposed under s. 2 (1) of the Act, being: "That no film other than photographs of current events, which has not been passed for 'universal' exhibition by the British Board of Film Censors shall be exhibited in the premises without the express consent of the D council during the time that any child under, or appearing to be under, the age of sixteen years is therein: Provided that this condition shall not apply in the case of any child who is accompanied by a parent or bona fide adult guardian of such child." The British Board of Film Censors was an unofficial body appointed to act as censors by firms letting out films on hire and was not E responsible to the respondents, and did not consult them.

Held: (i) as the condition did not make the decision of the Board final, but rendered it subject to review by the council, the council had not delegated its statutory duties to the Board; (ii) neither the words "any child appearing to be under the age of sixteen" nor the words "bona fide adult guardian" made the condition so vague as to be unreasonable; and, therefore, the condition F was valid.

Ellis v. *Dubowski* (1), [1921] 3 K.B. 621, distinguished.

Notes. Referred to: *Short* v. *Pool Corpn.* (1925), 42 T.L.R. 107; *Harman* v. *Butt*, [1944] 1 All E.R. 558.

As to licensing of cinematograph theatres, see 32 HALSBURY'S LAWS (2nd Edn.) 72–75; and for cases see 42 DIGEST 920–922. For Cinematograph Act, 1909, see G 25 HALSBURY'S STATUTES (2nd Edn.) 39.

Cases referred to:

(1) *Ellis* v. *Dubowski*, [1921] 3 K.B. 621; 91 L.J.K.B. 89; 126 L.T. 91; 85 J.P. 230; 37 T.L.R. 910; 19 L.G.R. 641; 27 Cox, C.C. 107, D.C.; 42 Digest 921, *162*.

H (2) *Theatre de Luxe* (*Halifax*), *Ltd.* v. *Gledhill*, [1915] 2 K.B. 49; 112 L.T. 519; 79 J.P. 238; 31 T.L.R. 138; 13 L.G.R. 541; 24 Cox, C.C. 614; sub nom. *Halifax Theatre de Luxe, Ltd.* v. *Gledhill*, 84 L.J.K.B. 649, D.C.; 42 Digest 920, *160*.

(3) *R.* v. *Burnley Justices, Ex parte Longmore* (1916), 85 L.J.K.B. 1565; 115 L.T. 525; 80 J.P. 382; 32 T.L.R. 695; 14 L.G.R. 960, D.C.; 42 Digest 921, *161*.

I (4) *London County Council* v. *Bermondsey Bioscope Co., Ltd.*, [1911] 1 K.B. 445; 80 L.J.K.B. 141; 103 L.T. 760; 75 J.P. 53; 27 T.L.R. 141; 9 L.G.R. 79, D.C.; 42 Digest 921, *164*.

(5) *Kruse* v. *Johnson*, [1898] 2 Q.B. 91; 67 L.J.Q.B. 782; 79 L.T. 647; 62 J.P. 469; 46 W.R. 630; 14 T.L.R. 416; 42 Sol. Jo. 509; 19 Cox, C.C. 103, D.C.; 13 Digest (Repl.) 239, *639*.

Case Stated by a metropolitan magistrate.

An information was preferred by William John Jones on behalf of the London

County Council (hereinafter called "the respondents") under the Cinematograph Act, 1909, against Harry Mills (hereinafter called "the appellant") for that he, on April 6, 1924, being the occupier of the premises known as the Nelson Electric Theatre, 388, Old Kent Road, Camberwell, did allow such premises to be used in contravention of the conditions upon which a licence relating to the said premises was granted to him by the respondents under the statute aforesaid, that is to say, did, in contravention of condition 7 (iv) of the said licence, exhibit without the express consent of the respondents a film (entitled "Woman to Woman"), not passed for "universal" exhibition by the British Board of Film Censors, upon the said premises during the time that a child under, or appearing to be under, the age of sixteen years was therein.

Upon the hearing of the information the following facts were proved or admitted. (a) The appellant was the occupier of and carried on the business of a cinematograph theatre known as the Nelson Electric Theatre, at 388, Old Kent Road, in the county of London. (b) The appellant was the holder of a licence under the Cinematograph Act, 1909, granted by the respondents on Jan. 1, 1924. Condition 7 (iv) of the licence was:

> "That no film other than photographs of current events which has not been passed for 'universal' exhibition by the British Board of Film Censors shall be exhibited in the premises without the express consent of the council during the time that any child under, or appearing to be under, the age of sixteen years is therein: provided that this condition shall not apply in the case of any child who is accompanied by a parent or bona fide adult guardian of such child."

(c) The British Board of Film Censors was an unofficial body appointed by firms engaged in letting out films on hire to act as censors of the films, and such body formed no constituent part of the respondents nor did it consult the respondents with regard to passing or not passing any films. (d) The British Board of Film Censors had adopted a custom of passing films for "universal" and also for "restricted" exhibition. Those considered by the Board suitable for universal exhibition were marked "U" and those which were considered by the Board suitable for exhibition to adults but not to children were marked "A." (e) On April 6, 1924, the appellant exhibited at the said theatre a film entitled "Woman to Woman" which to his knowledge had been passed and marked "A" by the Board. (f) The consent of the respondents had not been sought or obtained to such exhibition of the film by the appellant. (g) The film was not indecent, and was not in any other way unsuitable for exhibition for children. (h) There were children present under the age of sixteen years unaccompanied by a parent or guardian during the exhibition of such film.

It was contended on behalf of the appellant: (a) That the condition was ultra vires; (b) that the condition was unreasonable; (c) that the condition was void by reason of vagueness and uncertainty; (d) that on the above facts the appellant was not in law liable to be convicted. On behalf of the respondents it was contended that the condition was neither ultra vires nor unreasonable nor vague nor uncertain, and that the appellant was liable to be convicted. The magistrate's attention was called to the following cases: *Ellis* v. *Dubowski* (1); *Theatre de Luxe (Halifax), Ltd.* v. *Gledhill* (2), *R.* v. *Burnley Justices, Ex parte Longmore* (3). Being of opinion that the respondents, in framing the said condition of the said licence, had adopted the form of words suggested by SANKEY, J., and approved by LAWRENCE, C.J., in *Ellis* v. *Dubowski* (1), the magistrate convicted the appellant.

H. M. Giveen for the appellant.
H. D. Roome for the respondents.

LORD HEWART, C.J.—This is a Case stated by one of the learned magistrates of the police courts of the metropolis. An information was preferred by Mr. Jones on behalf of the London County Council (the respondents) under the Cinematograph

Act, 1909, against the appellant, for that on a day in April last, being the occupier of certain premises known as the Nelson Electric Theatre in Camberwell, he did allow those premises to be used in contravention of the conditions upon which a licence relating to those premises was granted to him by the respondents under the statute. The particular complaint was that in contravention of a certain condition the appellant exhibited, without the express consent of the respondents, a film not passed for universal exhibition by the British Board of Film Censors, upon those premises during a time when a child under, or appearing to be under, the age of sixteen years was therein. That information was heard by the learned magistrate, and having reserved his decision he ultimately convicted the appellant.

The question raised by the Case Stated is whether the particular condition referred to in the information was ultra vires. The words of the condition are:

> "That no film other than photographs of current events which has not been passed for 'universal' exhibition by the British Board of Film Censors shall be exhibited in the premises without the express consent of the council during the time that any child under, or appearing to be under, the age of sixteen years is therein: Provided that this condition shall not apply in the case of any child who is accompanied by a parent or bona fide adult guardian of such child."

It was urged before the learned magistrate, and it is urged in this court, that that condition which is contained in the licence, and to which the licence is subject, is ultra vires. It was said to be unreasonable. It was said to be void by reason of vagueness and uncertainty. The learned magistrate, having heard the argument, upheld the condition and decided against those contentions.

It is important to remember that under this statute, the Cinematograph Act, 1909, the licensing authority is given, and no doubt most deliberately given, very wide powers. Section 2 (1) provides as follows:

> "A county council may grant licences to such persons as they think fit to use the premises specified in the licence for the purposes [of cinematograph exhibitions] on such terms and conditions and under such restrictions as, subject to regulations of the Secretary of State, the council may by the respective licences determine."

As was said by LORD ALVERSTONE in *L.C.C.* v. *Bermondsey Bioscope Co., Ltd.* (4) ([1911] 1 K.B. at p. 451):

> "The language of s. 2 (1) seems to me to be quite clear, and we must therefore construe it according to its plain meaning. In my opinion, that section is intended to confer on the county council a discretion as to the conditions which they will impose, so long as those conditions are not unreasonable."

I think it is pertinent with reference to this subject-matter, in view of the wide words that are employed in that subsection, to refer to the observations of LORD RUSSELL in *Kruse* v. *Johnson* (5), where he was dealing with the cognate subject of byelaws made by public representative bodies. He there said ([1898] 2 Q.B. at p. 99):

> "When the court is called upon to consider the byelaws of public representative bodies clothed with the ample authority which I have described, and exercising that authority accompanied by the checks and safeguards which have been mentioned, I think the consideration of such byelaws ought to be approached from a different standpoint. They ought to be supported, if possible. They ought to be, as has been said, 'benevolently' interpreted, and credit ought to be given to those who have to administer them that they will be reasonably administered. This involves the introduction of no new canon of construction."

In the present case the criticism which is directed against this condition aims at three points. It is said, first of all, that this condition is bad, because it means that the London County Council have delegated or transferred to the British Board of Film Censors no small part of the duties of the council under the Act, and

reference is made to *Ellis* v. *Dubowski* (1). In that case the condition which was attached to the licence was in these terms: "That no film be shown which has not been certified for public exhibition by the British Board of Film Censors." It was held with some doubt that that condition was unreasonable and ultra vires. AVORY, J., for example, spoke ([1921] 3 K.B. at p. 626) of the considerable doubt and hesitation which he had in holding that the condition was so unreasonable as to be ultra vires the licensing authority. But one thing was made very plain by that court, both in the course of the argument and in the course of the judgment: that very different considerations would have applied if the condition had been so framed as to make the certificate or the decision of the British Board of Film Censors not final, but subject to review. It was said, for example, by LAWRENCE, C.J. (ibid. at p. 625):

> "If, as was suggested by SANKEY, J., in the course of the argument, the condition has reserved to the committee the right to review the decisions of the Board, it would seem to be a reasonable condition. Upon that Mr. Giveen's answer did not convince me, for it is reasonable that no film should be shown which has not been passed by some body. But that body should not be made the final dictator, and a condition putting the matter into the hands of a third person or body not possessed of statutory or constitutional authority is ultra vires the committee."

In the present case that mischief is avoided. This condition with which we are now concerned provides an exception where the express consent of the council is given. In other words, there is an appeal in the matter from the decision of the British Board of Film Censors to the council itself. In my opinion, therefore, the first objection fails.

But it is said, secondly, that this condition is unreasonable because it is vague, and it is under that head that the remaining two criticisms fall. The first is directed to the words "any child under, or appearing to be under, the age of sixteen years." The second criticism is directed to the words "accompanied by a parent or bona fide adult guardian." The words "under, or appearing to be under, the age of sixteen years" seem at first blush to be a little unusual, but when one looks at a statute passed in the year before that in which the Cinematograph Act, 1909, was passed, namely, the Children Act, 1908, it appears by s. 39 of that Act that it is an offence to sell cigarettes to children "apparently under the age of sixteen years" [see now s. 7 of Children and Young Persons Act, 1933], and in like manner by the Licensing (Consolidation) Act, 1910, not to mention other instances, it is provided that the holder of a justices' on-licence shall not sell or allow any person to sell, to be consumed on the premises, any description of spirits to any person apparently under the age of sixteen years. There is no difference, except in spelling, between "apparently" and "appearing to be." What, then, is the mischief which is aimed at by the legislature in such phrases? Is it not clearly this, that in order to prevent that from being done which the legislature desires to prevent, it throws a somewhat unusual burden upon the alleged offender? The statute is directed against a sale to persons apparently under a certain age, and, if a case arose under the condition with which we are now dealing, where the child referred to was said to be apparently under the age of sixteen, I cannot imagine that a tribunal would convict if it appeared upon examination that in fact the child was over sixteen. But, however that may be, counsel for the appellant says that in this condition, as contrasted with the provisions of certain sections of the Children Act, 1908, and the provisions, for example, of s. 67 of the Licensing (Consolidation) Act, 1910 (repealed), here the defendant may be convicted either way, because it is enough, in order that the condition should be broken, that a child should be present who is, in fact, under, or appears to be under, the age of sixteen years. Recollecting the subject-matter with which one is concerned, namely, the exhibition of photographs, and the exhibition of photographs which a board of censors thinks to be not fit for children,

A though fit for adults, I see no difficulty at all in regarding that cumulative test as reasonable, although, as I said a moment ago by anticipation, I cannot myself imagine that if it was shown in fact that the child referred to was over the age of sixteen the fact that the child appeared to be under that age would be fatal to the defendant. I do not think, therefore, that these words, "any child under, or appearing to be under, the age of sixteen years," translating them into the language B of the statutes—"any child under or apparently under the age of sixteen years"—incorporated as they are in this condition, makes the condition so vague as to be unreasonable.

The same observation applies to the criticism finally directed against the words "bona fide adult guardian." It is quite easy to see that in particular circumstances, and especially in an emergency where it was thought that trouble was C about to arise, a person might be put forward, or might falsely put himself forward, as being the guardian of the children referred to when he was not; and it is not likely to pass the wit of any tribunal which may have to deal with such a matter to determine, aye or no, whether the person under whose wing protection in a particular case is sought, comes or does not come within the category of bona fide adult guardian. The argument which has been put per contra is, I have said, D an attractive argument, but I think that this condition, looking at the wide words of the statute and looking at the purpose of the condition, ought to be supported, if it can reasonably be supported. In my opinion, it can reasonably be supported. For those reasons I think that this learned magistrate came to the right conclusion, and that this appeal fails.

E **SHEARMAN, J.**—I am of the same opinion. This licence is attacked as a whole, and the first, and, to my mind, the most important, part that has been attacked is that provision of it which it has been argued is bad because it says that no film which has not been passed for universal exhibition by the British Board of Film Censors shall be exhibited on the premises without the express consent of the council during certain times. Counsel for the appellant argued that that was F unreasonable because it was an unreasonable and improper delegation of powers to a Board which was not appointed by the county council and really represented a diverse interest. In my judgment, we ought not to listen to that argument. A somewhat similar provision was discussed in *Ellis* v. *Dubowski* (1), when the court set aside a regulation which did not contain the words "without the express consent of the council." In that case the same counsel put up the argument that there G was an illegal delegation of powers by the committee and that it was unreasonable on that ground. The court, as it was constituted then, set aside that particular provision as unreasonable, not because certain powers had been delegated to this extraneous body, but because the decision of that extraneous body had been made final and unappealable. That is quite clear from the judgments of all the three judges. In the result, the argument that the mere fact that the delegation to an H alien body made it bad was rejected by the three judges who heard the case, although they decided that it was bad because it left no discretion at all of any kind to the committee; and two of the judges expressly went on to say that, if it had contained substantially the very words that are in the licence which we are at present considering, they would have been of a different opinion. It is quite true, as was urged upon us, that all those three statements of the three learned I judges who decided *Ellis* v. *Dubowski* (1) were not decisions, but dicta; but when all three judges, in a case which is argued at length, reject a particular argument and all give their grounds intimating that they see nothing wrong in a particular delegation of powers, I think it would not be seemly for this court, even if it wished, to re-consider that matter and to say that the delegation is bad. To do so would introduce a chaotic result with regard to the administration of licences of this nature. I am not expressing any disapproval of the dicta in that case. To my mind, they were dicta which were expressed unanimously by the three judges, and, therefore, we ought to adopt them.

As to the remaining points which have been dealt with at length by my Lord, I agree with him entirely that there is nothing unreasonable in putting in the words "during the time that any child under, or appearing to be under, the age of sixteen years," because it is on a par with a good deal of contemporary legislation which treats as a thing to be prohibited the sale of certain articles not only to children actually under a particular age, but to children appearing to be or apparently under that age. I think there is still less force in the contention that it is unreasonable to speak of "a bona fide adult guardian." I think it means a real or true guardian of the child, and I see nothing unreasonable in that. In the result, in my judgment, the whole of this licence is reasonable, it is enforceable, and the conviction was good.

SALTER, J.—I agree. As to the second point, apparent age is a standard already applied in the statute relating to children, and there is nothing vague or oppressive or unreasonable in making the condition apply both to persons under sixteen and to persons apparently under sixteen.

Appeal dismissed.

Solicitors: *Norman Hart & Mitchell*; *Solicitor to the London County Council.*

[*Reported by* J. F. Walker, Esq., *Barrister-at-Law.*]

SHERWOOD *v.* TUCKER

[Court of Appeal (Sir Ernest Pollock, M.R., Warrington and Sargant, L.JJ.), June 30, 1924]

[Reported [1924] 2 Ch. 440; 94 L.J.Ch. 66; 132 L.T. 86; 40 T.L.R. 782; 68 Sol. Jo. 769]

Landlord and Tenant—Option to purchase—Option included in three years' agreement—Extension of term—Exclusion of option.

By an agreement dated in 1914 a house was demised to a lessee for three years. The agreement contained a clause providing that the tenant should "have the right to purchase the said house and premises at any time during the three years hereby provided for" for the sum therein mentioned. Before the expiration of the term an endorsement was made on the agreement as follows: "We the undersigned hereby agree that this lease shall be extended for three years, expiring Dec. 25, 1920," and before the expiration of the extended term a further endorsement was signed in the same terms extending the term for a further period of three years, expiring on Dec. 25, 1923.

Held: in the absence of clear words to the contrary the option to buy was a contract separate and independent of the demise in the original agreement and the burden of proving otherwise was on the tenant; on a proper construction, the words in the endorsements extending the term specified in that agreement related only to the demise; and, therefore, the option was not extended by the endorsements, but terminated with the original agreement.

Iggulden v. *May* (1) (1807), 7 East, 237, *Raffety* v. *Schofield* (2) [1897] 1 Ch. 937, and *Bradbury* v. *Grimble & Co.* (3) [1920] 2 Ch. 548, applied.

Decision of Astbury, J., [1924] 2 Ch. 42, reversed.

Notes. Distinguished: *Batchelor* v. *Murphy*, [1925] All E.R.Rep. 176; *Hill* v. *Hill*, [1947] 1 All E.R. 54. Referred to: *Stromdale and Ball, Ltd.* v. *Burden*, [1952] 1 All E.R. 59.

A As to options to purchase, see 23 Halsbury's Laws (3rd Edn.) 470–472; and for cases see 30 Digest (Repl.) 494 et seq.

Cases referred to:

(1) *Iggulden* v. *May* (1807), 2 Bos. & P.N.R. 449; 127 E.R. 703, Ex. Ch.; 31 Digest (Repl.) 78, *2316*.

B (2) *Raffety* v. *Schofield*, [1897] 1 Ch. 937; 66 L.J.Ch. 448; 76 L.T. 648; 45 W.R. 460; 30 Digest (Repl.) 497, *1411*.

(3) *Re Leeds and Batley Breweries and Bradbury's Lease*, *Bradbury* v. *Grimble & Co.*, [1920] 2 Ch. 548; 89 L.J.Ch. 645; 124 L.T. 189; 65 Sol. Jo. 61; 30 Digest (Repl.) 495, *1393*.

(4) *Swinburne* v. *Milburn* (1884), 9 App. Cas. 844; 54 L.J.Q.B. 6; 52 L.T. 222; 33 W.R. 325, H.L.; 31 Digest (Repl.) 76, *2302*.

C (5) *Woodall* v. *Clifton*, [1905] 2 Ch. 257; 74 L.J.Ch. 555; 93 L.T. 257; 54 W.R. 7; 21 T.L.R. 581, C.A.; 30 Digest (Repl.) 495, *1395*.

Also referred to in argument:

Rider v. *Ford*, [1923] 1 Ch. 541; 92 L.J.Ch. 565; 129 L.T. 347; 67 Sol. Jo. 484.

Appeal by the lessor from an order of Astbury, J., upon an originating summons D in an action for a declaration.

The facts appear in the judgments.

Beebee for the lessor.

Rivière for the lessee.

SIR ERNEST POLLOCK, M.R.—This is an appeal from a decision of Astbury, E J., upon an originating summons which was taken out to determine the meaning of two endorsements upon a memorandum of agreement whereby some premises were demised from Mr. Frederic John Tucker to Mr. Benjamin Sherwood. The agreement was made on Oct. 29, 1914, and the premises were demised, or purported to be demised, under the agreement for a term of three years from the subsequent Dec. 25. Although I do not know that it has any effect upon our F decision, perhaps it is to be noted that the term originally stipulated for in the memorandum of agreement made on Oct. 29 was for a period of more than three years from the making thereof and that the agreement ought to have been made under seal in accordance with the Statute of Frauds [see now Law of Property Act, 1925, s. 52, s. 205 (1) (ii)], but it does not matter for the present purpose. On June 17, 1917—that is a few months before the demise ran out—the parties G signed this form of agreement: "We, the undersigned, hereby agree that this lease be extended for three years expiring December 25th, 1920," and when that three years was coming to its close, namely, in September, 1920, they again signed an agreement, namely: "We, the undersigned, hereby agree that this lease be extended for three years expiring December 24th, 1923." It is to be observed that in those two agreements subsequent to the demise the words used are "that this H lease be extended" in both cases. The original agreement contained a clause whereby an option was given to the tenant to purchase in these terms:

> "That the said tenant shall have the right to purchase the said house and premises at any time during the three years hereby provided for for the sum of £700 sterling."

I We have to determine what is the effect of the subsequent agreement made in relation to the continuance of the lease upon that term which gives an option to the tenant. It was said that the tenant had a right to exercise his option so long as the term of the demise continued. It was said, on the other hand, that this option was an option given, as it says, "during the three years hereby provided for," that is the original term, and not longer, and that the agreement which was made on the two successive occasions in June, 1917, and September, 1920, to extend the lease, did not and does not extend the option. Astbury, J., came to the conclusion that, looking at the documents as a whole, he was inclined to think that by the

expression "this lease" they meant the actual document with all its provisions intact. There was some evidence before him (to which I do not know what attention he paid) that the parties were laymen and that the words "this lease" when used by them had a different signification from what they would mean in the hands of lawyers and ought to be construed accordingly. For my part, I would like rather to protest against a doctrine that one is to construe the meaning of words according as they are used by laymen or by lawyers. I think that we have to take the words as they stand and construe them, and that we ought not to make out what was the probable intention of the parties. Their intention is to be found in the meaning of the words which they have used, properly construed.

What do the words which have been used in this case mean. "We agree that this lease be extended"—are those words apt to cover the option as well as the extension of the demise? For my part I think they do not cover the option. There is a great and clear distinction between the two things. The first is the demise of the premises by the landlord to the tenant, and, although it is to be found in the agreement which is signed and executed by the parties, still the option is a separate and independent contract whereby a chance is given to the tenant under the conditions imposed to purchase the freehold of the premises which are demised to him, and that that option is an independent contract is wholly and sufficiently indicated in one or two cases which have been cited to us. The nature of the distinction is pointed out in *Iggulden* v. *May* (1), and in that case, although, no doubt, it is not precise and comments have been made, and counsel for the lessee has pointed out that what had to be decided was whether or not there should be a perpetual renewal, still, it is important and relevant to our view to find that LORD ELLENBOROUGH, C.J., speaks of the covenant to allow a renewal in these terms (7 East, at p. 241):

> "The argument that a covenant for a lease with all the covenants cannot be satisfied by a lease with all but one will have no weight if, according to the fair construction of the lease, that one covenant should be found to have nothing to do with the subject-matter to be granted."

He points out that the option was not a necessary part, but was, indeed, an independent part of the demise. Again in *Raffety* v. *Schofield* (2), ROMER, J., considering what were the relations between the owner of some land and a builder under a building agreement with regard to the right of purchase, says ([1897] 1 Ch. at p. 942):

> "It was in fact a new and distinct contract from that created by the building agreement, though it arose by reason of and flowed from the building agreement."

Earlier, in *Swinburne* v. *Milburn* (4), LORD SELBORNE, with reference to this right of renewal, after speaking of a number of authorities, said that those authorities do impose upon anyone claiming such a right—that is a right to exercise an option —the burden of strict proof and are strongly against inferring it from any equivocal expression which may fairly be capable of being otherwise interpreted. It is, therefore, in my judgment, important that one should approach the question of the interpretation to be put upon these words, bearing in mind the essential distinction which is to be drawn between the demise and the contract under which the option to purchase is given. They are essentially different.

Having regard to those principles, I look at the words which are before us in this case. Twice over the words are used that "this lease be extended for three years." It is quite clear that a landlord may be prepared to give to his tenant an option to purchase at a fixed price for a limited period of time. The circumstance of value may enable both parties to fix upon a sum which will stand good for a definite time. It is quite another thing to say that the same considerations apply where there is to be an extension of the term and a renewed extension of the term. This was well pointed out by PETERSON, J., in *Bradbury* v. *Grimble & Co.* (3). It is unnecessary to say more about that decision, with which I agree, than that

A the relevant consideration which appears to have dominated the learned judge's mind was that, remembering the distinction between an option and a demise and that the landlord may be content for a fixed time to be bound to a fixed price, it is another matter altogether to say that that is to continue for an indefinite period unless clear words are used for that purpose. It seems to me that on p. 551 ([1920] 2 Ch.) the learned judge points out the antithesis between a fixed price within a B limited time and a fixed price which is to be carried on for a very much longer period. In the present case we have got words which can be fully interpreted and adequately explained by holding that they relate to the demise and the demise only. The words that are used are not among the terms of this document, but they were endorsed on it—"this lease"—and the lease must be the terms of the demise of the premises. Those are the words used. Full effect can be given to them in C holding that they apply to the demise, and the demise only, and I think it would be wrong to say that they mean not merely the demise but the demise and the option originally given as well. The words are, I think, not uncertain, they are appropriate to a continuance of the demise, and they are not appropriate to a continuance of the option.

In these circumstances I think the learned judge allowed himself to go rather D outside the limits of the lawyer's interpretation and the proper interpretation of the document when he held that the words "this lease" included a demise of the option. I think the right interpretation is that they refer to the demise and the demise only. The appeal must be allowed and allowed with costs.

WARRINGTON, L.J.—I am of the same opinion. The question is rightly E stated in the originating summons in these terms. The plaintiff asks for "a declaration that upon the true construction of an agreement dated Oct. 29, 1914, and made between the defendant of the one part and the plaintiff of the other part and two agreements endorsed thereon signed by the defendant and the plaintiff, the plaintiff was entitled to an option to purchase the freehold estate" there mentioned, and that he has exercised that option by a notice in writing. The learned F judge has made the declaration asked for by the plaintiff. With all respect to him, in my opinion that order ought not to stand.

The question is whether where you find an agreement for a lease, or in this case an agreement for a term of three years, containing an option to purchase, and the parties sign two subsequent documents extending the lease for a further period, the effect of those documents is not only to extend to a further period of three G years the relation of landlord and tenant, but also to continue to confer upon the tenant the special privilege given to him by the option to purchase. It has frequently been held and may be treated as perfectly well settled that an option of purchase is to be regarded, not as a provision incident to the relation of landlord and tenant, but as a matter collateral to and independent of it. The last decision on that matter, which was a decision of the Court of Appeal in *Woodall* v. *Clifton* H (5), is a very good example of the application of that principle. In that case the question turned upon the construction of the statute 32 Hen. 8, c. 34 [relating to grantees of reversions: repealed by Law of Property Act, 1925], and in particular upon s. 2 of that statute. The question which was raised in that case was analogous to the question which is raised in the present, namely, whether an option to purchase is to be included among the conditions, covenants, or agreements I contained or expressed in the lease so as to pass under the words of the statute to the grantees of the reversion. What Romer, L.J., said in the Court of Appeal was this ([1905] 2 Ch. at p. 279):

> "Properly regarded [the option of purchase] cannot, in our opinion, be said to directly affect or concern the land, regarded as the subject-matter of the lease, any more than a covenant with the tenant for the sale of the reversion to a stranger to the lease could be said to do so. It is not a provision for the continuance of the term, like a covenant to renew, which has been held to run with the reversion, though the fact that a covenant to renew should be held

to run with the land has by many been considered as an anomaly, which it is too late now to question, though it is difficult to justify. An option to purchase is not a provision for the shortening of the term of the lease, like a notice to determine or a power of re-entry, though the result of the option, if exercised, would or might be to destroy the tenancy. It is, to our minds, concerned with something wholly outside the relation of landlord and tenant with which the statute of Henry VIII was dealing."

It seems to me, therefore, that when the tenant in the present case sets up a contention that the endorsement on the document extending the lease has continued the option of purchase, what he has to show is that there is to be implied in the terms of those endorsed documents by necessary implication an agreement to continue the option. Primâ facie those documents which extend the lease ought to be held to extend the relation of landlord and tenant, and the person who seeks to give them any further meaning than that must find in the document extending the lease either something expressed—which, of course, there is not here—or, if that is not to be found, then something which by necessary implication has that effect.

I think I am justified in making that statement of what I conceive to be the law by a few words in the judgment of LORD SELBORNE, L.C., in *Swinburne* v. *Milburn* (4), in which, it is true, he was dealing with a different question, namely, whether a covenant to renew is one of those covenants which have to be inserted in the first and every other renewal under the covenant to renew. But what he says is this (9 App. Cas. at p. 849):

"As against a perpetual right of renewal, it is to be observed that there is nothing here which, either expressly or by necessary implication, points to perpetuity [that is, a continuance of the renewal in perpetuity] if the words 'as often as one or two life or lives of and in the said tenements, &c., shall drop and be determined,' can be otherwise satisfied. I am not inclined to adopt the language which is to be found in some authorities, to the effect that there is a sort of legal presumption against a right of perpetual renewal in cases of this kind; but those authorities certainly do impose upon anyone claiming such a right the burden of strict proof, and are strongly against inferring it from any equivocal expressions which may fairly be capable of being otherwise interpreted."

If one reads those words in the light of such decisions as those of which the decision of this court in *Woodall* v. *Clifton* (5) is an example, I think that they are as applicable to the question that LORD SELBORNE had to determine as they are to the present question. Having said so much, I think it unnecessary to say more, because it is quite clear that the expression "the lease shall be extended" is capable of meaning the relation of landlord and tenant created by the document on which the memorandum of extension is endorsed. If it means the extension of the relation of landlord and tenant, it does not include such a provision as an option to purchase, and with all respect I think the decision of the learned judge was wrong, and the appeal ought to be allowed.

SARGANT, L.J.—I am of the same opinion. The words here are very short, but that does not diminish their difficulty. In fact, their difficulty rather arises from their very brevity. I am not sure that the decisions which have been referred to about covenants for renewal of lease really help, for the reason that there is always a difficulty in those cases in holding that a covenant to renew on the same conditions implies a toties quoties covenant, namely, that the covenant itself to renew shall be included in the document which is to contain the same conditions. I do not think that difficulty arises where the bargain to be construed is a bargain which is made by some subsequent document as it is here. Turning to this document the phrase is "this lease be extended for three years." What does that mean? Does it mean that the term is to be extended or that the contract is to be extended with all its incidents. I think the word "extension" is not

really strictly applicable properly used with regard to the document. One cannot extend the document. One cannot extend the actual lease. It is a word properly applicable to the extension of the term of years granted by the lease, and, in my judgment, I think that a very slight alteration of the terms here might have produced a different result. If the parties had agreed that the house should be taken for a further term of three years upon all the terms upon which it was taken under the original contract, the result might very likely have been different. But on the whole I cannot find in this document anything more than an extension, and an extension is primâ facie applicable to an extension of the term granted and does not necessarily involve the further grant of an option of purchase which is not itself one of the incidents of a tenancy strictly speaking. It is for the person who seeks to establish the relationship of vendor and purchaser to show that the right to create that relationship is given by the document under which he claims, and I cannot see that here counsel for the tenant has been successful—though I quite appreciate the force of the argument he has addressed to us—in showing that there was not merely an extension of the term of the tenancy, which is all I think the words strictly mean, and I do not think that it is shown that there has been a fresh bargain under which the collateral option to purchase was to be extended for a further period of three years in each case.

Solicitors: *Linklaters & Paines*; *Scott, Bell & Co.*

[*Reported by* J. L. DENISON, ESQ., *Barrister-at-Law.*]

ATTORNEY-GENERAL *v.* PEARSON AND OTHERS

[KING'S BENCH DIVISION (Rowlatt, J.), March 18, 1924]

[Reported [1924] 2 K.B. 375; 94 L.J.K.B. 139; 132 L.T. 717]

Estate Duty—Aggregation—Property in which the deceased never had an interest —"Interest"—Finance Act, 1894 (57 & 58 *Vict.*, *c.* 30), *s.* 2 (1) (*d*), *s.* 4.

By an ante-nuptial settlement, the settlor, in contemplation of his marriage (which subsequently took place), assigned to trustees a policy of insurance on his life, in trust for the settlor until the marriage and thereafter on trust that the trustees should receive the proceeds and invest them and hold the proceeds and investments on trust to pay the income thereof to the wife during her life if she should survive the settlor, and, after the death of the survivor of the settlor and his wife, in trust for the issue of the marriage as the settlor and the wife should by deed, or the survivor by deed or will, appoint. In default of such appointment, the fund was directed to be held in trust for such of the children of the intended marriage as attained the age of twenty-one years or being daughters married under that age equally; but if no child attained a vested interest, then in trust for the settlor absolutely. There were three children (all daughters) of the marriage, all of whom attained the age of twenty-one years or married. The marriage was dissolved, and the wife released her interest under the settlement. On the death of the settlor, it was accepted that estate duty was payable on the proceeds of the policy under the Finance Act, 1894, s. 2 (1) (d), but it was contended by the taxpayers that the proceeds were not aggregable with other property passing on the death for the purpose of ascertaining the appropriate rate at which the duty was chargeable.

Held: the proceeds were not exempt from aggregation because it could not

be said that the settlor "never had an interest" in the proceeds of the policy within the meaning of the proviso to s. 4 of the Act of 1894. A

Notes. Applied: *Tennant* v. *Lord Advocate*, [1939] 1 All E.R. 672. Considered: *Re D'Avigdor-Goldsmid's Life Policy, D'Avigdor-Goldsmid* v. *I.R. Comrs.*, [1951] 2 All E.R. 543. Referred to: *A.-G.* v. *Dickinson and Baron*, [1937] 2 All E.R. 485; *D'Avigdor-Goldsmid* v. *I.R. Comrs.*, [1953] 1 All E.R. 403. B

As to property in which the deceased never had an interest, see 15 HALSBURY'S LAWS (3rd Edn.) 63 et seq.

Cases referred to:

(1) *A.-G.* v. *Robinson*, [1901] W.N. 192; [1901] 2 I.R. 67; 21 Digest 15, *q*.

(2) *A.-G.* v. *Murray*, [1904] 1 K.B. 165; 73 L.J.K.B. 66; 89 L.T. 710; 68 J.P. 89; 52 W.R. 258; 20 T.L.R. 137, C.A.; 21 Digest 16, *79*. C

Information by the Attorney-General.

By an indenture of settlement (hereinafter called the "1887 settlement") dated Dec. 30, 1887, and made between Cyril Arthur Pearson (who afterwards became Cyril Arthur Pearson, Baronet, and is hereinafter called "the settlor") of the first part Isabel Sarah Bennett Spinster of the second part and Ernest Powys Sketchley and William Augustus Fydell Rogers of the third part (being a settlement made D in contemplation of the marriage then intended and shortly afterwards solemnised between the settlor and the said Isabel Sarah Bennett) the settlor assigned to the said Ernest Powys Sketchley and William Augustus Fydell Rogers (thereinafter called "the trustees") a policy of assurance on his life for £2,000 effected with the Clergy Mutual Assurance Society, subject to the annual premium of £37 (which policy is hereinafter called "the Clergy Mutual policy") and the said sum of E £2,000 and all other moneys to become payable thereunder by way of bonus or otherwise, in trust for the settlor until the said intended marriage and from and after the said marriage on trust that the trustees should receive the moneys to become payable under the said policy and invest the said moneys as therein mentioned and hold the said moneys and the investments for the time being representing the same in trust to pay the income thereof to the said Isabel Sarah Bennett if she should F survive the settlor during her life and, after the decease of the survivor of the settlor and the said Isabel Sarah Bennett, in trust for such child children or remoter issue of the said intended marriage as the settlor and the said Isabel Sarah Bennett should by deed jointly appoint. In default of such appointment then the fund was to be held as the survivor of the settlor and the said Isabel Sarah Bennett should by deed or will appoint, and, in default of such appointment, in trust for G all the children of the said intended marriage who being sons should attain the age of twenty-one years or being daughters should attain that age or marry under that age in equal shares. If there should be no child of the said intended marriage who being a son should attain the age of twenty-one years or being a daughter should attain that age or marry, the fund was directed to be held in trust for the settlor absolutely; and it was by the 1887 settlement provided that it should not be H considered a breach of trust for the trustees to permit the said policy to become void through any means whatever; and it was agreed and declared that it should be lawful for the settlor at any time during his life to redeem the said policy by paying to the trustees the sum of £2,000 and in such case the policy should be reassigned to the settlor discharged from the trusts of the 1887 settlement and the trustees should stand possessed of the sum of £2,000 paid to them by the settlor on I the trusts and with and subject to the powers and provisions thereinbefore declared and contained concerning the policy moneys but so that during the joint lives of the settlor and the said Isabel Sarah Bennett and the life of the survivor of them every investment should be made with their his or her consent in writing and that the income of the investments for the time being representing the same should be paid to the said Isabel Sarah Bennett during her life.

The marriage between the settlor and Isabel Sarah Bennett was on the petition of the settlor dissolved by a decree nisi of the Probate Divorce and Admiralty

Division of the High Court dated Nov. 24, 1896, and on May 31, 1897, the said decree was made absolute. There was issue of the said marriage three children only and no more all of whom were daughters and attained the age of twenty-one years or married.

By an indenture of settlement (hereinafter called the "1897 settlement") dated the 2nd day of June, 1897, made between the settlor of the first part, the defendant Dame Ethel Maud Pearson (then and therein described as Ethel Maud Fraser spinster) of the second part, the defendants James Carter Harrison and Marion Pearson (therein called "the trustees") of the third part, and Thomas Cassinet Palmer of the fourth part (being an indenture of settlement made in contemplation of the marriage then intended and shortly afterwards solemnised between the settlor and the defendant Dame Ethel Maud Pearson) the settlor assigned to the trustees along with other property a policy of assurance on his life effected with the Scottish Widows Fund and Life Assurance Society for £15,000 (hereinafter called "the Scottish Widows' policy") subject to a premium of £285 payable in each half-year until 1916, in trust for the settlor until the said intended marriage and afterwards on the trusts thereinafter declared. By cl. 5 it was declared that the trustees should stand possessed of all moneys which should be received by them in respect of the said policy of assurance on the trusts thereinafter declared with regard to the trust funds in cl. 7 thereof defined. By cl. 9 it was declared that the trustees should hold the trust funds during the joint lives of the settlor and Dame Ethel Maud Pearson and during the life of the settlor if he should survive her on trust to pay all or any part of the income thereof or apply the same for the maintenance support or benefit of all or any one or more to the exclusion of the other or others of the following persons, namely, the settlor, his said wife, and any of the children of the said intended marriage or the said three daughters of the settlor by his former marriage as the trustees might in their uncontrolled discretion think fit. Subject to such discretionary trust or power, the trustees should hold the said income or so much thereof as should not be applied under such discretionary power on the trusts and for the purposes on and for which the said income would be held if the settlor were then dead. By cl. 10 and cl. 11 it was declared that the trustees should hold the trust funds during the life of Dame Ethel Maud Pearson if she should survive the settlor, upon trust to pay the income thereof to her for her life and after the death of the settlor and Dame Ethel Maud Pearson upon trust for the children of the said intended marriage and the said three daughters of the settlor by his former marriage who being male should attain the age of twenty-one years or being female should attain that age or marry and if more than one in equal shares, and if no one of the three said daughters by the settlor's former marriage or no child of the said intended marriage should being a male attain the age of twenty-one years or being a female attain that age or marry then the trustees should stand possessed of the trust funds and the income thereof in trust for the settlor absolutely. It was by cl. 13, cl. 14 and cl. 15 declared that any bonus which might from time to time be declared in respect of the Scottish Widows' policy might at the option of the settlor be applied either wholly or partially in reduction of the premiums on such policy and in default and subject to any exercise of the said option should be added to and be subject to the same trusts powers and provisions as the moneys assured by the said policy, and that the trustees might during the life of the settlor with his consent in writing while he should pay the premiums in respect thereof or if at any time he should fail to do so and after his decease at the discretion of the trustees sell the said policy of assurance either by way of surrender to the Office or otherwise as the trustees might think fit and might on any such surrender or sale accept a fully paid up policy on the settlor's life in whole or partial consideration for such surrender and that the trustees should not be chargeable or responsible for any such policy lapsing or becoming void by any means whatever.

After the dissolution of the settlor's first marriage the said Isabel Sarah Bennett intermarried with and became the wife of Adrien Durandeau.

By an indenture dated Jan. 4, 1898, and made between the settlor of the first part, the said Isabel Sarah Durandeau of the second part, the said Ernest Powys Sketchley and William Augustus Fydell Rogers of the third part, the defendants Dame Ethel Maud Pearson and Marion Pearson and Peter Keary and the defendant James Carter Harrison of the fourth part, the said Ethel Maud Pearson Marion Pearson Peter Keary and James Carter Harrison were appointed to be trustees of the 1887 settlement in the place of the said Ernest Powys Sketchley and William Augustus Fydell Rogers who retired therefrom. The said Isabel Sarah Durandeau released and assigned to the said Ethel Maud Pearson Marion Pearson Peter Keary and James Carter Harrison all her interest in the Clergy Mutual policy and the trust funds and property subject to the trusts of the 1887 settlement, to the intent that the trust in the 1887 settlement declared in favour of the said Isabel Sarah Durandeau might thenceforth be absolutely determined; and the said Isabel Sarah Durandeau also released from the power of appointment by the 1887 settlement given to or vested in her the Clergy Mutual policy and the trust funds and property subject to the trusts of the 1887 settlement to the intent that the said power might be absolutely extinguished. All the premiums including as well the first premium as all the others payable in respect of each of them the Clergy Mutual policy and Scottish Widows' policy were duly paid by the settlor during his life.

The settlor died on Dec. 9, 1921, having by his will dated July 8, 1921, appointed his wife the defendant Dame Ethel Maud Pearson and his son the defendant Sir Neville Arthur Pearson to be the executors thereof and they duly proved his said will on Jan. 21, 1922.

By an indenture dated Aug. 12, 1922, and made between the defendant Dame Ethel Maud Pearson of the first part, the defendant Marion Pearson of the second part, the defendant James Carter Harrison of the third part and the defendants Sir Milsom Rees and Sir Neville Arthur Pearson of the fourth part and expressed to be supplemental to the 1897 settlement, after reciting (inter alia) that the defendant Marion Pearson was desirous of retiring from the trusts of the 1897 settlement, Dame Ethel Maud Pearson in exercise of the power given to her by the 1897 settlement appointed the defendants Sir Milsom Rees and Sir Neville Arthur Pearson to be trustees of the 1897 settlement in the place of the defendant Marion Pearson who retired from the trusts thereof.

Shortly after the death of the settlor there was paid to the defendants Dame Ethel Maud Pearson Marion Pearson and James Carter Harrison as the trustees of the 1887 settlement in respect of the Clergy Mutual policy the sum of £2096 11s. 2d. and to the defendants James Carter Harrison Sir Milsom Rees and Sir Neville Arthur Pearson as the trustees of the 1897 settlement the sum of £16,275 in respect of the Scottish Widows' policy.

On the death of the settlor there passed and estate duty became payable on the following properties viz. (a) the said sum of £2,096 11s. 2d. (b) the said sum of £16,275 (c) the settlor's own free property and (d) fully paid ordinary shares of £1 each in C. Arthur Pearson, Ltd., which were given by the settlor within three years before his death to the defendant Sir Neville Arthur Pearson and were valued at £1,000.

The said Peter Keary died on Jan. 29, 1915, and the defendants Dame Ethel Maud Pearson Marion Pearson and James Carter Harrison were at the death of the settlor the trustees of the 1887 settlement and as such were under s. 8 (4) of the Finance Act, 1894, accountable for estate duty on the said sum of £2,096 11s. 2d. paid in respect of the Clergy Mutual policy. The present trustees of the 1897 settlement were the defendants James Carter Harrison Sir Milsom Rees and Sir Neville Arthur Pearson and as such were under s. 8 (4) of the Finance Act, 1894, accountable for the estate duty payable in respect of the said sum of £16,275 paid in respect of the Scottish Widows' policy. The defendants Dame Ethel Maud Pearson and Sir Neville Arthur Pearson as the executors of the settlor's will were accountable for the estate duty on the sum of £66,241 11s. 9d. being the value of

A the settlor's own free property. The defendant Sir Neville Arthur Pearson as the donee of the said shares which were given to him by the settlor as aforesaid was accountable for the estate duty on the said sum of £1,000 being the value of the said shares.

The Crown claimed payment of the estate duty payable on the said sums of £2,096 11s. 2d., £16,275, £66,241 11s. 9d., and £1,000 at the appropriate rate on B the basis of all the said sums being aggregated, but the defendants contended that the settlor never had an interest in the said policies or either of them and that each of the said sums of £2,096 11s. 2d., £16,275, and £1,000 was to be treated as an estate by itself and was liable for estate duty on that basis only and the defendants refused to pay estate duty at the appropriate rate applicable on the footing of all the sums upon which estate duty was payable being aggregated together.

C The information prayed: (i) To have it declared that on the death of the settlor estate duty became payable upon the said four sums of £2,096 11s. 2d., £16,275, £66,241 11s. 9d., and £1,000 at the rate appropriate on the footing of their being aggregated together for the purpose of determining the rate of duty. (ii) To have it declared (a) that the defendants Dame Ethel Maud Pearson, Marion Pearson, and James Carter Harrison were accountable for estate duty at the appropriate D rate on the said sum of £2,096 11s. 2d.; (b) that the defendants John Carter Harrison, Sir Milsom Rees, and Sir Neville Arthur Pearson were accountable for estate duty at the appropriate rate on the said sum of £16,275; (c) that the defendants Dame Ethel Maud Pearson and Sir Neville Arthur Pearson were accountable for estate duty at the appropriate rate on the said sum of £66,241 11s. 9d.; and (d) that the defendant Sir Neville Arthur Pearson was accountable for estate duty E at the appropriate rate on the said sum of £1,000. (iii) That an account should, if necessary, be directed to ascertain the amount of estate duty payable in respect of each of the said sums at the appropriate rate on the footing of the aforesaid declarations together with interest thereon; and that the defendants respectively should be ordered to pay to the Inland Revenue Commissioners the amount of the said duty and interest for which they were respectively accountable.

F *The Attorney-General* (*Sir Patrick Hastings, K.C.*), *W. R. Sheldon*, and *T. Colquhoun Dill* for the Crown.

Sir William Finlay, K.C., C. A. Bennett, K.C., and *W. Coppin* for the taxpayers.

ROWLATT, J.—In this case the question is whether the Crown are entitled to aggregate, under the familiar principle of the Finance Act, 1894, moneys the G proceeds of policies on the life of the deceased. There were two policies. They were settled on the occasion of two marriages. Both of them were taken out by the deceased a short time before the settlement. They were both kept up by the deceased, and were settled on terms that the moneys payable on the death of the deceased should go, speaking generally, for the benefit of the wife for life with remainder to children, and in default of issue to the settlor, the deceased.

H I do not know that it is necessary to decide it, but it seems to me that in a case like that there is no property which passes on the death of the deceased under s. 1 of the Act of 1894 alone, however it would be if the policy was unsettled. Whatever it is, it has gone from him before his death. If he has no living interest in the policy at all, there is nothing to have. But it is brought in under s. 2 (1) (d) of the Act of 1894. Section 2 (1) provides:

I

> "Property passing on the death of the deceased shall be deemed to include the property following, that is to say: . . . (d) any annuity or other interest purchased or provided by the deceased . . . to the extent of the beneficial interest accruing or arising by survivorship."

That the policy moneys in a case like this are liable under that clause is clear upon authority beginning with *A.-G.* v. *Robinson* (1). I do not know whether it is necessary to say, as a matter of microscopic analysis, whether what is deemed to pass is the interest limited to the amount of the beneficial interest arising or

accruing, or whether one goes straight to the words "beneficial interest arising or accruing" and says that the beneficial interest arising or accruing out of an annuity or interest purchased or provided by the deceased is what is to be deemed to be the property that is passing. A

Counsel for the taxpayers contended that the reasoning of the Lord Chief Baron in *Robinson's Case* (1) showed that the property which was to be deemed to pass was the beneficial interest accruing or arising, i.e., the policy moneys which were payable on the death. The passages which have been read from the Lord Chief Baron's judgment seem to me to put it that way, although in the Court of Appeal in *A.-G.* v. *Murray* (2), in which they approved of this judgment, it was said in the judgment of the court ([1904] 1 K.B. at p. 172): "A policy is plainly property within the scope of s. 2, and we can see no ground for excluding it from sub-s. (1) (d)." Although he uses the word "policy," he is generally approving the reasoning of the Lord Chief Baron. Therefore I may take it that what passed here was in strictness of language the beneficial interest accruing or arising on the death of Sir Arthur Pearson. B C

The only difficulty arises upon s. 4 of the Act of 1894. So far as property passes there is not any dispute, because the executors agree that duty must be paid under this Act. The question is as to aggregation, and for that purpose it does not matter how one reads the decision in *A.-G.* v. *Robinson* (1). The argument for the taxpayers upon sect. 4, however, starts with the point that what passes is the beneficial interest accruing or arising. Had the deceased ever an interest in the moneys which arose? One cannot help feeling that the general scope of the Act was that the man enjoyed something during his life; and if he enjoyed it at all it must be deemed to pass. But I have to look at the words of the Act, and I cannot see that he had no interest. "An interest" is a precise expression. I think that the deceased had an interest in this benefit which was to arise or accrue on his death. He could never enjoy it in possession, but he had an interest before he settled the policy, although it was a remote one. He had it all his married life contingently on the failure of his issue. If his wife and his children had predeceased him the legal position would not have altered, but his interest would have become a very proximate one and an extremely valuable one and he would have died worth the capital value of the insurance money. D E F

Under those circumstances my judgment must be for the Crown.

Judgment for the Crown.

Solicitors: *Solicitor of Inland Revenue*; *Carter, Harrison & Co.*

[*Reported by* J. S. Scrimgeour, Esq., *Barrister-at-Law.*] G

SHIPMAN *v.* SHIPMAN

[Court of Appeal (Sir Ernest Pollock, M.R., Atkin and Sargant, L.JJ.), March 19, 1924]

[Reported [1924] 2 Ch. 140; 93 L.J.Ch. 382; 131 L.T. 394; 40 T.L.R. 483; 68 Sol. Jo. 498]

Husband and Wife—Matrimonial home—Property of wife—Right to exclude husband—Husband's conduct amounting to matrimonial offence or such as to afford wife defence to restitution suit—Married Women's Property Act, 1882 (45 & 46 *Vict.*, *c.* 75), *s.* 12.

A husband will not be restrained from entering premises belonging to or in the occupation of his wife to enjoy the matrimonial consortium, or from interfering with her possession thereof, unless he has been guilty of a matrimonial offence which would constitute a ground for relief in a matrimonial suit by the wife or of such misconduct as would enable her to resist a petition for restitution of conjugal rights, or, **semble**, as would damage the property.

Notes. Applied: *Boyt* v. *Boyt*, [1948] 2 All E.R. 436. Considered: *Gorulnick* v. *Gorulnick*, [1958] 1 All E.R. 146. Referred to: *Gottliffe* v. *Edelston*, [1930] 2 K.B. 378; *Richman* v. *Richman* (1950), 66 (pt. 2) T.L.R. 44.

As to wife's remedies for security of her property, see 19 Halsbury's Laws (3rd Edn.) 897 et seq.; and for cases see 27 Digest (Repl.) 258–260. For Married Women's Property Act, 1882, see 11 Halsbury's Statutes (2nd Edn.) 799.

Cases referred to:

(1) *Green* v. *Green* (1840), 5 Hare 400, n.; 67 E.R. 967; 27 Digest (Repl.) 258, *2087*.

(2) *Wood* v. *Wood* (1871), 19 W.R. 1049; 27 Digest (Repl.) 258, *2088*.

(3) *Symonds* v. *Hallett* (1883), 24 Ch.D. 346; 53 L.J.Ch. 60; 49 L.T. 380; 32 W.R. 103, C.A.; 27 Digest (Repl.) 258, *2090*.

(4) *Weldon* v. *de Bathe* (1884), 14 Q.B.D. 339; 54 L.J.Q.B. 113; 53 L.T. 520; 33 W.R. 328; 1 T.L.R. 171, C.A.; 27 Digest (Repl.) 259, *2095*.

Appeal from an interlocutory order by Russell, J., granting an interim injunction restraining the defendant from entering or trespassing upon the premises, the property of his wife, the plaintiff, where they lived together.

A. R. Taylour for the husband.

G. D. Johnston, for the respondent, was not called upon to argue.

SIR ERNEST POLLOCK, M.R.—I think this appeal must be dismissed with costs. The parties were married in 1920, and the story of the married life is told in the affidavits. There is no doubt the husband has misbehaved as a husband. The wife purchased this house, and she has been living there with her daughter and her husband. The charge made by the wife against the husband is that he has not been industrious, but has been drinking, and I think that there is some solid ground for this, even if it be exaggerated, because the husband admits that he was "rarely" the worse for drink, and he admits that he struck his wife, though, he says, it was in self-defence. In any case, it looks as if he had rendered their life together very difficult. The wife, apparently, provided a business for the husband to go to, and, she says, that by his mismanagement it failed. Since its failure, the husband has been unemployed. His conduct to the wife is complained of by her, and she says it is impossible for her to live with him. Her evidence is confirmed by her daughter and the neighbours. In the circumstances, although no proceedings have been taken before a magistrate for judicial separation, I think, there is evidence that the husband has been guilty of grave misconduct.

This matter comes before us on an order made by Russell, J., on an interlocutory application before trial. The action is brought for a declaration that the

house is part of the wife's separate estate, and RUSSELL, J., has made an order that the husband be restrained until judgment or further order from entering the house. RUSSELL, J., put into operation s. 12 of the Married Women's Property Act, 1882. That section is in wide terms, and [as amended by the Law Reform (Married Women and Joint Tortfeasors) Act, 1935, Scheds. I and II] it provides that:

> "Every woman, whether married before or after this Act, shall have in her own name against all persons whomsoever, including her husband, the same civil remedies . . . for the protection and security of her own property, as if she were a feme sole, but, except as aforesaid, no husband or wife shall be entitled to sue the other for a tort."

RUSSELL, J., has determined that for the purpose of protecting the house, it was right to grant the injunction. There may be some confusion of thought as to why these rights were given to a wife, because husband and wife stand in very special relationship to each other, and one must not forget, when looking at s. 12, that they have a paramount duty to live together, and it is merely statute law which gives them relief in certain unhappy cases. I do not wish to appear to overlook the duty of spouses to live together, if possible. But here the case is one in which the injunction was granted only until the trial of the action. It is not a final adjudication, it is only an order to keep the matter in statu quo. In *Green* v. *Green* (1) an injunction was granted enforcing the rights of a wife as regards her separate property. In *Wood* v. *Wood* (2) an injunction was granted in order to carry out the terms of a contract by which the wife was installed as manageress of a hotel. In *Symonds* v. *Hallett* (3) an injunction, which was also an interim injunction, was granted against the husband to prevent him from "invading" a leasehold house which had been settled on the wife. Without going any further, it is quite clear that the courts have interfered to protect the property of a wife when that property has been secured to her as her separate property, and still more should this be done since the passing of the Married Women's Property Act, 1882. But I wish to associate myself with a caution which was expressed by COTTON, L.J., in *Symonds* v. *Hallett* (3), when he said (24 Ch.D. at p. 351):

> "To say that she is a feme sole is a mere hypothesis and an imagination, because she has a husband; though, as regards property, she is to be considered as a feme sole. Expressions have been used that she is entitled to be there in all respects as a feme sole, and to be protected against her husband's acts as if he were a stranger. That is very true as regards the property. But is the husband to be considered a stranger because the property is vested in her for her separate use? That is a point which those who assert that the husband is to be considered a stranger must prove."

That was afterwards re-affirmed in *Weldon* v. *de Bathe* (4), and, I think, it correctly states the doctrine of courts of equity in protecting the property of a wife.

I desire to associate myself with those words, and, while regarding the property of a wife as a proper subject for protection, we must also regard the duties of spouses to each other. There is, however, in the present case, in my opinion, evidence of conduct by the husband which would justify the wife in maintaining a matrimonial suit against him, as, for instance, in defending a suit for restitution of conjugal rights. She is in a position to defend herself in matrimonial proceedings. In those circumstances, I think that RUSSELL, J., was right in granting an injunction for the security of the wife's property until trial, under the terms of s. 12, and I think that the order for an injunction should be affirmed, though, in my opinion, its terms should be altered by the omission of the words "trespassing thereon" and the substitution of the words "or otherwise interfering with the plaintiff's possession thereof."

ATKIN, L.J.—I agree. This is a matter of great importance, and, as my reasons are not altogether identical with those of the learned judge, I will express

A them in a few words. It is a remarkable thing that if a wife has, under the Act of 1882, the right which is claimed here, there is no correlative right given to the husband. Now, s. 12 is very clear. Applying that section, the learned judge granted an injunction finding that the husband's living in the house would diminish its value. That is a view of the facts which I am not prepared to accept. I think there is no evidence that the value of the house would be materially diminished. B I do not think there was any evidence that the taking of lodgers was prevented by the husband's presence. It was contended before us for the husband that those were the only circumstances in which the Act would apply. I do not think so, I think the rights given to a wife are much wider, I think she was intended to have all the rights and all the remedies that every owner of property was intended to have, and the question is whether she has those rights in respect of the matri- C monial home against her husband. That is a matter of public importance. It is the duty of husband and wife to live together, and if one or other wilfully absents himself or herself, that is a matrimonial offence. And if a wife without good cause seeks to exclude her husband from the matrimonial home, she seeks to get the court to enable her to evade a duty. Therefore, I should be reluctant to lay down a rule that a wife can treat her husband in the same way as a man not her D husband. So, perhaps, in normal circumstances, the husband may have a right to enter the matrimonial home for duties which it is not only his right to demand, but his duty to render, and I think, in those circumstances, the husband would be guilty of no misconduct if his innocent presence did some damage, and I think the wife would have no claim. But such a right of the husband would be limited to being on the premises to enjoy the matrimonial consortium, and if the husband E were guilty of conduct which would be a ground for a petition by the wife, or would enable her to resist a petition for restitution of conjugal rights, the effect would be that he would forfeit the privileged position he held previously, and would be relegated to the position of any other person. In no circumstances would he have the right to interfere with the rights of the wife in a way detrimental to her separate property.

F In the present case, I think that there was evidence of cruelty and drunkenness, which was corroborated by the daughter and by the neighbours, and there were even admissions by the husband that he was drunk and that he struck his wife. I think there is evidence before the court that if the wife were compelled to live with her husband, she might be obliged to give up her property altogether or be exposed to his cruelty and violence. In these circumstances, I think the right G course was to protect her, and I agree that the appeal should be dismissed.

SARGANT, L.J.—The words of s. 12 are very clear, and in terms cover this case. An injunction against a stranger would be given as a matter of course, but the special position of husband and wife in relation to their matrimonial duties has to be considered. As COTTON, L.J., says in *Symonds* v. *Hallett* (3) (24 Ch.D. at p. 351), in the passage read by the Master of the Rolls, her rights of property must H not make her husband a stranger to her. But the remedy invoked here is a special remedy, and a discretionary remedy, and I do not think the court should grant it if it were sought from mere caprice on the part of the wife. But I do not think that that is so here. I think the husband's conduct is such that he has apparently lost the right to the matrimonial consortium, and, therefore, he is in no better position than a stranger, and I think, therefore, that the injunction was I rightly granted.

Appeal dismissed.

Solicitors: *Bircham & Co.*; *Cartwright, Cunningham & Co.*

[*Reported by* G. P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

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WILLIAMS *v.* BALTIC INSURANCE ASSOCIATION OF LONDON, LTD.

[KING'S BENCH DIVISION (Roche, J.), May 26, 27, 1924]

[Reported [1924] 2 K.B. 282; 93 L.J.K.B. 819; 131 L.T. 671; 40 T.L.R. 668; 68 Sol. Jo. 814; 29 Com. Cas. 305] B

Insurance—Motor insurance—Third party risks—Insurance of friend or relative of insured driving with his consent—Interest of insured—Insurance on "goods"—Life Assurance Act, 1774 (14 *Geo.* 3, *c.* 48), *s.* 1, *s.* 3, *s.* 4.

The insured was the owner of a private motor car and insured the same with the respondents under a policy issued by the respondents and dated C July 19, 1921. During the period covered by the policy, on Oct. 27, 1921, while the car was being driven by the insured's sister, I.C.W., a licensed driver, with the insured's general knowledge and consent, an accident happened which caused personal injuries to persons then in the car as passengers who were not in the insured's employment or members of the insured's household. An action was, therefore, brought in the King's Bench Division by the D persons injured against the insured and I.C.W., as defendants, to recover in respect of damage suffered by the plaintiffs. The action was tried before MCCARDIE, J., and a common jury on Nov. 30, and Dec. 1, 1922, and, in accordance with the verdict, judgment was entered in favour of the insured, and for the plaintiffs against the defendant, I.C.W., for £2,900 with costs. The plaintiffs' costs were taxed at £262 12s. 3d., making the amount of the E judgment £3,162 12s. 3d. The insured claimed that the respondents were liable under the policy to indemnify I.C.W. against all sums for which she became liable under the judgment. This claim was disputed by the respondents. By a clause in the policy the respondents insured the insured against "all sums for which the insured (or any licensed personal friend or relative of the insured while driving the car with the insured's general knowledge and consent) shall F become legally liable in compensation for loss of life or accidental bodily injury caused to any person . . . and caused by any motor vehicle belonging to the insured described in the schedule hereto, to an unlimited amount in respect of each accident . . ."

Held: the liability of the insured's sister was covered by this clause; on the true construction of the policy the motor car was the subject of the insurance G and the policy was a policy bona fide made on goods (the motor car) within s. 4 of the Life Assurance Act, 1777; and, therefore, it was not a gaming policy within s. 1 of the Act, nor was the amount recoverable by the insured limited by s. 3, and the insured was entitled to succeed on his full claim.

Notes. Considered: *Tattersall* v. *Drysdale*, [1935] All E.R.Rep. 112; *Digby* v. H *General Accident, Fire and Life Assurance Corpn., Ltd.*, [1940] 1 All E.R. 514. Referred to: *Vanderpitte* v. *Preferred Accident Insurance Co. of New York*, [1932] All E.R.Rep. 527; *Digby* v. *General Accident, Fire and Life Assurance Corpn., Ltd.*, [1942] 2 All E.R. 319; *Prudential Staff Union* v. *Hall*, [1947] K.B. 685.

As to motor vehicle insurance, see 22 HALSBURY'S LAWS (3rd Edn.) 353 et seq.; and for cases see 29 DIGEST 408. For Life Assurance Act, 1774, see 13 HALSBURY'S I STATUTES (2nd Edn.) 7.

Cases referred to:

(1) *Waters* v. *Monarch Life Assurance Co.* (1856), 5 E. & B. 870; 25 L.J.Q.B. 102; 26 L.T.O.S. 217; 2 Jur.N.S. 375; 4 L.R. 245; 119 E.R. 705; 29 Digest 311, *2568*.

(2) *Howard* v. *Lancashire Insurance Co.* (1885), 11 S.C.R. 92; 29 Digest 311, *2566 ii.*

(3) *Rhind* v. *Wilkinson* (1810), 2 Taunt. 237; 127 E.R. 1068; 29 Digest 102, *592*.

A Also referred to in argument:

Wilson v. *Jones* (1867), L.R. 2 Exch. 139; 36 L.J.Ex. 78; 15 L.T. 669; 15 W.R. 435; 2 Mon.L.C. 452, Ex. Ch.; 29 Digest 116, *709*.

Halford v. *Kymer* (1830), 10 B. & C. 724; 8 L.J.O.S.K.B. 311; 109 E.R. 619; 29 Digest 346, *2792*.

B *Lucena* v. *Craufurd* (1806), 2 Bos. & P.N.R. 269; 127 E.R. 630, H.L.; 29 Digest 97, *555*.

Routh v. *Thompson* (1809), 11 East. 428; 103 E.R. 1069; 29 Digest 303, *2495*.

Stockdale v. *Dunlop* (1840), 6 M. & W. 224; 9 L.J.Ex. 83; 7 L.T. 804; 4 Jur. 681; 151 E.R. 391; 29 Digest 107, *641*.

Sunderland Marine Insurance Co. v. *Kearney* (1851), 16 Q.B. 925; 20 L.J.Q.B. 417; 18 L.T.O.S. 33; 15 Jur. 1006; 117 E.R. 1136; 29 Digest 87, *462*.

C **Special Case** stated by arbitrators for the opinion of the court.

The facts appear in the headnote and the judgment.

Schiller, K.C. (*H. D. Samuels* with him), for the insurance company.

Claughton Scott, K.C. (*Shakespeare* with him), for the insured.

D **ROCHE, J.**—This case arises upon an award stated in the form of a Special Case by arbitrators. The question submitted by the Case is whether, upon the true construction of a certain policy of insurance and of a certain statute relating to insurances relied upon by the insurers, the award of the arbitrators is right or wrong. The argument has covered a very wide area and has raised many points of interest, but because, in my judgment, the real point in the case is inherently E simple and it is unnecessary for me to traverse all the ground that the argument has, rightly, covered, I propose to deliver my judgment now.

The matter arises in the following manner. The claimant in the arbitration, Mr. Eric Bransby Williams, owned an Austin motor car. When driven by his sister, Miss Bransby Williams, who was, within the meaning of certain expressions in a policy to which I will hereafter refer, both a licensed driver and a driver of F Mr. Bransby Williams' motor car with his general knowledge and consent, a serious accident happened which resulted in certain passengers in the motor car so driven sustaining serious injuries and formed the subject-matter of an action tried in this Division. As the result of the trial of that action, Mr. Bransby Williams was held not liable, and Miss Bransby Williams was held liable in a sum for damages and costs amounting to £3,162. The action was defended under the guidance of the G insurance company; it was done without prejudice, and nothing arises out of that fact. I mention it to show that the whole of the matter was carefully and properly attended to.

The claim in the arbitration was made under the insurance policy, and was a claim that what Miss Bransby Williams was found liable to pay should be borne by the insurance company. The policy bore date July 19, 1921, and was a time H policy covering the Austin car to which I have referred for a period from June 27, 1921, to June 27, 1922. The clause which I have to consider is in a printed form. Presumably this company issues a considerable number of policies with this printed clause in it, and I am informed, and I readily believe, that it is a common clause in motor-car policies. That is of some importance, because the main contentions which have been raised before me were apparently raised before the arbitrators, J and so far as the industry and research of learned counsel can discover they have never been raised before the hearing of this case. That fact does not make the arguments bad, but it shows that the matter is one of an almost strange novelty, just as it is one of prime importance.

The clause in question seems to me, in spite of the argument I have heard to the contrary, perfectly plain and unambiguous. It reads in this way:

> "The association [the insurers] hereby agree to indemnify the insured during the period of the policy against . . . Claims by the public: Against all sums for which the insured (or any licensed personal friend or relative of the insured

while driving the car with the insured's general knowledge and consent) shall become legally liable in compensation for loss of life or accidental bodily injury caused to any person"

other than excepted persons. That would seem to cover Miss Bransby Williams's liability. She was, as is found, a licensed person, she was a relative of the insured, she was driving his car, and she was driving it with his general knowledge and consent, she became liable to pay compensation for accidental bodily injury. I hold, without the slightest doubt and hesitation, that what happened was the very thing which was covered by that clause. The contention of counsel for the insurance company depended on a somewhat strained interpretation of the clause, and the introduction of a number of words which are not there. It may be paraphrased somewhat in this way, that since the indemnity was to the insured, and that was Mr. Bransby Williams, the only thing which was covered by cl. 2 was the sum which the insured, Mr. Bransby Williams, would become legally liable to pay, whether he became legally liable to pay because a licensed personal friend or relative of his drove the car with his knowledge or consent, or otherwise. All I can say is that, in my judgment, those words in the policy are incapable of meaning that, and do not mean what is so suggested.

I pass to a matter of greater difficulty, and here again I have arrived at a clear conclusion. It was said before the arbitrators that this insurance, which now ex hypothesi is an insurance for and on behalf of Miss Bransby Williams as well as Mr. Bransby Williams, is a wager, and that it is, therefore, hit by the Life Assurance Act, 1774, which is directed against gaming and wagering. Before referring to the provisions of the Act, it is, perhaps, permissible to look at the matter from the point of view of ordinary common life. I should say that it would very much surprise any person who takes out a policy such as this, knowing that his son, or his daughter, or his wife, or any member of his family, may have occasion, in order to conduct the necessary affairs of the household under modern conditions, to drive his car for the common benefit of himself and the family, to be told that when he takes care by the policy to cover the liability that may occur to third parties he is gaming. It is a conclusion which would strike such a person, I think, as very strange. For a general discussion of the attitude of the law to insurance with or without interest and gaming, I would simply refer to the very excellent and useful book of MR. MACGILLIVRAY ON INSURANCE (1912), at p. 103. It is sufficient to say, as was stated long ago, that, unless prohibited by some Act, there is nothing in the common law of England which prohibits an insurance, even though no interest exists; it may be necessary for certain purposes to show that interest, but there is no general prohibition by law. It is said that the Act of 1774 renders these insurances which the company have issued, and which they, no doubt, desire to honour, contrary to the law, and that this policy is a gaming, wagering policy which is prohibited by law.

The Act, after a recital as to the mischievous kind of gaming which was going on, enacted:

". . . that from and after the passing of this Act no insurance shall be made by any person or persons, bodies politic or corporate, on the life or lives of any person or persons, or on any other event or events whatsoever, wherein the person or persons for whose use, benefit, or on whose account such policy or policies shall be made shall have no interest . . ."

The Act goes on to enact by s. 2:

"It shall not be lawful to make any policy or policies on the life or lives of any person or persons or other event or events without inserting in such policy or policies the person's or persons' name or names interested therein . . ."

By s. 3:

"In all cases where the insured hath interest in such life or lives, event or events, no greater sum shall be recovered or received from the insurer or in-

surers than the amount or value of the interest of the insured in such life or lives, event or events."

In s. 4 there is a proviso excepting out of the operation of the Act any insurance bona fide made "by any person or persons on ships, goods, or merchandise." Marine insurance had already been dealt with by Acts of Parliament. What is said here, in short, is that Mr. Bransby Williams is not interested in Miss Bransby Williams's liability; that the policy is made out in his name, and he, not being interested, cannot recover by reason of s. 1 of the Act; and that Miss Bransby Williams, who might be said to be interested, cannot recover because her name is not in the policy; that at all events, by s. 3 of the Act, Mr. Bransby Williams cannot recover any more under the policy than expresses his own interest, and that, as regards this matter, is nil.

The astonishing thing is how much of the argument in this case is really covered, and, in my judgment, concluded, in the famous argument of Mr. Mellish in *Waters* v. *Monarch Life Assurance Co.* (1) (5 E. & B. at p. 870). The conclusive answer, in my judgment, to the argument in this case was the one offered by Mr. Mellish to the argument of the company in *Waters' Case* (1). *Waters' Case* (1) was a case of a warehouseman who held goods under the terms that he was not responsible for their destruction by fire, and who claimed on an insurance policy against loss by fire. The warehouseman recovered for the benefit of the people to whom he was not liable and who were not named in the policy. It was objected that the statute which we are now considering applied. Mr. Mellish dealt with the matter, ibid. at p. 877. He says:

> "At common law, even if the contract were with persons having no interest at all, a contract of assurance was good. . . . If therefore there is any illegality, it must be by statute. The statute is the only statute bearing on the subject. . . . A common notion has prevailed that this proviso [i.e. the proviso in s. 4 of the Act] excepts only marine insurances, but there is no authority to that effect; the proviso does not except insurances on goods in ships, but insurances on ships, goods, and merchandises."

Then there is a great deal of argument about the benefits and the desirability of floating policies being legal, to every word of which I subscribe, and to which the learned judges subscribed in giving their judgments in that case. Indeed, Mr. Lush, who argued to the contrary in the case, did not resist the conclusion that that was a policy on goods, and the court adopted that view.

I am satisfied that the policy in the present case is a policy on goods. The motor car is the subject-matter of the insurance; the motor car is a chattel and "goods" just as much as that over which the warehouseman had control. It is said that this clause covering what are called third-party risks is not an insurance on goods. That argument, in my judgment, rests on altogether too narrow a construction of s. 4 of the Act of 1774. If that argument were right, so far as I can judge, the collision clauses in marine policies, which are not clauses on the ship or on the goods, would be within the mischief of the earlier part of the Act. It has long ago been held that an ordinary policy on a ship or a policy on goods does not carry with it protection against the risks which are covered by the well-known collision clause. It is in a different sense and in a different way a cover against third-party and similar risks as is this policy. Those are my reasons for holding that this policy is an insurance on a motor car and incidental to it is the clause which contains provisions as to what are called third-party risks.

If that is right, as I hope and believe it is, the rest of the argument disappears. It would be sufficient, I think, on the other points to say that; but if this case goes further, and it becomes material for the insured to rely on anything further upon the question of interest counsel for the insured has argued that Mr. Bransby Williams was interested in Miss Bransby Williams's protection against such claims as this. He has further argued that Miss Bransby Williams is herself interested, and it is admitted that she is interested in her protection against claims. He has

further argued that she is interested, as the driver of the motor car, in the motor car itself, sufficiently for insurance purposes. I do not decide those points. I only say in passing that I think there is a great deal in them. Even with regard to the last point, it will be noticed that in the Marine Insurance Act, 1906, insurable interest comes to be described—I will not say defined—in s. 5, and one of the items of description is a statement that a person is interested in a marine adventure where he may incur liability in respect thereof, that is, in respect of the property in question. I do not propose to travel farther into the most interesting, but extensive, region of insurable interest. One other point has been discussed, and that is whether, supposing the Act of 1774 does apply, Miss Bransby Williams is not sufficiently named to be able to recover, on the principle id certum est quod certum reddi potest. It is unnecessary for me to decide that. If it were necessary to come to a decision, I should feel myself unable to come to the conclusion that Miss Bransby Williams's name was inserted in this policy within the meaning of s. 2 of the Act of 1774. One last point remains to be mentioned, and that is the general argument that Mr. Bransby Williams cannot recover for Miss Bransby Williams, or Miss Bransby Williams cannot recover for herself. That is based on the argument that I mentioned when I was dealing with the construction of the policy, when it said that the insured was Mr. Bransby Williams. That, I think, is begging the question. Mr. Bransby Williams is the insured in the sense that he is the person who effects the insurance, but, adopting the construction I do of cl. 2, he is the insurer for himself and all other the persons mentioned in cl. 2, and, accordingly, the contract of the insurers is to pay or indemnify all such persons in the event of those things happening against which they insured. The principle of *Waters* v. *Monarch Life Assurance Co.* (1) in that matter also seems to me to apply to this case. My answer to the first question of the arbitrators is that they were right and not wrong in their view of the construction of the policy and of the statute.

Returning that answer to the questions submitted in the case, the effect is that the award stands. I desire to make an observation in case the question of insurable interest becomes of more importance than it is, having regard to the other parts of my judgment. I may mention that reliance was at one time placed by counsel for the insurance company on a statement contained in PORTER ON INSURANCE (6th Edn.) p. 40, to the effect that interest must subsist when the policy is taken out. That statement in MR. PORTER'S book is vouched by a reference to *Howard* v. *Lancashire Insurance Co.* (2) and reference to the report in question seems to show that although that statement in the learned author's work might be justified by something appearing in the judgment, and although the judgment itself is, as far as I can judge, abundantly warranted by the facts of the case, which seems to show a representation of interest at the time of the policy, and an avoidance of the policy because the representation was untrue, yet there is at this time of day, in my judgment, no warrant whatever for the broad proposition that an interest must subsist when the policy is taken out. It was decided to the contrary so long ago as the year 1810, in *Rhind* v. *Wilkinson* (3) in a judgment by a court consisting, amongst others, of LORD MANSFIELD, C.J., and LAWRENCE, J. The matter is discussed and dealt with in the same sense in s. 179 of PHILLIPS ON INSURANCE (1st Edn.) Vol. 1, p. 108.

Award affirmed.

Solicitors: *W. C. Crocker*; *Harry Wilson.*

[*Reported by* J. S. SCRIMGEOUR, ESQ., *Barrister-at-Law.*]

A

Re HUGHES' SETTLEMENT. HUGHES *v.* SCHOOLING. Re SMITH. HUGHES *v.* SCHOOLING

[CHANCERY DIVISION (Tomlin, J.), June 25, 26, 1924]

B [Reported [1924] 2 Ch. 356; 94 L.J.Ch. 57; 133 L.T. 470; 68 Sol. Jo. 791]

Settlement—Marriage settlement—Covenant to settle after-acquired property—All property to which wife was then or should during coverture become entitled whether in possession, reversion, or otherwise except "any legacy or other property acquired at one and the same time not exceeding in amount or value the sum of £200"—Reversionary interest belonging to wife at date of settlement—Application of exception—Date as at which value to be ascertained.

C

An exception from an after-acquired property clause in an ante-nuptial settlement of "any legacy or other property acquired at one and the same time not exceeding in amount or value the sum of £200" applies to a reversionary interest belonging to the wife at the date of the settlement.

D

In ascertaining the value of such reversionary interests acquired at one and the same time from different sources the value of these interests must not be aggregated, but the value of each must be ascertained, in the absence of a contrary intention shown in the settlement, as at the date when it vested in possession.

E

Notes. Applied: *Cannon* v. *Hartley*, [1949] 1 All E.R. 50.

As to the effect of a covenant to settle after-acquired property on various interests in property, see 29 HALSBURY'S STATUTES (2nd Edn.) 572–577; and for cases see 40 DIGEST (Repl.) 535 et seq.

Cases referred to:

F (1) *Hood* v. *Franklin* (1873), L.R. 16 Eq. 496; 21 W.R. 724; 40 Digest (Repl.) 559, *659*.

(2) *Re Hooper's Trusts* (1865), 5 New Rep. 463; 12 L.T. 137; 11 Jur.N.S. 479; 13 W.R. 710; 40 Digest (Repl.) 559, *652*.

(3) *Re Mackenzie's Settlement* (1867), 2 Ch. App. 345; 36 L.J.Ch. 320; 16 L.T. 138; 15 W.R. 662, L.JJ.; 40 Digest (Repl.) 544, *536*.

G (4) *Re Clinton's Trust, Holloway's Fund, The Same, Weare's Fund* (1871), L.R. 13 Eq. 295; 41 L.J.Ch. 191; 26 L.T. 159; 20 W.R. 326; 40 Digest (Repl.) 560, *666*.

(5) *Cornmell* v. *Keith* (1876), 3 Ch.D. 767; 45 L.J.Ch. 689; 35 L.T. 29; 24 W.R. 633; 40 Digest (Repl.) 546, *542*.

H Also referred to in argument:

St. Leger v. *Magniac*, [1880] W.N. 183; 40 Digest (Repl.) 559, *660*.

Re Pares, Re Scott Chad, Scott Chad v. *Pares*, [1901] 1 Ch. 708; 70 L.J.Ch. 426; 81 L.T. 385; 40 Digest (Repl.) 560, *664*.

Originating Summonses to determine whether certain property comprised in an old settlement and also a fund representing a legacy were caught by covenants to

I settle after-acquired property.

The following statement of facts is taken from the judgment: "By a settlement dated July 15, 1872 (hereafter referred to as the 1872 settlement), and made in contemplation of the marriage of William Hughes and Ann Hall Hughes (therein referred to by her then name of Ann Hall Smith) it was declared that the trustees should stand possessed of a sum of £570 Scinde, Punjab, and Delhi Railway stock transferred to them and of the moneys to become payable on three policies of assurance on the life of William Hughes assigned to them upon trust . . . to pay the income of the said premises and of the investments from time to time representing

the same to Ann Hall Hughes during her life and after her death to William Hughes and after the death of the survivor of Ann Hall Hughes and William Hughes to stand possessed of the said trust property and the income thereof in trust for all or any the children or child or the said then intended marriage who being a son or sons should attain the age of twenty-one years or being daughters or a daughter should attain that age or marry under that age and if more than one in equal shares. By the will, dated May 15, 1872, of John Smith (the father of Ann Hall Hughes), who died on April 6, 1873, he made a specific devise and certain specific bequests, and then gave to his trustees the sum of £2,500 upon trust to pay the dividends or income thereof to his daughter Ann Hall Hughes (therein referred to as Ann Hall Smith) for her life for her separate use without power of anticipation and after her decease upon trust to divide the capital thereof between her children equally who should live to attain the age of twenty-one years. William Hughes died on April 15, 1912, and Ann Hall Hughes died on Dec. 19, 1923. There were eight children of the marriage, two sons and six daughters, all of whom were born after the death of John Smith and attained twenty-one years of age. Four of the daughters—namely, the defendants Mabel Pulsford Sedgwick, Dorothy Taynton Yates and Katharine Sevecke Oak-Rhind, and Winifred Mary Potter—attained the age of twenty-one years before the dates of their respective marriages, and they all made ante-nuptial settlements, dated respectively April 18, 1902, June 14, 1906, Dec. 30, 1907, and June 8, 1909, of property other than their respective reversionary interests under the 1872 settlement and under the will of John Smith. Each settlement contained a provision in the following terms:

> 'All real and personal property (if any) not hereinbefore settled to which the said [intended wife] at the time of the said intended marriage or at any time during her now intended coverture shall be or become entitled whether in possession, reversion or otherwise (except moveable chattels or effects of household domestic or personal use or ornament and except also any legacy or other property acquired at one and the same time not exceeding in amount or value the sum of £200) and except any sums received as income as distinguished from capital shall as soon as circumstances admit and at the cost of the trust estate be assured and transferred by the said [intended wife] and by all other necessary parties (if any) unto or otherwise vested in the trustees and shall be held by them upon the trusts and with and subject to the powers and provisions hereinbefore declared and contained concerning the wife's trust fund.'

Winifred Mary Potter died on Aug. 19, 1913, and the defendant F. S. Potter was her administrator. At the date of the death of Ann Hall Hughes the funds subject to the 1872 settlement were of the approximate value of £1,202 16s. 3d., so that the eighth share of a child of the marriage amounted approximately to £150. At the same date the sum of £2,500 bequeathed by the will of John Smith was represented by investments of the value of £1,523 9s. 6d., so that an eighth share amounted approximately to £190. At the date of the settlement made upon the marriage of each of the four daughters, her eighth share of the property comprised in the 1872 settlement was less in value than £200, and her eighth share of the fund representing the legacy of £2,500 bequeathed by the will of John Smith exceeded £200."

Droop for the plaintiff.

Roger Turnbull for the trustees of the marriage settlements of the four daughters.

Wilfrid M. Hunt for the three daughters and the administrator of the deceased daughter.

TOMLIN, J.—The question I have to decide is whether the shares in certain trust funds that have fallen into possession in favour of a wife whose marriage settlement I have to construe are caught by the clause in the settlement providing,

A subject to certain exceptions, for the settlement of her existing and after-acquired property. [His Lordship stated the facts and continued:] Now it appears that at the date of the marriage settlement and of the marriage shortly afterwards solemnised the value of the wife's one-eighth share in the legacy of £2,500 bequeathed by the will of her maternal grandfather exceeded £200 on the footing of the then value in possession of the funds representing the legacy, but that at the B date of her mother's death the value of the share was less than £200. So far as her share in the property comprised in her parents' marriage settlement is concerned its value is less than £200, whether that value be ascertained on the footing of the value of the property in possession at the date of the settlement or on the footing of its value at her mother's death. It is, therefore, plain that the wife's share under her parents' settlement is not caught by the clause in her settlement, C unless either the exception beginning with the words "except also any legacy or other property acquired at one and the same time" is applicable only to future interests, or unless this share has to be aggregated with that which came to her at the same time in respect of her share of the legacy of £2,500 by reason of the absence from this exception of the words "from one and the same source." There is no other reason for suggesting that there should be aggregation at all.

D I am satisfied that the words "except also any legacy or other property acquired at one and the same time" cannot be confined to interests acquired by the wife at a future date, but that they extend also to interests already acquired at the date of the settlement. Further, I do not think that the omission of the words "from one and the same source" from the exception involves the obligation to aggregate everything to which the wife has become entitled at the same time, although from E different sources. I think that each acquisition is treated as a separate matter; and although the wife acquired contingent reversionary interests in both funds at birth and absolute reversionary interests on attaining twenty-one years of age, so that in that sense she acquired them at the same time, still they were separate acquisitions, and in the absence of an express provision for aggregation I do not think that they ought to be aggregated. That is the conclusion I come to on the F construction of this clause, and I obtain support for it from *Hood* v. *Franklin* (1), in which there is cited an earlier case, *Re Hooper's Trusts* (2), to the same effect.

As to the wife's interest under the will of her maternal grandfather, the further question remains whether regard ought to be had to the value of this interest at the date of the settlement or to the value of what the wife became actually entitled to receive when the interest fell into possession. Counsel on behalf of those G interested in contending that both the interests in question were caught by the settlement, has said all that can be said in support of this view, and he puts his argument in several different ways. First, he says that the interests were both reversionary interests at the date of the settlement and were then caught by the settlement, because the exception did not apply to reversionary interests, or at any rate, only applied to future reversionary interests. I have already dealt with H the contention that the exception only applied to future acquisitions, and I do not see any ground for saying that the exception does not extend to interests in reversion. This contention therefore fails. Next he says that the value of the interest must be ascertained as at the date of the settlement, so that the wife's interest in the £2,500 legacy is not within the exception. Of course it is plain that whatever be the date at which you take the valuation there will be inconveniences, I and I doubt whether any assistance can be obtained by weighing the inconveniences. I think that all I can do is to put what seems to me the proper construction on the language of the clause in the settlement, whatever the resulting inconveniences may be.

Counsel has cited a number of cases to me on this point—namely, *Re Mackenzie's Settlement* (3), *Re Clinton's Trust*, *Holloway's Fund*, *The Same*, *Weare's Fund* (4), and *Cornmell* v. *Keith* (5). I do not think any of these cases really assist him. The particular point does not appear to have been before the court in any of these cases. It is quite true that there are passages in the judgments which seem to

lend support to counsel's contention, but I doubt whether they can fairly be read in that sense, as in none of these cases was the mind of the court directed to the particular point. It is stated in NORTON ON DEEDS (1st Edn.), p. 602, that

> "when only property of a named minimum value is to be settled and the wife's interest is reversionary the sum named mean the value of the property itself when it falls into possession, not the value of the reversion when acquired";

and MR. NORTON cites in support of that proposition the very same cases which have been cited by counsel in support of the contrary proposition. I doubt whether either side really gains much assistance from these cases. I have also been referred to a passage in VAISEY ON SETTLEMENTS (1888), vol. I, p. 256, where the matter is put in this way:

> "In applying the test of value to a reversionary interest, the present value of the land or fund, not that of the reversionary interest in it, is to be taken."

Now it is true that the learned author there uses the phrase "the present value of the land or fund," but I cannot help thinking that he was using it with rather a different meaning from that which counsel suggests that it bears, and that he was not directing his mind to the subject of time. He was only stating that it was the value of the fund and not of the reversionary interest in the fund that was to be taken into account, and was not determining at what date the valuation of the actual fund was to take place.

That is all the assistance the cases and textbooks afford me. However, the language of the clause I am construing—and after all that is what I have to consider—indicates what the correct answer to this question should be, and points to the view that the time for applying the test of "amount or value" is the date when the interest vests in possession. It is obvious that if any other view were taken there might be serious difficulties. It does not in the least follow that the reversionary interest would be in a fund which was capable at the date of the settlement of any true valuation. It might be an interest in funds liable to violent fluctuations dependent on contingencies the happening of which was uncertain at the date of the settlement and indeed wholly unanticipated at that time. The only reasonable test in matters of this kind is what the beneficiary receives, and, unless precluded from that view by the language of this clause, the date of the receipt of the interest in possession is the one I should prefer. That is certainly made the test here in the case of the exception in favour of income, for the exception is of "any sums received as income as distinguished from capital." Moreover, the expression "amount or value" in the exception of "any legacy or other property . . . not exceeding in amount or value the sum of £200" points to the form in which the interest is actually received, that is, cash or something acquired in specie. The whole clause appears to me to be constructed on that basis. I, therefore, come to the conclusion that on the true construction of this clause neither of the two interests in question is caught by the settlement, the first because on any view as to the time of valuation it is too small unless there is to be an aggregation, for which I see no ground, and the second because what was actually received in respect of the share of legacy is less than the minimum amount fixed by the exception to the clause.

Solicitors: *Peacock & Goddard.*

[*Reported by* L. MORGAN MAY, ESQ., *Barrister-at-Law.*]

A

Re NEVILLE. NEVILLE *v.* FIRST GARDEN CITY, LTD. AND OTHERS

[Chancery Division (Tomlin, J.), October 21, 1924]

B [Reported [1925] Ch. 44; 94 L.J.Ch. 130; 132 L.T. 602; 41 T.L.R. 2; 69 Sol. Jo. 125]

Will—Debt owing to testator—Forgiveness—"I forgive all debts owing to me"—Mortgage debts, charges, and loan stock.

By a codicil to his will the testator declared: "I forgive all debts owing to me." A substantial part of his estate consisted of debts owing to him at the C time of his death in respect of money advanced by him on mortgages and charges and loan stock issued to him.

Held: the word "forgive" in the codicil introduced a personal note into the matter with which the testator was dealing; on the true construction of the will and codicil it appeared that the testator regarded investments as one thing and money owing to him in a personal capacity as wholly different; the fact D that the mortgage debts and loan stock constituted a large part of the testator's estate could be taken into consideration; and, therefore, none of those debts or stock fell within the word "debts" in the codicil.

Notes. Considered: *Midland Bank Executor and Trustee Co.* v. *Yarner's Coffee, Ltd.*, [1937] 2 All E.R. 54; *Re Smithers, Watts* v. *Smithers*, [1939] 3 All E.R. 689; *Re Coghill, Durry* v. *Burgess*, [1948] 1 All E.R. 254.

E Case referred to:

(1) *Re Rayner, Rayner* v. *Rayner*, [1904] 1 Ch. 176; 73 L.J.Ch. 111; 89 L.T. 681; 52 W.R. 273; 48 Sol. Jo. 178, C.A.; 44 Digest 623, *4535*.

Also referred to in argument:

Moore v. *Moore* (1863), De G.J. & Sm. 602; 2 New Rep. 347; 32 L.J.Ch. 605; F 8 L.T. 562; 11 W.R. 790; 46 E.R. 238, L.JJ.; 23 Digest (Repl.) 499, *5647*.

Re Derbyshire, Webb v. *Derbyshire*, [1906] 1 Ch. 135; 75 L.J.Ch. 95; 94 L.T. 138; 54 W.R. 135; 44 Digest 728, *5816*.

Re Taylor, Taylor v. *Tweedie*, [1923] 1 Ch. 99; 91 L.J.Ch. 801; 127 L.T. 684; 38 T.L.R. 850; 66 Sol. Jo. 693, C.A.; 44 Digest 723, *5737*.

Adjourned Summons.

G By his will, dated Aug. 16, 1921, Ralph Neville, after appointing executors and giving a large number of pecuniary legacies, devised and bequeathed all his interest in Banstead Place Estate, in the county of Surrey, and all his property not otherwise disposed of to the defendants, the Worshipful Company of Skinners, at the same time expressing the hope that they would be able to carry out his wishes as expressed in any future letter or memorandum signed by him. By cl. 13 of the H will he provided that his executors might at their discretion appropriate any part of his estate, "or the investments for the time representing the same," in or towards satisfaction of any legacy, and might for that purpose determine the value of any part of his estate or the investments thereof. A codicil to the will, dated Mar. 25, 1923, contained the following provision: "I forgive all debts owing to me." Apart from this the codicil contained ten further legacies, bringing up the I total of the pecuniary legacies bequeathed by the testator's will and codicil to £21,700. The testator's estate was valued for probate at upwards of £52,000 net personal estate and £10,000 real estate. The testator's personal estate consisted to the extent in value of £22,000 or thereabouts of British and Foreign government securities, redeemable debentures and debenture stock in commercial companies, and the mortgages and charges and loan stock which were the subject-matter of this application. The personal estate also included sums of irredeemable debenture stock to the value of about £2,000, and balances on drawing account at various banks totalling some £500, a policy of insurance for £200 on the testator's life,

and a number of interest and dividend warrants received by the testator before his death (but not cashed) in respect of investments in British government bonds and stocks and the stocks and shares of railway and other companies. The executors notified His Majesty's Treasury and the railway and other commercial companies and banks concerned of the provision in the testator's codicil forgiving the debts owing to him, but no claim had been made by them.

The present summons was, however, taken out by the executors at the suggestion of the companies and societies concerned to have it determined whether this provision in the testator's codicil operated as a legacy: (1) To the defendants, the First Garden City, Ltd., the National Cottage Society, Ltd., and the Norton Cottage Society, Ltd., respectively, of the sums secured by the following mortgages and charges: (a) A mortgage, dated Jan. 28, 1916, and made between First Garden City, Ltd., of the one part, and the testator's father, Sir Ralph Neville, of the other part, to secure the sum of £5,000 and interest. (b) Three memoranda of agreement and charge dated Dec. 13, 1915, Feb. 15, 1916, and July 27, 1916, and respectively made between the National Cottage Society, Ltd., of the one part, and the testator's father, of the other part, to secure the respective sums of £550, £731, and £69 and interest. (c) A memorandum of agreement and charge dated Sept. 25, 1915, and made between the Norton Cottage Society, Ltd., of the one part, and the testator's father, of the other part, to secure the sum of £150 and interest; and (2) To the defendants, Letchworth Housing Society, Ltd., Co-partnership Tenants, Ltd., Howard Cottage Society, Ltd., and Ealing Tenants, Ltd., respectively, of the following amounts of loan stock issued by those defendants to the testator's father and held by the testator at the date of his death. (a) £200 4½ per cent. Loan Stock of Letchworth Housing Society, Ltd. (b) £300 4 per cent. Loan Stock of Co-partnership Tenants, Ltd. (c) £300 4½ per cent. Loan Stock of Howard Cottage Society, Ltd. (d) £200 4 per cent. Loan Stock of Ealing Tenants, Ltd. All those mortgages and charges and sums of loan stock had passed to the testator under the will of his father. The whole of the mortgage debts secured by the mortgages and charges were still owing, and in the case of the first-mentioned mortgage, the testator had obtained the increase of the rate of interest payable from 5 to 6 per cent.

The First Garden City, Ltd., was a company registered under the Companies Acts with the object of erecting dwelling-houses, labourers' and artisans' cottages, and other buildings. There was nothing unusual about its memorandum and articles of association except that the dividends on its ordinary shares were, by art. 129, not to exceed 5 per cent. per annum. The National Cottage Society, Ltd., was a society registered under the Industrial and Provident Societies Acts, 1893 to 1895, with similar objects. The Norton Cottage Society, Ltd., was a private company registered under the Companies Acts with similar objects and with a limitation of dividends similar to that in the case of the First Garden City, Ltd. The Letchworth Housing Society, Ltd., was a society registered under the Industrial and Provident Societies Act, 1893, with rules under which the issue of loan stock was authorised. The material rules were:

> "Rule 23. Loans in general.—(1) The committee may from time to time obtain advances of money for the purpose of the society upon the securities of bonds, or agreements, or promissory notes, or certificates of indebtedness on account of loan stock, as provided hereafter, or of a mortgage, either legal or equitable, of any property thereof. Rule 24. Provisions as to loan stock.—Any amount of loan stock, being within the total limit mentioned in the preceding rule, may be issued by the committee to members and other persons who may agree to accept the same, subject to the conditions following: . . . (c) It shall not confer a right to demand payment of the principal from the society unless interest aforesaid is in arrear for two consecutive years, or in the event of the liquidation of the society."

A later provision in the rule incorporated (inter alia) r. 29 with certain alterations

under which it appeared that the committee might, on the application of the holder of any loan stock, repay any sum not exceeding the amount credited thereon, and should pay the whole sum so credited (except in a case mentioned in r. 36) where they refused to confirm the transfer of any stock. Co-partnership Tenants, Ltd., the Howard Cottage Society, Ltd., and Ealing Tenants, Ltd., were also registered under the Industrial and Provident Societies Act, 1893, and the rules as to loan stock were in every case substantially the same. The testator's estate also included a sum of £700 lent to one who had been an employee of the testator and £200 lent to a member of a boys' club in which the testator was interested, in each case to enable the recipient to start in business.

L. W. Byrne for the summons.

Rolt, K.C., and *Warwick Draper* for the First Garden City, Ltd., and other companies.

Myles for the Corporation Tenants, Ltd., and Ealing Tenants, Ltd.

Gavin Simonds, K.C., and *Bryan Farrer* for the Skinners Company.

TOMLIN, J.—I have to determine a question of construction upon the will and codicil of Mr. Ralph Neville, the son of the late Mr. Justice Neville. The clause, the meaning of which I have to determine, is contained in seven words in the codicil: "I forgive all debts owing to me." I think it will be relevant to state, before I embark upon a consideration of this provision, the nature of the testator's estate at his death. [His Lordship then stated the facts as to the testator's estate and the nature of the assets of the estate as to which the question arose, and of the companies and societies that had granted the mortgages or charges or issued the loan stocks in question, and after coming to the conclusion that the mortgages and charges differed in no way from ordinary mortgage securities, continued:] The net result of the rules with regard to the loan stocks appears to be in effect that the stock is in every case irredeemable except in two or three possible events which may not necessarily ever happen. For example, it may never happen that any of these societies should go into liquidation or make default in payment of interest for two consecutive years, so that, whatever else may be said about these sums of loan stock, they certainly do not seem to have the characteristics of pure debts. Counsel for these various companies and societies have put forward an argument in support of a construction of this short clause in the codicil which would have the effect of releasing the obligations of these companies and societies to the testator's estate, on the ground that these obligations are debts within the meaning of the clause in the codicil, and, having been forgiven, have naturally come to an end. That, speaking generally, is the contention.

It is quite plain that, for the purpose of construing this phrase in the codicil, I am entitled to look, not only at the verbal context in the codicil, if I can get any assistance or comfort from that, but also at the will itself and the language employed in the will; and I am entitled to know and to form my decision with a view to the circumstances of the testator's estate and the subject-matter upon which it is apparent that his will was intended to operate. I think, perhaps, that I cannot do better than adopt the language employed by VAUGHAN WILLIAMS, L.J., in *Re Rayner* (1), when he said that "the meaning of a word is relative to the circumstances and occasion and date on which the word is used."

The argument which has been addressed to me on behalf of the companies and societies is that the word "debts" has, in point of law, a definite meaning, namely, the amount owing in every case where one individual, or legal entity, owes money to another. It is contended, therefore, that when a testator has forgiven all his debts, all his debts of whatever nature are released, unless there is in the context something which justifies the court in departing from the strict legal meaning; and, with a courage that is worthy of the occasion, these defendants say that the result in this case is in point of law that, in relation to every investment which the testator had, the legal character of which was in the nature of a debt, he has made a present of it to the concern from which the money is owing. I suppose in regard

to Exchequer Bonds, 1928, the present would be in the nature of a present to the community through the instrumentality of the Chancellor of the Exchequer. These bonds are a debt, and I do not see why, in point of law, if the argument be well founded, the amount of these bonds would not be released; but whether that be so or not, there are a large number of investments in the testator's estate which clearly fall into the ordinary category of debts, if debts mean in this connection an obligation by a person or legal entity to pay money to another. For example, there can be no doubt that the Anglo-Persian Oil Co., Ltd., have, on this construction, received a present to them by the testator of the sum of £15,000 and interest secured upon 5 per cent. debenture stock of that company, redeemable in 1960. The generosity, on that basis, of the testator has extended to bodies of various kinds. The city of Montreal appears to benefit in company with the government of Victoria and the South Australian Railway. Whether the Mashonaland Railway, the debentures of which are irredeemable, falls within the category may be a little doubtful; but in view of the argument that the release of all debts operates to release all claims for interest, I think that the effect would, in the case even of the perpetual debenture stock, be that the right to interest would be gone for ever, and this possibly would operate as a release of the whole obligation. But, however that may be, and however the matter would work out in detail if this construction were applied strictly, I think it is plain that the effect of the clause so construed would be to destroy a large portion of the testator's estate for the benefit of a number of bodies and associations in various parts of the world to whom there is no reason to suppose that the testator had any marked benevolent feeling.

The question is whether I am really driven to place upon this will and codicil a meaning which, to my mind, is abundantly absurd. I do not think I am. I think that although these questions of construction may not be approached with a guessing mind, they may be approached with a mind that is endeavouring to apply some measure of common sense with a view to arriving at a conclusion which avoids the ridiculous, if not always the inconvenient. I come to the conclusion that the debts which are to be forgiven by virtue of this clause are, in fact, more limited than is contended for by the defendant societies and companies. I am told that if I reach that conclusion I am deliberately placing myself in a difficulty, because, if I do not accept the primary meaning of the word, I am at a loss to find the point at which I should draw the line. In that connection I think the observation of another judge is relevant. Although I may not be able to say where day ends or night begins I can say quite definitely that midnight is night and midday is day; and so far as this case is concerned, I propose to deal with it on that footing. I propose to say whether these disputed items are or are not within the phrase "I forgive all debts owing to me," but I do not propose to lay down a hard and fast line fixing the limits within which this provision operates. I think that on the true construction of the will and codicil it is quite plain as a matter of language that the testator regards investments as one thing and moneys owing to him in a personal capacity, if I may use that phrase, as a wholly different thing. I think when he uses the phrase, "I forgive all debts owing to me," he is not moved by emotion at the thought of railway companies who owe him the money lent on the security of debenture stock. What he has in his mind is that he may have lent some of his friends or acquaintances sums of money which he would not desire to recover from them. The word "forgive" seems to me to introduce a personal note into the matter with which the testator is dealing, and when I consider that and consider also the scheme of his will and take note of his direction with regard to the appropriation of investments, I feel satisfied that he is not using "debts" in the wide sense suggested. I am confirmed in this view when I take into account, as I am entitled to do, the character of the testator's estate and find that the application of that wide construction would lead to the destruction of a large part of it.

I come, therefore, to the conclusion that none of these loan stocks falls within

the word "debts" in the sense in which the testator is forgiving them here. They seem to me to be wholly outside what he is contemplating and dealing with. I do not think that it is necessary to express an opinion as to what is the precise legal position of the loan stock. It is enough, I think, for my purpose to say that neither the sums of loan stock (which may, I think, be rather less like "debts" than the mortgage debts) nor the mortgage debts are "debts" within the meaning of this clause in the codicil. It has been urged upon me that the testator and his father both took a personal interest in some of these societies, and that they were directors of them. I am unable to appreciate the relevancy of that. There is no evidence, so far as I can see, of the motive which moved the testator, in dealing with these particular investments, even if such evidence, if adduced, would have been admissible. I do not think that this consideration affects the question. I, therefore, come to the conclusion in regard to these particular items of loan stocks and mortgage debts that they are not released. It is not necessary for me to express any opinion in relation to the more personal debts which I have mentioned, because they have been dealt with by the executors and the residuary legatees who are sui juris.

Solicitors: *Western & Sons*; *Balderston, Warren & Co.*, for *Bolton & Tabor*, Letchworth; *Charlton Hubbard*; *Dawson & Co.*

[*Reported by* L. MORGAN MAY, ESQ., *Barrister-at-Law.*]

RUSSIAN COMMERCIAL AND INDUSTRIAL BANK *v.* LE COMPTOIR D'ESCOMPTE DE MULHOUSE AND OTHERS

[HOUSE OF LORDS (Viscount Cave, Viscount Finlay, Lord Atkinson, Lord Sumner, Lord Wrenbury), May 13, 15, 16, 19, 20, July 22, 1924]

[Reported [1925] A.C. 112; 93 L.J.K.B. 1098; 132 L.T. 99; 40 T.L.R. 837; 68 Sol. Jo. 841]

Company—Foreign company—Nationalisation in foreign country—Branch in England—Effect of decrees and orders of foreign State.

Bailment—Estoppel of bailee—Right to set up claim of third party against bailor's demand for re-delivery—Need of authority of third person.

Estoppel—Approbation and reprobation—Agreement to return securities in repayment of money owing—Right to set up title of third party to securities.

Pleading—Plaintiff lacking authority to sue—Not matter of defence—Application to strike out plaintiff's name.

The appellant bank, which was incorporated in Russia in 1889, carried on business in Russia and had a branch in London, the manager of which was empowered by a power of attorney to transact business for, and sue at law in the name of, the bank. In January, 1914, an arrangement was made between the head office in St. Petersburg and the first respondent, a French bank, whereby the latter agreed to open an acceptance credit for the former for 800,000 marks against a deposit in London of security, and, accordingly, the London branch deposited certain bonds with the second respondent, W. bank in London. After the Russian revolution in 1917 decrees were made by the Soviet government regarding the nationalising of the existing joint stock banks or the confiscation of their capital. In 1919 the manager of the London branch agreed with the French bank to pay off the amount due on the credit, and the French bank undertook to release the bonds. The amount was duly paid, but the French bank refused to release the bonds, contending that the original transaction was on behalf of the head office in Petrograd and the London

branch could not give a valid receipt for the bonds. In 1920 the manager of the London branch, in the name of the Russian bank, sued the French bank and the English bank for the return of the bonds and damages for their detention. In May, 1921, the Soviet government was recognised by the British government as the de facto, and in January, 1924, as the de jure, government of Russia.

Held: (i) on construction of the decrees their effect was not to terminate the existence of the appellant bank, and, in any case, the decrees had a purely territorial effect and did not apply to branches of banks in countries outside Russia; (ii) it was not open to the W. bank who, as bailees, had received the bonds from the appellant bank, as bailors, to set up an adverse claim as existing in the Soviet government or in the State Bank established by it except on behalf and with the authority of that government or bank, and neither the Soviet government nor the State Bank had made any claim to the bonds or intervened in any way; (iii) it was not open to the respondents to plead by way of defence that owing to the nationalisation of banks in Russia the authority given to the London manager by the power of attorney must be deemed to be revoked so that he had no authority to bring the action: if it was desired to dispute his authority, the proper course for the respondents to have taken was to move at an early stage of the action to have the name of the appellant struck out as plaintiff and bring the proceedings to an end; the French bank, having received the sum agreed on as due in respect of the credit, could not approbate and reprobate the transaction, and were estopped from disputing the authority of the appellant bank to receive the bonds in exchange for the payment made; and, therefore, the appellant was entitled to succeed in the action and to a return of the bonds.

Per Viscount Cave: It is not an agreeable task for a British court of justice to consider the effect of a series of decrees and orders providing for the compulsory acquisition by a foreign State of the assets of private persons on the basis of complete confiscation, but the Soviet government has been recognised by Great Britain as the lawful government of Russia, and, this being so, its decrees must be treated by the courts of this country as binding so far as the jurisdiction of the Russian government extends.

Decision of Court of Appeal, [1923] 2 K.B. 630, reversed.

Notes. Considered: *The Jupiter* (*No. 2*), [1925] All E.R.Rep. 203. Followed: *Banque Internationale de Commerce de Petrograd* v. *Goukassow*, [1925] A.C. 150. Applied: *Employers' Liability Assurance* v. *Sedgwick Collins*, [1926] All E.R.Rep. 388. Considered: *The Jupiter* (*No. 3*), [1927] All E.R.Rep. 237. Distinguished: *Page* v. *Scottish Insurance Corporation* (1929), 98 L.J.K.B. 308. Considered: *Russian and English Bank* v. *Baring Brothers & Co.*, [1932] All E.R.Rep. 122. Distinguished: *Lazard Brothers & Co.* v. *Midland Bank, Ltd.*, [1932] All E.R.Rep. 571. Considered: *Banque des Marchands de Moscou* (*Koupetschesky*) v. *Kindersley*, [1950] 2 All E.R. 105. Referred to: *Russian and English Bank* v. *Baring Brothers & Co.*, [1935] Ch. 120; *Shaw & Sons* (*Salford*), *Ltd.* v. *Shaw*, [1935] All E.R.Rep. 456; *Banco de Bilbao* v. *Rey*, [1938] 2 All E.R. 253; *Deutsche Bank und Disconto Gesellschaft* v. *Banque des Marchands de Moscou* (1938), 107 L.J.K.B. 386; *A/S Tallinna Laevauhisus* v. *Tallinn Shipping Co.* (1946), 175 L.T. 285.

As to actions by foreign companies, see 6 Halsbury's Laws (3rd Edn.) 842, 843; as to estoppel of bailee, see ibid., vol. 2, 138, 139; as to approbation and reprobation, see ibid., vol. 15, 171; and as to striking out pleadings, see ibid., 2nd Edn., vol. 25, pp. 252 et seq. For cases see 10 Digest (Repl.) 1297–1301, 3 Digest 100–102, 21 Digest 328 et seq., Digest (Pleading and Practice) 55 et seq.

Cases referred to:

(1) *Aksionairnoye Obschestvo A. M. Luther* v. *James Sagor & Co.*, [1921] 3 K.B. 532; 90 L.J.K.B. 1202; 125 L.T. 705; 37 T.L.R. 777; 65 Sol. Jo. 604, C.A.; 11 Digest (Repl.) 611, *418*.

(2) *Rogers, Sons & Co.* v. *Lambert & Co.*, [1891] 1 Q.B. 318; 60 L.J.Q.B. 187; 64 L.T. 406; 55 J.P. 452; 39 W.R. 114; 7 T.L.R. 69, C.A.; 3 Digest 101, *285.*

(3) *Richmond* v. *Branson & Son*, [1914] 1 Ch. 968; 83 L.J.Ch. 749; 110 L.T. 763; 58 Sol. Jo. 455; 33 Digest 236, *1526.*

(4) *Daimler Co., Ltd.* v. *Continental Tyre and Rubber Co.* (*Great Britain*), *Ltd.*, [1916] 2 A.C. 307; 85 L.J.K.B. 1333; 114 L.T. 1049; 32 T.L.R. 624; 60 Sol. Jo. 602; 22 Com. Cas. 32, H.L.; 9 Digest (Repl.) 573, *3780.*

(5) *Roe* v. *Mutual Loan Association Fund, Ltd.* (1887), 19 Q.B.D. 347; 56 L.J.Q.B. 541; 33 W.R. 723; 3 T.L.R. 655, C.A.; 5 Digest 1005, *8195.*

Also referred to in argument:

Colonial Bank v. *Cady and Williams, London Chartered Bank of Australia* v. *Cady and Williams* (1890), 15 App. Cas. 267; 60 L.J.Ch. 131; 63 L.T. 27; 39 W.R. 17; 6 T.L.R. 329, H.L.; 9 Digest (Repl.) 379, *2448.*

Dunlop Pneumatic Tyre Co. v. *Act. für Motor and Motorfahrzeugbau vorm. Cudell & Co.*, [1902] 1 K.B. 342; 71 L.J.K.B. 284; 86 L.T. 472; 50 W.R. 226, C.A.; 13 Digest (Repl.) 351, *1587.*

Re Commercial Bank of South Australia (1886), 33 Ch.D. 174; 55 L.J.Ch. 670; 55 L.T. 609; 2 T.L.R. 714; 10 Digest (Repl.) 1305, *9185.*

Bateman v. *Service* (1881), 6 App. Cas. 386; 44 L.T. 436; 10 Digest (Repl.) 1293, **3475.*

Re Matheson Bros., Ltd. (1884), 27 Ch.D. 225; 51 L.T. 111; 32 W.R. 846; 10 Digest (Repl.) 1304, *9184.*

Re Commercial Bank of India (1868), L.R. 6 Eq. 517; 16 W.R. 1104; 10 Digest (Repl.) 1305, *9188.*

Woodland v. *Fear* (1857), 7 E. & B. 519; 26 L.J.Q.B. 202; 29 L.T.O.S. 106; 3 Jur.N.S. 587; 5 W.R. 624; 119 E.R. 1339; 3 Digest 217, *548.*

Re Thomas, Ex parte Poppleton (1884), 14 Q.B.D. 379; 54 L.J.Q.B. 336; 51 L.T. 602; 33 W.R. 583, D.C.; 9 Digest (Repl.) 71, *273.*

Appeal by the plaintiffs in the action from an order of the Court of Appeal (BANKES and SCRUTTON, L.JJ., ATKIN, L.J., dissenting) reported [1923] 2 K.B. 630, affirming a decision of SANKEY, J.

The facts appear in the opinions of their Lordships.

The Attorney-General (*Sir Patrick Hastings, K.C.*), *Schiller, K.C.*, and *Micklethwait* for the appellants.

R. A. Wright, K.C., and *O'Hagan* for the respondents.

The House took time for consideration.

July 22. The following opinions were read.

VISCOUNT CAVE.—The appellants, the Russian Commercial and Industrial Bank, was incorporated under Russian law in the year 1889, its capital being divided into shares. Its head office was in St. Petersburg, and it had branches in London, Paris and elsewhere. The manager of the London branch was Mr. Victor Jones, who held a power of attorney giving him wide powers. In January, 1914, the appellants, through their head office, obtained from the respondents, Le Comptoir d'Escompte de Mulhouse (whom I will call "the Mulhouse Bank"), an acceptance credit of 800,000 marks; and on the instructions of the head office the London branch deposited with the respondents, the London County Westminister and Parr's Bank, Ltd. (whom I will call "the Westminster Bank"), as security for the advance £29,000 Chinese 5 per cent. bonds and £29,000 Brazilian 4 per cent. bonds. In January, 1919, the London branch was minded to pay off the advance, and after some correspondence the amount due for principal and interest was agreed at marks 1,090,000, and the Mulhouse Bank agreed to accept payment of that sum from the London branch. On Sept. 15, 1919, the Mulhouse Bank wrote to the Paris branch of the appellant bank in the following terms:

"In pursuance of our verbal discussion with Monsieur Maurice Montebrun, your attorney, we request you to remit for our account to the B.N. de C., at Mayence, the amount of Mk. 1,090,000—One million and ninety thousand marks, representing approximately the balance of your account per Sept. 22. On the other hand, we are writing to-day to the London County Westminster and Parr's Bank to hold at the disposal on Sept. 22 of your London office: £29,000 Chinese 5 per cent. bonds capital, and £29,000 Brazil 4 per cent. 1911 bonds coupons secured—security which has been lodged in 1914 by your London office for account of your Petrograd office for the purpose of covering our advance of 800,000 marks. We will despatch to you as soon as possible a rectified extract of account and request you to settle the difference as soon as possible with the B.N. de C., at Mayence, under advice to us."

In reliance on the agreement which had been made and confirmed by the above letter the London branch paid to the credit of the Mulhouse Bank the sum of marks 1,090,000, and claimed delivery of the bonds; but the Mulhouse Bank, having received the agreed amount, made difficulties about giving up the bonds, and finally instructed the Westminster Bank not to part with them. Thereupon this action was brought by the appellants against the Mulhouse Bank and the Westminster Bank, claiming the bonds and the interest accrued thereon with damages for their detention. The two defendant banks joined in resisting the plaintiffs' claim, and by their defence as amended raised in substance two pleas, namely (i) that by virtue of certain decrees of the Soviet government of Russia the plaintiff corporation had been dissolved and its property transferred to the People's State Bank of Russia; and (ii) that the real plaintiff in the action was, not the plaintiff corporation, but Mr. Jones, and that the effect of the decrees above-mentioned and of the seizure of the appellants' property in Russia was to determine his authority either to receive the bonds or to bring the action. In addition to these pleas, the court had to consider a contention raised on behalf of the appellants that the Mulhouse bank, having received the marks 1,090,000 under the agreement confirmed by the above letter, were estopped from alleging the appellants' want of authority as an excuse for their failure to carry out their part of the agreement. During the currency of the proceedings an order was made under s. 268 of the Companies (Consolidation) Act, 1908, [see now Companies Act, 1948, s. 399] for the winding-up of the appellant company, and the effect of that order had to be considered. The action was heard by SANKEY, J., who gave judgment for the respondents, mainly on the second of the above pleas; and on appeal his judgment was confirmed by a majority of the Court of Appeal (BANKES and SCRUTTON, L.JJ.) mainly on the first of the above pleas, ATKIN, L.J., dissenting. Both the courts held that the alleged estoppel had not been made out. Hence the present appeal.

In the course of argument of this appeal a number of questions were raised, and I propose to deal with them in the following order: (i) Have the respondents proved that the appellant company is dissolved, and, therefore, incapable of maintaining this action? (ii) Have they proved that the property in the bonds in dispute is no longer in the appellant company? (iii) Have they proved that the authority of Mr. Jones was determined, and, accordingly, that he had no authority either to receive the bonds or to bring this action? (iv) Were the respondents prevented by their conduct from alleging want of authority?

(i) Before considering the effect of the decrees it appears desirable to refer briefly to the nature of the Constitution which was set up in Russia after the revolution of October, 1917. It appears from the evidence given in this case that after that time the supreme authority in Republican Russia was vested in the All Russian Congress of Soviets, but that legislative authority was also vested in the Central Executive Committee of Soviets. There was also an executive body called the Council of People's Commissaries, which had wide powers of administration; but all its orders or important decisions were subject to the examination and

A ratification of the Central Executive Committee. The government so established originally exercised its functions in the northern districts of Russia only, including Petrograd and Moscow; but its authority was gradually extended over the other parts of old Russia including the Ukraine. The Soviet government was recognised by the British government as the de facto government of Russia in or about May, 1921; and it is well known that at a later period, that is to say, in January, B 1924, it was recognised as the de jure government also. The decrees upon which the respondents relied in their pleadings were three in number and were dated Dec. 14, 1917, Jan. 26, 1918, and April 12, 1918. A fourth decree, dated Jan. 19, 1920, was discovered and put in evidence at a later period. There are also certain resolutions and instructions of the Russian government which have to be taken into account. The decree of Dec. 14, 1917, was made by the Central Executive C Committee, and was in the following terms:

"Decree on the Nationalisation of Banking. In the interests of the proper organisation of national economic life, of the resolute eradication of banking speculation, and of the complete liberation of the workers, peasants, and the whole labouring population from exploitation by banking capital, and also with the object of establishing a single people's bank of the Russian republic—a D bank genuinely serving the interests of the people and the poorest classes—the Central Executive Committee hereby decrees: 1. Banking is declared a State monopoly. 2. All existing joint stock banks and banking houses are amalgamated with the State Bank. 3. The assets and liabilities of the liquidated banks are taken over by the State Bank. 4. The method of amalgamation of joint stock banks with the State Bank shall be determined by a special decree. E 5. The management of the business of joint stock banks is temporarily placed in the charge of the council of the State Bank. 6. The interests of small investors shall be fully safeguarded."

The decree of Jan. 26, 1918, was made by the Council of People's Commissaries, and there is no evidence that it was confirmed by the Central Executive Committee. It was as follows: F

"Decree of the Council of People's Commissaries confiscating share capital of the former joint-stock banks. 1. The share capital (stock, reserve and special) of former joint-stock banks are transferred to the State Bank of the Russian republic on the basis of complete confiscation. 2. All bank shares are declared null and void, and payment of dividends of any kind whatsoever is G unconditionally stopped. 3. All bank shares must forthwith be surrendered by the present holders to the local branches of the State Bank. 4. The holders of bank shares which they cannot produce must submit to the branches of the State Bank register records of the shares in their holding, indicating their exact whereabouts. 5. The holders of bank shares who have failed to surrender them in accordance with para. 3, or to submit register records of their shares H in accordance with para. 4, within a period of two weeks following the day of the publication of the present decree, are punished by confiscation of all their property. 6. All transactions and deeds of transfer referring to bank shares are unconditionally prohibited. Persons taking part in such prohibited transactions and deeds are punished with imprisonment up to three years. Signed: VL. ULIANOFF (Lenin), (Chairman of the Council of the People's Commissaries); I VL. BONTCH-BRUIEVITCH (Principal Secretary to the Council of People's Commissaries.)"

It appears that at or about the time when these decrees were passed the premises of the appellant bank in Petrograd were seized by Red Guards, and a commissary appointed by the State Bank took possession of the books and securities of the appellant bank. Shortly afterwards the name of the appellant bank was removed, and a board was put up over the premises bearing the words, "People's Bank No. 4."

On April 12, 1918, the Principal Commissariat of the People's Bank issued a

notice stating: "The administration of the late private banks is abolished as from April 1, 1918, and its functions are handed over to the People's Bank of the Russian republic." This notice is referred to in the defence as a decree. On July 10, 1918, the fifth All Russian Congress of Soviets adopted a new constitution which included the following paragraph:

> "There is confirmed the passing of all banks into the ownership of the Workmen-Peasants' State as one of the conditions of the emancipation of the labouring masses from beneath the yoke of capital."

On Sept. 20, 1918, the Council of the People's Commissaries passed the following resolution:

> "Having considered the report of the People's Commissary of Finance as to the mode of further carrying into effect the nationalisation of banks, the Council of People's Commissaries has resolved: 1. To recognise that by the decree of Dec. 14, 1917, there is established the principle of monopolisation of banking in Russia by means of nationalisation (or liquidation) of all the then existing private and public credit institutions. 2. To instruct the People's Commissary of Finance to carry out urgently by administrative procedure the nationalisation (or liquidation) of all still existing institutions. 3. To direct the People's Commissary of Finance to submit to the Council of People's Commissaries periodical reports as to the course of nationalisation of banks and as to the position of banking."

On Dec. 2, 1918, the same council passed the following further resolution:

> "Resolution of the Council of People's Commissaries on the liquidation of foreign banks, dated Dec. 2, 1918. All foreign banks operating within the confines of the Russian Socialist Federative Soviet Republic are to be liquidated. With regard to Russian joint stock banks, they come under the effect of the decree of Dec. 14, 1917 (Collection of Enactments, 1918, No. 10, art. 150), irrespective of the nationality of their shareholders or depositors. (Signed) Vl. Ulianoff (Lenin), (Chairman of Council of People's Commissaries); Vl. Bontch-Bruievitch (Administration of Affairs of Council of People's Commissaries)."

On Dec. 10, 1918, the People's Commissary of Finance issued instructions on the method of nationalisation of private banks, which were expressed to be issued in pursuance of cl. 4 of the decree of Dec. 14, 1917. These instructions declared that all private commercial banks with their branches, agencies, and commission agencies, were "subject to nationalisation," and that such nationalisation was to be carried out locally under the supervision of "special technical liquidation collegiums" to be appointed as therein mentioned. The liquidation of the "former private banks" was to take effect as from Dec. 14, 1917.

The fourth "decree" relied upon in these proceedings was dated Jan. 19, 1920, and was made by the Council of the People's Commissaries. It stated that "with the object of unification of the activities of the apparatus for estimates, settlement of accounts and cash operations" the council had resolved (among other things) as follows:

> "1. To abolish the People's (State) Bank of the Russian Socialist Federal Soviet Republic with all the staffs of officials, establishments and institutions forming part thereof. . . . 3. To transfer all the assets and liabilities of the late People's Bank to the Central Budget and Accounts Administration."

It is not an agreeable task for a British court of justice to consider the effect of a series of decrees and orders providing for the compulsory acquisition by a foreign State of the assets of private persons "on the basis of complete confiscation." But the Soviet government has been recognised by Great Britain as the lawful government of Russia; and, this being so, its decrees must, as Bankes, L.J., said in *Aksionairnoye Obschestvo A. M. Luther* v. *James Sagor & Co.* (1), be treated by the courts of this country as binding so far as the jurisdiction of the Russian

government extends; and upon this basis I proceed to consider the effect of the decrees upon the continued existence of the appellant company. On the language of the decrees themselves, and apart from any evidence given by the expert witnesses called in this case, I am by no means satisfied that their effect was to dissolve the plaintiff corporation. The decree of Dec. 14, 1917, is in very general terms, and reads more like a declaration of policy than a positive enactment which is to take immediate effect; and this construction of that decree is supported by the provision in cl. 4 that "the method of amalgamation of joint stock banks with the State Bank shall be determined by a special decree." The decree of Jan. 26, 1918, is inconsistent with the view that the joint stock banks had been dissolved in the previous December, for it provides for a transfer of the share capital and a surrender of the shares in those concerns. The notice issued by the principal commissary of the People's Bank on April 12, 1918, shows that he at all events did not take the view that the private banks had been dissolved in the previous December, for he directed that their administration should be abolished as from April 1, 1918. The paragraph in the Constitution of July 10, 1918, relating to the passing of all banks into the ownership of the Workmen and Peasants' State is even less definite than the decree of December and is inconsistent with it, for it omits all reference to the People's Bank and treats the private banks as passing directly into the ownership of the State. The resolutions of Sept. 20 and Dec. 2, 1918, and the instructions of Dec. 10, 1918, are executive acts only, but so far as they go they support the view that the decree of the previous December contemplated a future and not an immediate supersession of the private banks, for they provide for a liquidation of those banks to be effected by the new machinery which is set up. Lastly, the decree of Jan. 19, 1920, carries the matter no further so far as the private banking companies are concerned, for its only effect is to abolish the People's State Bank and transfer its assets to the State. From these documents, therefore, I should be unable to draw the inference that the joint stock banking companies, including the appellant corporation, were dissolved by the decree of December, 1917, and no other decree is proved which could have directly produced that effect. But it was argued on behalf of the respondents that, as the decree of Jan. 26, 1918, declared that all bank shares should be null and void, the effect of that decree was to destroy the banking corporations, for "where there are no corporators there can be no corporation." This argument was forcibly urged, but I do not think it should prevail. The decree in question, though purporting to declare the shares null and void, proceeds to direct that they shall be surrendered to the State Bank under severe penalties; and it appears to me that the intention must have been that the State Bank should hold the surrendered shares and so control the banking corporations. If so, the corporations would continue to exist. Further, this so-called decree was, in fact, only an order or resolution of the Council of Commissaries, and does not appear to have been confirmed by any body having legislative authority. I am unable to understand how such an order could be effective to confiscate or destroy shares held by persons out of the jurisdiction of the Soviet government, and as there were admittedly many such shares, the corporation cannot have wholly disappeared.

Passing to the evidence as to the construction of the decrees given by Russian lawyers in this case, I find that it rather increases than allays the doubts which I had felt on reading the original decrees. The expert witnesses called at the trial were Mons. Krougliakoff on behalf of the respondents, and Mons. Idelson and Mons. Halfern on behalf of the appellants, but for the purposes of the appeal further evidence was obtained from Mons. Krougliakoff and Mons. Idelson, and a new legal witness, Mons. Thal, gave evidence for the respondents. Mons. Krougliakoff, a Russian lawyer practising in London, stated in his evidence in chief that by the decree of December, 1917, the appellant bank was "abolished as a separate and private entity and was merged into the State Bank"; but in cross-examination he was disposed to say that the decree of December was a statement of policy only and that it was left to be afterwards determined whether the taking over of

the banks should be on the basis of compensation or of simple confiscation. In his further evidence he admitted that the banks had not "ceased their existence in law" before the decree of Jan. 26, 1918. Mons. Idelson, a Russian barrister and lecturer on banking law at the Peter the Great Polytechnic, Petrograd, stated emphatically that according to Russian law a Russian corporation could only be dissolved by a special law, and that in his opinion the plaintiff corporation was not dissolved by the decrees but was still in existence. In his view the decree of December, 1917, was "obviously a declaration of policy and not a legislative act in the ordinary way." Mons. Halfern, an advocate of the Court of Appeal at Petrograd and legal adviser to the British Embassy there as well as to several banks, stated his opinion that the effect of the decree of December, 1917, was not to effect in law the dissolution of the private banks as corporate bodies, and that none of the other decrees had that effect. "In my opinion," he said, "the corporation of the Russian Commercial and Industrial Bank still exists and owns assets." In his further evidence he added that the notice of December, 1918, had not the force of a decree. The defendants' second expert witness, Mons. Thal, a Russian barrister who had been professor of commercial and civil law at the University of Moscow and had remained there until the end of 1921, gave some very guarded evidence. When asked in his examination in chief whether after their amalgamation in the People's Bank the private banks had any existence in contemplation of law, he replied:

> "In contemplation of law I think they had not. It is very difficult under such a new revolutionary condition to give an unqualified yes or no to that question; therefore, I say, 'No.' But I must add that, in so far as outside the Soviet power, there might still be maintained any portions of this property, the continuance as a matter of pure fact of such operations would result from the existing circumstances; but, from the juridical point of view, those could not create any right on the part of these negotiorum gestores to the property which they are managing. It is not a beneficial interest; it is not individually to themselves, but it regards them as having some right.
>
> Q. Have they any title in Russian law?—A. They could have by subsequent ratification of the State. If the State had subsequently said all transactions effected by you are recognised by us, then this subsequent ratification would have formed a juridical basis, but without that they have none."

This witness's cross-examination added little or nothing to the above somewhat cryptic reply. He appeared for a time to say that on losing its property and going into liquidation the plaintiff corporation ipso facto ceased to exist; but after an adjournment of the court he made the following pronouncement:

> "During the lunch time I have had an opportunity of thinking over several of the questions put to me, and I think my answers might not have been clear, because I did not really think them sufficiently out myself. For instance, I was asked whether I think the loss by any company of its property ipso facto causes the cessation of the company. I answered 'Yes,' but I think not now. I think that, in order it should cease to exist as a juridical persona, there is need for either the act of some authority or other resolution on the subject. In my opinion, such act is represented by the decree of January concerning the cancellation of the shares. That is one correction. Another correction is this. A further question was put to me whether I think that every juridical persona which is in a state of liquidation does not exist while in that state. I think that a juridical persona which finds itself by its own resolution in liquidation for the purpose of its determination still possesses a certain limited legal capacity, namely, only that limited capacity which is necessary for the purpose of those actions requisite to put an end to it, but outside these limits it no longer possesses its legal capacity. That is the view of science and practice; I think that is this present case. In this bank there was no liquidation in the sense of a voluntary termination of its own existence, but, by the Soviet laws, a

different mode of legislation is laid down, namely, the conversion for the future into branches of the People's Bank. Therefore, in so far as the law uses the term "liquidation," that does not mean their destruction, but the carrying through of all the operations relating to their previous existence, so that, in the present case, the liquidator is not the company itself. The company has ceased to exist and the liquidation is carried out by someone else."

This hesitating and obscure statement appears to be the high-water mark of the defendants' evidence as to the dissolution of the plaintiff company; and, having considered it carefully, I am still far from being convinced that the respondents have proved—as in order to succeed they must prove—that the appellant corporation has ceased to exist.

There is another class of evidence to be considered, namely, evidence showing the conduct of the Soviet government which has a bearing on the proposal that the plaintiff bank has been dissolved. In this connection the resolutions and instructions of the executive in September and December, 1918, which have already been referred to are significant; but apart from these documents the dealings of the Russian government and its State Bank with the English branch of the appellant bank after the date of its alleged dissolution raise a strong presumption that the Russian government did not look upon the appellant bank as wholly extinct. These dealings were described by ATKIN, L.J., in his careful and lucid judgment, and need not here be stated in detail. It will be sufficient to quote the following conclusions from the judgment of the learned lord justice:

> "During the course of 1918, long after the alleged dissolution of the bank, the London branch was communicating in its corporate name with the head office at Petrograd, and receiving communications from Petrograd, each honouring orders addressed by the one to the other. It is true that Petrograd signs 'Formerly the Russian Commercial and Industrial Bank, Liquidating Committee,' or describes itself as a branch of the State Bank, and sometimes, but not always, describes London as a branch of the State Bank, but there is no suggestion of any lack of continuity, the old name is retained in formal documents, while in communications from Moscow the Moscow Commissary addresses himself to the Russian Commercial and Industrial Bank."

Similar evidence continuing down to the year 1922 was given as to the dealings of the Russian government with another Russian banking corporation, the Russian Asiatic Bank, which was not less affected than the [appellant] bank by the decrees on which the [respondents] relied. Having regard to these transactions it is impossible to avoid the conclusion that the Soviet government desired to have the benefit of the operations of the [appellant] bank in England and elsewhere abroad, and for that purpose treated it as having a continuous existence as a corporation. Upon the whole matter I have come to the same conclusion as that which was reached by ATKIN, L.J., namely, that the respondents have not established their plea that the appellant corporation no longer exists.

(ii) The allegation that by virtue of the Russian decrees the property and rights of the plaintiff corporation (including the bonds in dispute) had been transferred to and vested in the People's State Bank, or in their successors the Russian government, is found in the defence in this action; but so far as the bonds are concerned it was not supported by any arguments before your Lordships. Indeed, counsel for the respondents deliberately refrained from arguing the question whether a Russian decree could confiscate foreign bonds which were in this country; and it is, therefore unnecessary to deal with this question. But it is desirable to add that neither the Russian State Bank nor the Russian government has (so far as the evidence shows) made any claim whatever to the bonds in dispute or otherwise intervened in any way; and, this being so, it is not open to the Westminster Bank, who received the bonds from the appellant bank, to set up an adverse claim as existing in a third person except on behalf of and by the authority of that person: see *Rogers, Sons & Co.* v. *Lambert & Co.* (2).

(iii) But it is said that, assuming the appellant bank still to have a corporate existence, yet, having regard to the transfer of the undertaking of the bank to the State Bank, and afterwards to the Soviet government, and to the suppression of the board of administration of the plaintiff bank, the authority given by that bank to Mr. Jones by his power of attorney must be deemed to have been revoked, and, accordingly, that he had no authority to claim or receive the bonds or to commence this action. I do not think that it is open to the respondents to raise this question by way of defence to the action. If the respondents desired to dispute the authority of Mr. Jones to commence these proceedings in the name of the appellant company, their proper course was to move at an early stage of the action to have the name of the company struck out as plaintiff and so to bring the proceedings to an end. The decision of WARRINGTON, J., to that effect in *Richmond* v. *Branson & Son* (3) is not affected by the decision of your Lordships' House in *Daimler Co., Ltd.* v. *Continental Tyre and Rubber Co. (Great Britain), Ltd.* (4), where the alleged plaintiff was incapable of giving any retainer at all. The same observation applies to the suggestion that, as the arrangement for the loan was made with the appellants' head office, these proceedings could only be brought by the authority of that office. The appellant company and its branches are one, and with the authority given for these proceedings the respondents are not concerned. But there is another answer to this plea. The power of attorney given by the appellant company to Mr. Jones contained the following clause:

> "And the bank hereby ratifies and confirms and agrees to ratify and confirm all and whatsoever the acting manager pro tem. shall legally do or cause to be done by virtue of these presents including in such confirmation whatsoever may be legally done between the date of revocation by any means of these presents and the time of such revocation becoming known to the acting manager pro tem."

It may well be that if in the year 1920, when the bonds were claimed and this action was commenced, Mr. Jones had known all the facts which have been disclosed in the evidence in these proceedings, he would have felt considerable difficulty in acting under his power of attorney. But the evidence shows that he had not then any such knowledge as should have led him to infer that his authority had been revoked, and that on the contrary he had been treated throughout by the authorities in Russia as a person entitled to continue to carry on the business of the London branch. Further it was only after this action had been commenced that the Soviet government was recognised by Great Britain as the de facto government of Russia, and until that event happened Mr. Jones could not be satisfied that any act of that government could effectually determine his authority. This being so, the revocation (if any) of Mr. Jones' authority had not then "become known" to him, and the acts done by him in purported exercise of his authority were, as between himself and his principal, valid and effective. Any difficulty which might now exist in delivering the bonds to Mr. Jones is removed by the winding-up order and the appointment of the Official Receiver as liquidator. It was argued that the winding-up order was void as, by reason of the order of Jan. 26, 1918, the company had no shareholders; but it is plain that there were many English shareholders, and, in my opinion, the order of January, 1918, did not effectively confiscate their shares.

(iv) There remains the appellants' plea of estoppel, and I think that is sound. The Mulhouse Bank, with all the knowledge which they now have, agreed with the London branch of the appellants' bank to receive payment of the marks 1,090,000 and to deliver up the bonds, and, having received the sum agreed upon, they cannot now be heard to dispute the authority of the London branch to receive the bonds which were to be delivered in exchange for it: see *Roe* v. *Mutual Loan Association Fund, Ltd.* (5). It is stated that some time after the receipt of the marks 1,090,000, when the value of the mark had greatly depreciated, an offer

was made to return to the London branch the same sum in marks, and was refused; but no such offer is pleaded, and if made it was wholly illusory.

For the above reasons I have come to the conclusion that the defences set up by the respondents fail and that the appellant bank is entitled to a return of the bonds. I am, therefore, of opinion that this appeal should be allowed, that the orders of SANKEY, J., and the Court of Appeal should be set aside, and that judgment should be entered for the appellants for the relief which they claim with costs here and below, and I move your Lordships accordingly.

VISCOUNT FINLAY (read by LORD SUMNER).—The Russian Commercial and Industrial Bank was incorporated in Russia in 1889 as a joint stock company for banking business. The head office was in St. Petersburg; there were various branches in Russia and abroad; one of them was at Odessa, another in Paris and a third in London. Le Comptoir d'Escompte de Mulhouse, the first respondent, carried on business at Mulhouse and appears to have been closely associated with the Banque Nationale de Crédit, a French bank. In January, 1914, the London branch of the Russian Commercial and Industrial Bank deposited with the respondents, the London County Westminster and Parr's Bank, certain bonds: £29,000 Chinese 5 per cent. 1912 Bonds and £29,000 United States of Brazil 4 per cent. bonds. The bonds so deposited had been in the custody of the London branch and were handed over by the manager of that branch on the terms that the coupons were to be remitted as they became due to the London branch of the Russian Bank and that the bonds were to be held by the London and Westminster Bank to the order of the Mulhouse Bank as security for advances made by the Mulhouse Bank to the appellants, and the dividends on the bonds were to be credited to the Russian Commercial and Industrial Bank at their London office. This arrangement went on till 1919, when Mr. Jones, the manager of the London branch of the Russian bank, paid off the loan, which was fixed by agreement at 1,090,000 marks. The money was duly paid but the bonds were not returned, and this action was brought on Jan. 23, 1920, to recover them. Pleadings were delivered, but before the case came on for trial there took place in May, 1921, the recognition by Great Britain of the Soviet government. The defendants in the action applied for an adjournment in order to enable them to amend the pleadings so as to raise the defence that by the legislation of the Soviet government the Russian Commercial and Industrial Bank had ceased to exist. The adjournment was granted, and the amended defence, delivered on June 15, 1921, contained the following paragraphs:

> "10. The defendants say that the persons suing herein are an unincorporated body of persons and have adopted the style or title of the Russian Commercial and Industrial Bank, but have no right to the property of or to claim under agreements made with the said corporation. 11. The said corporation has in fact ceased to exist by reason of the matters aforesaid."

The case now turns substantially on the question whether this allegation that the corporation in whose name the action is brought had in fact ceased to exist, is established. Mr. Jones, the manager of the London branch of the Russian bank, held a power of attorney from the Russian bank, dated Nov. 20, 1914, and under this power he carried on the business of the bank in London until a provisional liquidator was appointed in February, 1922. SANKEY, J., on Feb. 23, 1922, delivered judgment in favour of the respondents. He based his judgment chiefly on the finding that having regard to the facts which had supervened and to the complete change of circumstances, Mr. Jones's power of attorney had become exhausted either because the Russian bank had ceased to exist or because a state of circumstances had supervened which was never contemplated at the time the power of attorney was given and to which the power of attorney was not applicable. An appeal was brought, and the Court of Appeal by a majority (BANKES and SCRUTTON, L.JJ.) dismissed the appeal. ATKIN, L.J., differed as he was of opinion that

judgment should be entered for the appellant bank in the action, with costs.

As I have said, the great question in the case is whether the bank in whose name the action is brought still exists as a corporation, and the first point to be investigated is the effect of the legislation of the Soviet government—has it terminated the existence of the plaintiff company? We have before us an agreed translation of the Russian decrees and orders and the evidence of eminent Russian lawyers as to their effect, upon which there is an acute difference of opinion among the expert witnesses. I shall first examine the decrees themselves and then consider the expert evidence as to their effect. The first decree is that of Dec. 14, 1917. It runs as follows:

> "In the interests of the proper organisation of national economic life, of the resolute eradication of banking, speculation, and of the complete liberation of the workers, peasants, and the whole labouring population from exploitation by banking capital, and also with the object of establishing a single people's bank of the Russian republic—a bank generally serving the interests of the people and the poorest classes—the Central Executive Committee hereby decrees: 1. Banking is declared a State monopoly. 2. All existing joint stock banks and banking houses are amalgamated with the State Bank. 3. The assets and liabilities of the liquidated banks are taken over by the State Bank. 4. The method of amalgamation of joint stock banks with the State Bank shall be determined by a special decree. 5. The management of the business of joint stock banks is temporarily placed in the charge of the council of the State Bank. 6. The interests of small investors shall be fully safeguarded. Passed at the session of the Central Executive Committee on December 14."

It seems to me that this decree did not put an end to the existence of the Russian Commercial and Industrial Bank. The decree is largely in the nature of a manifesto in its provisions as well as in its preamble. The preamble speaks for itself, and I proceed to the consideration of the operative clauses. By them banking is declared a State monopoly (cl. 1). This assertion of principle is followed by the statement (cl. 2) that all existing joint stock banks are amalgamated with the State Bank. The third clause provides that the assets and liabilities of the liquidated banks are taken over by the State Bank. Clause 4 announces that the method of amalgamation shall be determined by a special decree, and cl. 5 states that the management of a joint stock bank is temporarily placed in the charge of the council of the State Bank. The sixth and last clause provides that the interests of small investors shall be fully safeguarded.

It is obvious that the method in which the amalgamation contemplated by cl. 4 should be carried out is for the present purpose all important. We have not before us any special decree such as is spoken of in that clause, but we have a document entitled "Instructions approved by the People's Commissary of Finance on Dec. 10, 1918, on the Method of Nationalisation of Private Banks." These instructions begin by referring to the fourth clause of the decree of Dec. 14, 1917. The second clause is as follows:

> "Under nationalisation, referred to in clause 1, must be understood not only the transfer of credit institutions out of the hands of private owners into the hands of the State by means of amalgamating them with the State (People's) Bank, but also the reorganisation of the activities of such institutions on new principles in accordance with the tasks imposed by the conditions of the present social order on the People's Bank of the Russian Socialist Federative Soviet Republic."

The first sentence of the third clause is this:

> "All private commercial banks with their branches, agencies, and commission agencies are subject to nationalisation . . ."

Clause 3 goes on to provide for the carrying out of nationalisation of private banks locally under "special technical liquidation collegiums." Clause 5 is as follows:

A "In those towns where besides the establishments of the former State Bank there is only one establishment of a private bank, the latter is subject to liquidation; in the towns with two or several affiliated branches of private banks all such branches are amalgamated into one or several branches, in accordance with local requirements. In any case, if local economic conditions call forth a necessity of opening more than one affiliated branch of the People's B Bank, then the fundamental branch (office) must make an application to this effect, stating its reasons, to the central administration of the People's Bank."

Clause 6 provides that Dec. 14, 1917, is to be the initial date to which the liquidation of former private banks is to be referred. Clause 7 provides that the liquidation balance sheet shall be made up on Dec. 14, 1917. Clause 10 makes C provision for the form of balance sheet to be returned, and cl. 21 provides for preservation of the rights of mortgagors, a note being appended: "Securities are not to be returned." These instructions are a somewhat lengthy document. I think it appears, from the general tenor of the document, and especially from the clauses to which I have referred above, that these instructions were intended to deal with banks in Russia and do not apply to, and are not intended to apply to, D branches in foreign countries such as those in London and Paris. But further, it is obvious that "amalgamation" might be carried out without destroying the existence of the corporations which are amalgamated. These instructions do not show that such destruction was involved in the amalgamation, and there is no "special decree" such as was indicated in the decree of Dec. 14, 1917. It is, in my opinion, not established that that decree, either with or without the instructions, put an end to the existence of the Russian Bank. E

The decree of Dec. 14, 1917, was followed by another issued in January, 1918. It is a decree of the council of the People's Commissaries, and is dated Jan. 26. This second decree declares the transfer to the State Bank on the basis of complete confiscation of all share capital stock in the former joint stock banks. It further declares all bank shares null and void and stops the payment of all dividends (cl. 2). All bank shares are to be forthwith surrendered to the local branches F of the State Bank (cl. 3). Particulars must be furnished to the State Bank of the locality of all shares which cannot be produced (cl. 4). The holders of the bank shares who have failed to comply with cll. 3 and 4 within two weeks are to be punished with confiscation of all their property (cl. 5), and, finally, all transactions and deeds of transfer referring to bank shares are prohibited under penalty of imprisonment up to three years. Whatever may have been the effect of this G decree in the territory under the control of the Soviet government, it appears to me that it cannot be regarded as applicable to such branches as those which were carrying on business in London and in Paris.

The same observation applies to the document entitled "State Organisation." This appears to be a statement of the Constitution of the Soviet Republic adopted on July 10, 1918, by the fifth All-Russian Congress of Soviets. This document H begins by stating that the congress sets itself as its fundamental task the destruction of all exploitation of man by man, and the complete elimination of the division of society into classes, the establishment of a Socialist organisation of society and the victory of Socialism in all countries, and proceeds to make special provisions under heads (a) to (g). For the present purpose, only head (e) need be noticed. It runs thus: I

"There is confirmed the passing of all banks into the ownership of the Workmen-Peasants State as one of the conditions of the emancipation of the labouring masses from beneath the yoke of capital."

There is another document entitled "Resolution of the Council of the People's Commissaries, dated Sept. 20, 1918, on the Undeviating Enforcement of the Decree of Monopolisation of Banking." It recognises (cl. 1) that by the decree of Dec. 14, 1917, there is established the principle of monopolisation of banking by liquidation of all still existing private and public credit institutions. Another

decree has been supplied to us, "Decree of the Council of People's Commissaries," dated Jan. 19, 1920, but this appears merely to refer to the organisation in Russia of the machinery for dealing with banking matters, and not to be relevant to the present inquiry. Neither of the documents last mentioned appear to have any bearing upon the position of the bank branches in England or France.

As I have said, evidence was called on both sides as to the effect which these various documents have according to Russian law upon the continued existence in point of law of the Russian Commercial and Industrial Bank. For the plaintiffs in the action, evidence was given by Dr. Idelson and M. Halpern. Both of these gentlemen gave their evidence before SANKEY, J., at the trial in 1921. I desire to quote what the learned judge said of Dr. Idelson:

> "Upon this question, several Russian lawyers of great eminence gave evidence. I was particularly impressed by that given by Dr. Idelson, who was a member of the council of the Ministry of Finance, and held the Chair of Banking in the Imperial Peter the Great Polytechnic from 1906 to 1918. He gave it excellently, but appreciated the difficulty of applying any principles of law, as we understand it, to what has taken place in Russia. It is not easy to apply the canons derived from the wisdom of the ages to the hasty experiments of the moment."

This passage records the impression of the judge who heard and saw the witnesses as to Dr. Idelson's trustworthiness and ability, and in it the learned judge puts his finger upon the difficulty of dealing with such legislation as this on the ordinary lines, which would apply to legislation in a European country in normal circumstances. Dr. Idelson was asked whether the effect of the Soviet legislation in the various decrees was to destroy the entity of this bank in Russia. He replies:

> "In this case, the Russian Commercial and Industrial Bank, a limited company, was deprived of its rights to carry on banking business within the jurisdiction of the Bolshevik authorities, but the limited company is still in existence because, as I have already explained, a corporation aggregate under Russian law cannot die by simply taking out of the till of that corporation certain securities or passing certain laws which prohibit the corporation within certain boundaries to carry on this or that business that it has been carrying on before."

SANKEY, J., then asked him: "You say the bank has not entirely ceased to exist?" Answer: "The limited company under the style of the Russian Commercial and Industrial Bank is still in existence." The witness further says that while the government has seized assets of the banks it has not taken over their liabilities and that the corporation continues to exist. M. Halpern, an advocate of the Court of Appeal in Petrograd and legal adviser to His Britannic Majesty's Embassy at Petrograd, who is familiar with banking business, also gives evidence to the same effect. He is asked about the decree of Dec. 14, 1917, and says: "I do not think that its effect in law was the destruction of the private banks as corporate bodies." With regard to the decree of Jan. 26, 1918, he said that in his view the legal entity still exists while the share capital was transferred to the State Bank. He is referred to other decrees, and says that in his view the corporation of the Russian Commercial and Industrial Bank still exists and owns assets, and adds that he regards such decrees as having purely territorial effect. Dr. Idelson gave evidence of the same nature in his deposition when further evidence was called for in the Court of Appeal. Dr. Krougliakoff and Dr. Thal were called as experts on the other side. Dr. Krougliakoff gave evidence at the trial and made a deposition on examination under commission. He said on the former of these occasions that the effect of the decrees was that the bank was abolished as a separate and private entity and was merged into the State Bank, which was then called the "People's Bank," and that the effect of the abolition of the Russian Commercial and Industrial Bank was to abolish also the power of attorney which it had issued. Louis Thal, who had been Professor of Commercial and Civil Law at Moscow, a

A member of the Russian Bar and a member of the Senate for commercial cases, also gave evidence for the respondents on commission. Dr. Thal gave it as his opinion that the joint stock banks no longer exist as legal entities, but spoke of them as converted into portions of the National Bank. When he was asked whether the banks had, after such conversion, any existence in contemplation by law, he said:

B

> "In contemplation of law I think they had not. It is very difficult under such a new revolutionary condition to give an unqualified yes or no to that question; therefore, I say, 'No'; but I must add that in so far as outside the Soviet power, there might still be maintained any portions of this property, the continuance as a matter of pure fact of such operations would result from the existing circumstances, but, from the juridical point of view, those could
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> C not create any right on the part of these negotiorum gestores to the property which they were managing; it is not a beneficial interest; it is not individually to themselves, but it regards them as having some right. Q. Have they any title in Russian law?—A. They could have by subsequent ratification of the State. If the State had subsequently said all transactions effected by you are recognised by us, then this subsequent ratification would have formed a juridi-
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> D cal basis, but without that they have none."

A great deal of the evidence on this head is very involved and obscure, and I do not think that anything would be gained by an attempt to abstract it. As I have said, BANKES and SCRUTTON, L.JJ., were of the opinion that the effect of the decrees was to put an end to the existence of the Russian Commercial and In-

E dustrial Bank, and on this ground they affirmed the judgment of SANKEY, J., in favour of the defendants.

The effect of the Soviet legislation is, to my mind, somewhat obscure, and I certainly am not prepared to assent to the proposition that the effect of the decrees has been to put an end to the existence of the Russian bank. The burthen of proving that the appellant bank had ceased to exist is upon the respondents, who

F assert the demise of the corporation, and, in my opinion, it has not been satisfactorily established. But considerable light is thrown upon the problem by the narrative of what took place in fact. It is from this point of view that ATKIN, L.J., treats the case in his dissenting judgment. I desire to refer to his judgment on this subject, and I agree with his conclusion which is as follows:

> "For the above reasons I have come to the conclusion that the defendants
>
> G have not established their plea that the plaintiff corporation no longer exists. I venture to think that their witnesses have assumed too readily that nationalisation involves extinction, and have not given sufficient weight to the consideration that a business may be nationalised or amalgamated without the persons who owned the business being extinguished."

It must never be forgotten that here we have to deal with a branch of the bank

H established and carrying on business in this country. Even if it had been demonstrated that the Russian bank had, so far as Russia was concerned, ceased to exist, I should not treat that as decisive in this case. The London branch has existed for a long time; it has carried on business here; there are many English shareholders; liabilities to British subjects have come into existence. It carries on business here now just as the French branch does in Paris. To affirm the

I defence set up by the respondents in the present case would be to make it impossible for the branch to get in its assets and discharge its liabilities. In all fairness the branch must have the right to use the name of the bank for the purpose of getting in its assets. If there is any other body or person having a preferential right to these securities a claim may be made in the winding-up in this country. But it is clear that Le Comptoir d'Escompte de Mulhouse, having been paid the 1,090,000 marks, has no right to retain the securities too; the securities should be returned to the London branch by which they were lodged and which is suing in this action for their recovery, having paid off the debt.

Even if the power of attorney originally given to Mr. Jones should be regarded as at an end, I think the circumstances are such as to authorise those in control of the English branch to take the steps necessary for getting in the assets and discharging the liabilities of the branch. In my opinion the judgment should be entered for the appellants with costs here and below.

LORD ATKINSON.—The facts of this case have been fully stated by my noble friends who have preceded me. I will not attempt to deal with them at any length. I find in the able and, to me, convincing judgment of ATKIN, L.J., the following passage containing a succinct and accurate description of the real nature of this case. He said:

> "In the result this case resolves itself into the simple position of a claim against a mortgagee who has been paid off and who holds both the security and the sum repaid."

This position is defended on the ground that where bonds are deposited with a bank to secure a particular advance, and the amount of the advance is subsequently paid to this same bank by one purporting to be the agent of the bailor duly authorised to pay it for and on behalf of his principal, it is competent for the bank to receive from the agent the money in the character and for the purpose for which it is paid, and at the same time to refuse to deliver up to him the bonds pledged to secure the payment of the very debt which he has discharged, on the ground that, though the bank has by accepting the payment from the agent treated him as a person having lawful authority from an existing principal to pay the latter's debt, yet in the matter of obtaining possession of the bonds so pledged, the principal may be treated as dead, extinct, incapable of appointing an agent or giving him authority to do anything. Stripped of all sophistry and contention as to the meaning and force of certain decrees of the Soviet government, this is really the right claimed by the Westminster Bank. It is about as audacious an attempt to, at the same time, approbate and reprobate a given transaction, as could well be imagined. It was urged in argument that the Westminster Bank had offered to refund the money paid to them. The time at and the circumstances in which the offer was made are not stated. It may possibly be that it was after they had discovered that the device of approbating and reprobating a given transaction was not, in the courts of law in this country, very successful in defeating just claims.

The substance of the evidence given on behalf of the defendant was that the Soviet government had by two decrees, dated respectively Dec. 14, 1917, and Jan. 26, 1918, not only acquired the business and assets of the Russian Commercial and Industrial Bank (a banking corporation having its head office in Petrograd and branches in London, Paris and Berlin), taken over its administration, and annulled the rights of its shareholders, but had, in addition, dissolved the legal entity, and completely terminated its existence, so as to make it incapable of being an actor in a suit, or appointing an agent to take proceedings on its behalf or in its interest. The agreement, in pursuance of which the bonds, the subject-matter of this proceeding, were deposited, bore date the month of January, 1914. The bonds were actually deposited with the Westminster Bank about the same time, and the debt the bonds were deposited to secure was paid off on or about Dec. 22, 1919, one year and eight months after April 12, 1918, the date of the order of the principal commissioner of the People's Bank so much relied upon. The revolution in Russia did not break out till the month of November, 1917, and the Soviet government was not recognised by His Majesty's government till May, 1921. This recognition is presumed to have been retrospective in its operation and effect. It is essential to consider how the business of the London branch of this bank was carried on from, at all events, the time when the deposit of the deeds was made, the parent corporation being then alive, and apparently in vigorous health and activity, and how that same business was carried on after the parent institution was, as is contended, dead, dissolved, and had ceased to be. ATKIN, L.J., deals

with this matter ably and exhaustively in his judgment. He shows conclusively, I think, that several of the branches of this Russian bank were not only communicating and doing banking business with each other, but with the parent institution itself, long after the latter's alleged decease. It is said that "even in our ashes live their wonted fires," but a dead and dissolved bank having live and active branches with which it transacts banking business is rather incomprehensible. The inference to be drawn from what has occurred would seem to me to be that none of the parties concerned—the head office of the Russian bank in Petrograd, its various branches, or the banking institutions with which they severally dealt—ever regarded the parent institution as defunct, unable to appoint an agent, or to do business through and by the aid of such an officer. The London branch knew presumably that the parent institution had been spoliated by the above-mentioned decrees, but it could not, it would appear to me, have ever considered that it had been annihilated or the branch would not have acted as it has done.

The burden of proving that the entity—the parent banking institution in Petrograd—was annihilated and destroyed, that it had ceased to exist as a business entity, rests upon the respondents. It has been proved by the evidence given on behalf of the appellants that the dissolution of a corporation like that of the Russian bank could only be effected by an express statutory enactment. Russian lawyers were examined by both sides upon this point. They were directly opposed to each other in opinion; those examined on behalf of the respondents being of opinion that the effect of the decrees was to extinguish the Russian bank, while those examined for the appellants were of opinion that, in spite of the decrees mentioned, this bank maintained its existence as a legal entity. Having regard to this evidence, I do not think it is competent for an English tribunal to hold that each of these decrees is ex facie, according to Russian law, clear and unambiguous in its meaning, or, if properly construed, would be precise and certain in its operation and effect. It is, in my view, essential, in order to find out what it was designed according to the Russian law to effect by those decrees, to have regard to what was done under them by the parties concerned, what kinds of business transactions between those parties were carried on after the decrees were respectively made. It is more rational, it would appear to me, to hold that the banking and other business carried on, subsequently to the date of these decrees, by the parties concerned was permissible according to Russian law than to hold that it was carried on in violation of the prohibitions contained in the decrees. If that be so, as I think it is, then the business so carried on, by its very existence and nature, affords help in the construction of the decrees as legal documents. ATKIN, L.J., has collected and described these transactions in the passages of his judgment to which I have already referred. I thoroughly agree with him as to their significance and effect. The detailed examination of them, coupled with that of the decrees and orders actually made by the Soviet government, has convinced me that the respondents have, as to this part of their case, utterly failed to discharge the burden of proof already mentioned, which, in my view, at all events, indubitably lay upon them. I think that they have failed to prove their plea that the appellant corporation has ceased to exist. Till that is established, it must be taken that the corporation exists as a juridical person capable of instituting such an action as the present in this country.

The minor question, or one of the minor questions, remaining for decision is whether Mr. Jones, the manager of the London branch of the appellant corporation, had, as agent of that corporation, authority to institute the present action. The power of attorney executed by the Russian bank bears date Oct. 7, 1914. It purports to be executed by the board of directors of the Russian Commercial Industrial Bank, thereinafter styled "the board." In it Mr. Jones is styled "the acting manager" pro tem. in London, to carry on, in the name of this bank, in accordance with the fourteenth article of its articles of association the operation therein described, in the United Kingdom. It conferred upon this acting manager very wide and important powers, amongst others the following:

"(1) To direct and superintend the business affairs of the bank (i.e., the Russian Commercial and Industrial Bank) in the United Kingdom in accordance with the instructions and orders of the board, and the provisions of the above-named articles of association. (2) To represent the bank whether as plaintiff or defendant in connection with any litigation in which the bank may in any way be interested before any tribunal or court, and to appoint on behalf of the bank such solicitors, counsel, or other professional person or persons to prosecute or defend any action, suit or other proceedings, and generally in connection with the affairs of the bank, and any such appointments at pleasure to revoke and to appoint another or others in the place of the parties so removed."

No date is expressly named at which this power of attorney is to be taken to be revoked or to expire, but by its last clause it is provided that

"the bank ratifies and confirms and agrees to ratify and confirm all and whatsoever the acting manager pro tem. shall legally do or cause to be done by virtue of this power of attorney, including in such confirmation whatever shall be legally done between the date of its revocation by any means and the time of such revocation becoming known to the manager pro tem."

It is not pretended that the authority of the manager was ever expressly revoked either by the directors of the State Bank or by the Soviet government. But it is contended, apparently on the evidence of the expert Russian lawyer, Mr. Krougliakoff, called as a witness on behalf of the respondents, that the decree of January, 1920, did in effect work a revocation of this power of attorney. That is presumably a question to be determined by Russian law. But even if the decree had this effect, the revocation it worked would come within the last clause of the power since the words used are "revocation by any means." The powers of the acting manager, therefore, continued until the revocation became known to him, which could not have been before May, 1921, when the English government for the first time recognised the Soviet government—that is, more than twelve months after the present suit had been instituted, eleven months after the respondents had filed their defence, and one month after that defence was amended. The question remains whether, even though the authority of the acting manager was by implication revoked in the manner described, it was not renewed by the new authority, the Soviet government, which had become responsible for the management and administration of the affairs of the bank. ATKIN, L.J., deals with this point, so convincingly to my mind, in a passage of his judgment that I cannot do better than copy it verbatim. It runs thus:

"In the second place, even if the authority had been revoked, it appears to me plain that it was renewed by the new authority responsible for the administration of the affairs of the bank. That the Soviet government knew that there was a London branch is obvious, that they knew that it was continuing to carry on business in the name of the Russian Bank is established by the correspondence to some of which I have already referred, and also that they intended it to carry on business. Indeed, without such correspondence I should have drawn that inference from the knowledge of the existence of the branch and the knowledge of the nature of banking business. They reply to letters written by Mr. Jones on behalf of the bank and accept his business directions. They must be deemed to have intended that some one should carry on the business of the bank in this country, and in the ordinary case of a private principal I cannot conceive of anyone refusing to draw the inference that authority was impliedly given to the former manager to carry on as before with the former authority. Such an inference under the circumstances would, in my judgment, be a matter of course if we were dealing with an official liquidator or receiver and manager in Russia permitting a branch to be continued here, and I refuse to draw a different inference merely because we are dealing with a foreign government."

I also concur in opinion with ATKIN, L.J., (i) that on the authority of *Richmond* v. *Branson & Son* (3) the point of want of authority to sue is not open to the respondents as a defence to the action, and (ii) that the Mulhouse Bank (the respondents), having received the bonds from the Russian Bank, is estopped from raising a jus tertii except on behalf of a third person named and with the authority of that person whose right of property is set up: (*Rogers, Sons & Co.* v. *Lambert & Co.* (2)). I am of opinion that the appeal succeeds, and that judgment should be given for the plaintiffs for the relief claimed with costs.

LORD SUMNER.—I have had the opportunity of reading the opinion of my noble and learned friend on the Woolsack, and I entirely agree with it.

LORD WRENBURY.—I am of opinion with your Lordships that this appeal succeeds and I concur in the reasoning upon which that conclusion is based. Had I been of a different opinion as regards the operation of the Soviet decrees and had I thought that those decrees had an effect beyond that of taking over, amalgamating, and absorbing the private banks in Russia and extended to extinguishing and determining altogether the existence of the Russian corporation, there would have emerged another question upon which the appeal might have fallen to be decided and I should have desired to hear argument. There is no question but that, according to private international law and according to the comity of nations, a foreign corporation is for many purposes recognised as a corporation here. It may sue and be sued here in its corporate name. But there is also no question but that a corporation created under a foreign law is not a corporation within our law. The foreign corporation which establishes itself in trade in this country is an unregistered company within s. 268 of the Companies (Consolidation) Act, 1908 [s. 399 of Companies Act, 1948], and may be wound-up as an unregistered company. The question which arises is whether the association of persons which is in the foreign country bound together by a nexus of corporation is not in this country an association of natural persons bound together by a nexus of partnership but not corporate. No objection arises by reason of the association consisting of more than ten persons for the word "formed" in s. 1 of the Companies (Consolidation) Act, 1908 [s. 429 of Act of 1948], means "formed in this country" and the association was in such a case "formed" abroad by incorporation there. The question then is whether the association is not to be treated here as an association or partnership of natural persons whose relations inter se are to be found in the articles of association of the company and are to be ascertained no doubt with reference to the lex loci contractus, but is nevertheless an association whose existence is not terminated by the death of the foreign corporation, but continues for the purpose of winding-up its affairs so far as this country has control over the persons and the assets within its jurisdiction. The natural persons forming such an association are not dead even if the corporation is. It is settled that a company which is a foreign corporation can be wound-up here, and even if the corporation had been "dissolved" in the foreign country, I should have wished to hear argument upon s. 268 of the Companies Act, 1908, whether after the "dissolution" in the foreign country it would not be good ground for winding it up here, that it had been dissolved and fell within the words in s. 268 which provide that an unregistered company may be wound-up " if the company is dissolved." I have desired to add these few words to protect myself in case the above question should arise hereafter. It has been unnecessary now to determine the question having regard to the course which the case took upon other grounds.

Appeal allowed.

Solicitors: *Freshfields, Leese & Munns*, for *The Solicitor, Board of Trade; Donald McMillan & Mott.*

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

A

THE COAHOMA COUNTY

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sir Henry Duke, P.), January 22, 23, February 4, 1924]

[Reported [1924] P. 95; 93 L.J.P. 141; 131 L.T. 575; 40 T.L.R. 355; 16 Asp.M.L.C. 342] B

Shipping—Bill of lading—Steamer to be "entitled to commence discharging immediately after arrival . . . either into lighters or other craft, or at the quay . . ."—Goods "shall be taken from the ship's tackle by the consignees . . . directly on their coming to hand in discharge of ship"—Master's certificate to be conclusive as to extent of delay—Obligation on consignees to C *provide lighters, craft or quay space—Delay due to unavoidable causes—Validity of master's certificate.*

Timber was consigned to the defendants in the plaintiffs' steamer under bills of lading containing the following terms: ". . . the steamer shall be entitled to commence discharging immediately after arrival . . . either into lighters or other craft, or at the quay, or at more than one berth, and discharge con- D tinuously, day and night, also on Sunday from all hatches simultaneously, without intermission, all at the discretion of the master. . . . The goods shall be taken from the ship's tackle by the consignee of goods directly on their coming to hand in discharge of the ship. . . . If consignees fail to receive as above stated, and no facilities are available for discharging into craft or on wharf without delay to the steamer, receivers shall pay the steamer demurrage E at [a fixed rate]. The master's certificate shall be conclusive and binding both as to the extent of the delay in the receipt of the cargo and the amount payable by consignees hereunder in respect of such delay. . . ." No berth was available at the port of discharge, and, owing to the dimensions of the timber, discharge into lighters was impossible. The cargo was, therefore, discharged over the ship's side into the water, where it was formed into rafts and removed F by the consignees. The vessel occupied twelve and a half days discharging, and the master certified that £2,792 was due from the consignees in respect of six days' demurrage, attributing the delay to the failure of the consignees to provide a berth or craft. The delay was, in fact, due to other causes for which the consignees were not responsible.

G

Held: (i) the words "the steamer shall be entitled to commence discharging immediately after arrival . . . either into lighters or other craft, or at the quay" conferred a right, power, or liberty on the carrier, but did not imply an undertaking on behalf of the consignee of the goods that facilities would be available whereby such right, power or liberty should be made available to the carrier; (ii) the goods having been, in the business sense, taken from alongside directly H on their coming to hand, there was no delay attributable to the consignees, and the plaintiffs were not entitled to recover demurrage; (iii) had there been a breach by failure of the consignees to take delivery as agreed, the master's certificate could not be accepted as a conclusive assessment of damages, since the delay which he assessed was not the delay in respect of which he was empowered by the bill of lading to certify for demurrage. I

Notes. As to the time within which delivery of cargo must take place, see 30 HALSBURY'S LAWS (2nd Edn.) 537 et seq.; and for cases see 41 DIGEST 531 et seq.

Action.

The plaintiffs, the United States of America, represented by the United States Shipping Board, were the owners of the steamship *Coahoma County*, and the defendants, the Falmouth Docks and Engineering Co., were endorsees and receivers of cargo under three bills of lading dated Mobile July 30, 1921, and issued in

A respect of forty-three and 1,126 pieces of pitch pine timber, and 382 pieces of pitch pine timber respectively. By cl. 8 of the bills of lading it was provided:

"Also, that the steamer shall be entitled to commence discharging immediately after arrival (without reference to the state of the weather) either into lighters or other craft, or at the quay, or at more than one berth, and discharge
B continuously day and night, also on Sunday from all hatches simultaneously, without intermission, all at the discretion of the master, any custom of the port to the contrary notwithstanding. The goods shall be taken from the ship's tackle by the consignee of goods directly on their coming to hand in discharge of the ship; otherwise the master or ship's agent shall be at liberty to enter and land the goods, or put them into store, warehouse or craft, or on quay, at
C the receiver's risk and expense, without giving previous notice to consignees before weighing or counting, notwithstanding all regulations or customs of the port to the contrary. If consignees fail to receive as above stated, and no facilities are available for discharging into craft or on wharf without delay to steamer, receivers shall pay the steamer demurrage for such detention at the rate of 50 cents per net registered ton per day of twenty-four hours for each
D day or part of day during which the goods shall not be received as above stipulated. The master's certificate shall be conclusive and binding both as to the extent of the delay in the receipt of the cargo and the amount payable by consignees thereunder, in respect of such delay. . . ."

The *Coahoma County* arrived in Falmouth to discharge, on Sept. 6, 1921, but no berth was available, and since it was not practical to discharge into lighters or
E craft, the timber was discharged overside into the sea by means of the ship's tackle. The discharge was not complete until 4.15 p.m. on Sept. 20. The total time occupied in discharging was, therefore, twelve and a half days, and the plaintiffs claimed that the ship could have been discharged in six and a half days if craft or a berth had been available. They, therefore, claimed six days' demurrage at 50 cents per net registered ton per day, amounting to £2,792 3s. 7d.,
F and/or damages. On Sept. 20, the master of the *Coahoma County* certified that this sum was payable by the receivers in respect of six days' demurrage. The defendants contended that they took the cargo immediately on the cargo coming to hand, and that the delay was attributable to overstowing, replacing hatches over the part cargo of grain, and other causes.

G *Dunlop, K.C.*, and *G. P. Langton* for the plaintiffs.
W. Norman Raeburn, K.C., and *Pilcher* for the defendants.

Cur. adv. vult.

Feb. 4. **SIR HENRY DUKE, P.,** read the following judgment.—This action is brought by the United States Shipping Board as owners of the steamship *Coahoma County*, to recover from the defendants, the Falmouth Docks and Engineering Co.,
H £2,792, which the plaintiffs allege to be due to them for demurrage on an assessment of demurrage by the ship's master pursuant to the terms of bills of lading, and, alternatively, for damages under three bills of lading issued by the plaintiffs' master and accepted by the defendants in respect of the carriage by sea of three consignments of timber and lumber from Mobile, U.S.A., to Falmouth. The substantial questions in the case are whether the sum claimed is due and recoverable
I on the certificate of the master of the *Coahoma County* as a conclusive assessment in pursuance of powers conferred on him by the bill of lading, and, if the master's certificate is not conclusive against the defendants, whether on the contract in the bill of lading a breach has been established in respect whereof damages at common law must be awarded by the court to the plaintiffs.

The defendants are proprietors of docks at Falmouth, and in July, 1921, being in need of pitch pine timber for constructional work on their property, they purchased from London merchants parcels consisting of 43 pieces and 1,126 pieces of pitch pine timber, and 382 pieces of pitch pine lumber. These parcels were shipped

on July 30, 1921, and the plaintiffs' vessel arrived at Falmouth on Sept. 6, 1921. She had on board besides the consignments in question, timber cargo for London, and grain in bulk. Her discharge began in the afternoon of Sept. 6, and was completed in the afternoon of Sept. 20. The working days occupied were twelve and a half. On completion of the discharge, the master of the *Coahoma County* issued the certificate in question, whereby he certified £2,792 to be due from the defendants in respect of six days' demurrage. He had previously on the same day notified the defendants by letter that he held them liable for demurrage on account of delays and slowness in discharging the cargo of his vessel. The master's certificate, the validity of which is in question, purports to have been made in pursuance of cl. 8 of the several bills of lading.

Counsel for the plaintiffs claimed that, on the true construction of the clause, the absence of facilities at Falmouth for discharge of the vessel by her owners in manner specified, and the defendants' failure to receive with such facilities forthwith, involved the defendants in liability for such sums as should be certified by the master to be due to delay thereby caused. He contended also that the defendants must be held on the true construction of the bill of lading, to have warranted to the plaintiffs the availability at Falmouth of facilities such as are specified in cl. 8, of such a character and extent as to enable the ship to make continuous discharge of cargo during such hours as the master at his discretion should think fit to require, and that the defendants had also come under an obligation to receive from the ship's tackle cargo so discharged at such a rate of discharge as the master in his discretion might direct and be able to make. On behalf of the defendants it was contended that, on the true construction of the clause, the defendants had bound themselves to nothing more than an obligation to take delivery as fast as was reasonably practicable under the circumstances.

In order to apply the terms of the bill of lading to the transaction in question, it is necessary to state certain facts. When the *Coahoma County* arrived at Falmouth on Sept. 6, 1921, no deep water berth was available, and owing to the exceptional dimensions and, in particular, the exceptional lengths of the timber in the cargo, the use of lighters or other craft for the purpose of discharge was, save as to a small quantity of the goods, out of the question. No facilities were available by means whereof the master or ship's agent could land the timber or put the same into store, warehouse or craft, otherwise than as the same was in fact disposed of in the course of the discharge of cargo as it took place between Sept. 6 and Sept. 20. On being notified of the ship's arrival, the defendants named Garrack Roads in the harbour at Falmouth, about two miles from the shore, as a suitable place of discharge, and the master moored his vessel there and proceeded to discharge by delivery of the timber over the ship's side into the water, where it was received by the defendants' agents and formed into rafts and removed. This was, on Sept. 6, the only practicable mode of discharge of the Falmouth consignments. The fact was relied on on behalf of the plaintiffs as conclusive evidence of the alleged breaches by the defendants of their obligations under the bill of lading.

The first question to be considered on the construction of cl. 8 is that of the effect of the first sentence therein:

> "the steamer shall be entitled to commence discharging immediately after arrival (without reference to the state of the weather) either into lighters or other craft, or at the quay, or at more than one berth, and discharge continuously day and night, also on Sunday from all hatches simultaneously, without intermission, all at the discretion of the master, any custom of the port to the contrary notwithstanding."

If the words "the steamer shall be entitled to commence discharging, &c., and discharge continuously, &c." impose obligations on the receiver of cargo by implication, either of a warranty or otherwise, there has been a breach. In my opinion, however, this sentence in the clause must be held to confer a right, power or liberty on the carrier, but not to imply an undertaking on behalf of the consignee of the

goods that facilities shall be available whereby such right, power or liberty shall be made available to the carrier. The provisions in question would restrict the rights of the consignee on the narrower of two alternative constructions, which I place on them, and, on that construction, therefore, would not be inoperative. The wider construction contended for by the plaintiffs, if it can be arrived at at all, can only be arrived at by implication, and would import into the contract terms not merely oppressive as regards the consignee, but virtually impossible in a business sense to be carried out by him. It would not be in accordance with authority to import unreasonable terms into the bill of lading by implication. In point of fact also, the master of the *Coahoma County* accepted the designated place of discharge as a proper place of discharge under the bill of lading. I hold that no breach of contract is made out under the conditions in the first sentence in cl. 8.

The second sentence of cl. 8 imposes a clear obligation on the consignees to take the goods from the ship's tackle directly on their coming to hand. The liberty reserved to the master to enter and land the goods, &c., is immaterial in the events that have happened. The one question to be determined with regard to the consignees' obligation under this part of the clause is one of fact—Did they receive the goods in manner agreed? No facilities were available for discharging into craft or on wharf without delay. What is now to be done under cl. 8 is to determine whether in point of fact the consignees failed to take their goods from the ship's tackle directly on their coming to hand, and whether demurrage at the specified rate is thereupon payable to the amount certified by the master. The question of fact goes to the root of the plaintiffs' alleged causes of action, whether for demurrage or for damages. Counsel for the plaintiffs contended that failure to receive under that part of the clause which I last mentioned must be found when it should appear that there were not the specified facilities, and that the goods were, at any rate, not taken from the ship's tackle at the rate specified, but, for reasons I have indicated, I am of opinion that the failure provided for is failure to take goods from the ship's tackle directly on their coming to hand.

There are facts in the case relevant to both the matters to be decided which would make the master's certificate oppressively erroneous if it be in fact conclusive. Three days of delay was caused by the exposed situation of the place of discharge. Some delay was caused by the battening down of the hatches to protect the part cargo of grain in bulk from damage by rain. Very serious delay was caused by the fact that the timber cargo for discharge at Falmouth was "overladen" by a considerable quantity of the timber cargo shipped for London. I accept the evidence of the defendants' witness Harold Wills as to the effect of these hindrances. There was delay also by the breakdown of a winch or winches. The master allowed in his calculation of demurrage one and a half days for delay by "overloading," which was an inadequate allowance, and no allowance was made by the master for any of the other causes of delay. On reference to the master's certificate, it appears that the delay of six working days in respect of which he assesses demurrage was attributed by him, as authorised assessor of demurrage under the bill of lading, to the situation of the place of actual discharge. What he states is this:

> "No berth alongside quay and no lighters or other craft were available, consequently I was obliged to anchor in mid-harbour and to discharge the cargo of timber into the sea. As a result continuous delay took place from the commencement until completion of discharge in consequence of the time occupied in lowering the timber into the water and holding it there until ship's tackle was released by the receivers. Moreover, on three days no effective progress in receiving timber from the ship was made on account of rough weather."

At the hearing, the real cause of delay which was relied on by the plaintiffs was the alleged failure of the defendants' men employed at the ship's side to receive the timber at the rate at which the ship was ready to discharge it. One of the plaintiffs' witnesses stated that a delay of about four minutes occurred in the un-

shackling of each log after it was put over the side. This is, I am sure, an unjustifiable statement. There was a strong conflict of evidence on this part of the case, and the conclusion at which I have arrived is that neither the stevedores' gang who were employed on board the ship by the plaintiffs nor the raftsmen who worked alongside for the defendants were able to handle the unusual lengths of timber as they would have done pieces of smaller dimensions, and that the discharge was, therefore, made at a slower rate than the normal. There was no complaint during the discharge, and at the hearing it was not disputed that the raftsmen made the best dispatch in their power and were as good workmen as could have been obtained for the purpose. Such delay as occurred was mutual on the part of the stevedores' gang and the raftsmen and was unavoidable, and was of the kind alone which I have indicated. I find that the goods were, in the business sense of the words, "taken from the ship's tackle by the consignee directly on their coming to hand in discharge of the ship."

The conclusions of law and findings of fact which I have stated dispose of the case. Had I found a breach by failure to take delivery as agreed I should have been unable to accept the master's certificate as a conclusive assessment of damages. His evidence shows that the delay he assessed was not the delay in respect of which he was empowered by the bill of lading to certify for demurrage. Moreover his figure of six days was arrived at by the application of an arbitrary and incorrect formula. Taking his normal rate of discharge as 300 pieces of timber per diem, he divided the number of pieces in the defendants' consignments by 300 and so determined that five days was the contract time for discharge. To the five days he added one and a half for time lost by "overloading" of the Falmouth cargo with London cargo. Six days out of twelve and a half remained, and for these he assessed demurrage. The certificate is bad on the face of it. Had it been material to ascertain the apportionment of the time beyond five days spent in the discharge of timber at Falmouth, I should, so far as I can see, have found the delay by stormy weather to have been three working days, that caused by the mode of stowage of the London and Falmouth cargo two days, that caused by rain and the ship's management of the hatches for protection of grain cargo together with that caused by disablement of winches one day, and that attributable to slow handling caused by the character of the cargo and the circumstances of discharge, one and a half days. On the findings I have stated, the action fails.

Judgment for the defendants.

Solicitors: *Thomas Cooper & Co.*; *Deacon & Co.*

[*Reported by* Geoffrey Hutchinson, Esq., *Barrister-at-Law.*]

THE JUPITER

[Court of Appeal (Bankes, Scrutton and Atkin, L.JJ.), July 11, 17, 1924]

[Reported [1924] P. 236; 93 L.J.P. 156; 132 L.T. 624; 40 T.L.R. 815; 16 Asp.M.L.C. 447]

Constitutional Law—Foreign sovereign State—Immunity from suit—Right to have writ set aside—No investigation of plaintiff's claim—Writ in rem claiming possession of ship.

Where a foreign sovereign State applies to set aside a writ which has been addressed to it the court must decline jurisdiction without investigating whether the plaintiff's claim is good or bad.

The plaintiffs by a writ in rem claimed possession of the steamship *J.* against "all persons claiming any right or interest in the said steamship." An appearance under protest was entered by the Union of Socialist Soviet Republics, who moved to set aside the writ, alleging that the *J.* was their property. The Union of Socialist Soviet Republics was recognised by the British government as an independent sovereign State.

Held: the writ must be set aside without considering whether the claim was right or wrong.

Notes. Applied: *Compania Naviera Vascongada* v. *Steamship Cristina*, [1938] 1 All E.R. 719. Referred to: *The Arantzazu*, [1939] P. 37.

As to the immunity from suit of foreign States, see 1 Halsbury's Laws (3rd Edn.) 52, 61, and ibid., vol. 7, pp. 265–267. For cases see 1 Digest 48–50, 110, 111, and 11 Digest (Repl.) 622–627.

Cases referred to:

(1) *The Gagara*, [1919] P. 95; 88 L.J.P. 101; 122 L.T. 498; 35 T.L.R. 259; 63 Sol. Jo. 301; 14 Asp.M.L.C. 547, C.A.; Digest Supp.

(2) *The Dictator*, [1892] P. 64, 304; 61 L.J.P. 73; 67 L.T. 563; 7 Asp.M.L.C. 251; 1 Digest 104, *66*.

(3) *The Gemma*, [1899] P. 285; 68 L.J.P. 110; 81 L.T. 379; 15 T.L.R. 529; 8 Asp.M.L.C. 585, C.A.; 1 Digest 224, *1500*.

(4) *The Annette*, *The Dora*, [1919] P. 105; 88 L.J.P. 107; 35 T.L.R. 288; Digest Supp.

Also referred to in argument:

The Santissima Trinidad (1822), 20 U.S. 283.

Russian Bank for Foreign Trade v. *Excess Insurance Co.*, [1919] 1 K.B. 39; 88 L.J.K.B. 209; 119 L.T. 733; 35 T.L.R. 42; 63 Sol. Jo. 40; 14 Asp.M.L.C. 362, C.A.; 29 Digest 283, *2302*.

Chartered Mercantile Bank of India v. *Netherlands India Steam Navigation Co.* (1883), 10 Q.B.D. 521; 52 L.J.Q.B. 220; 48 L.T. 546; 47 J.P. 260; 31 W.R. 445; 5 Asp.M.L.C. 65, C.A.; 11 Digest (Repl.) 434, *788*.

The Porto Alexandre, [1920] P. 30; 89 L.J.P. 97; 122 L.T. 661; 36 T.L.R. 66; 15 Asp.M.L.C. 1, C.A.; Digest Supp.

The Parlement Belge (1880), 5 P.D. 197; 42 L.T. 273; 28 W.R. 642; 4 Asp.M.L.C. 234, C.A.; 11 Digest (Repl.) 628, *516*.

The Tervaete, [1922] P. 259; 91 L.J.P. 213; 128 L.T. 176; 38 T.L.R. 825; 67 Sol. Jo. 98; 16 Asp.M.L.C. 48, C.A.; Digest Supp.

Appeal from an order of Hill, J., setting aside the writ and all proceedings in an action in rem in which the plaintiffs, the Compagnie Russe de Navigation à Vapeur et de Commerce, claimed possession of the steamship *Jupiter*. The writ was addressed to "the steamship *Jupiter* and all persons claiming any right or interest in the said steamship." An appearance was entered under protest by the Union of Socialist Soviet Republics, an independent sovereign State, who moved to set aside the writ and all subsequent proceedings upon the ground that the Union were the owners of the *Jupiter* by virtue of a decree of nationalisation

dated Jan. 26, 1918. The Union was recognised by the British government as an independent sovereign State, and as such the Union refused to sanction the proceedings. The plaintiffs had formerly carried on business in Russia and in the Ukraine, but their head office was now stated to be in Paris. The *Jupiter* was a vessel registered at the port of Odessa in the Ukraine. In 1924 she was lying at Dartmouth where she had been laid up by her owners with a skeleton crew, consisting of the master, chief officer, and chief engineer. In March, 1924, after the recognition by the British government of the Union of Socialist Soviet Republics as the de jure rulers of those parts of the old Russian Empire which acknowledged their authority, including the Ukraine, representations were made to the master of the *Jupiter* by the agents of the Union government in London to the effect that the Union government were the owners of the *Jupiter* by virtue of the decrees made in Russia by which all Russian vessels were nationalised and became the property of the Union government. The master, accordingly, handed over the ship's papers to the agents of the Union government in London and flew the flag of the Union on the *Jupiter* in place of the old Russian imperial flag which he had previously flown, and he refused the plaintiffs access to the ship. Affidavits were filed on behalf of the Union government by their Chargé d'Affaires in London, from which it appeared that Odessa was within the jurisdiction of the Union government, that the Union government claimed that the *Jupiter* was their property, and that it declined to submit to the jurisdiction of the court. On the motion of the Union government, HILL, J., set aside the writ and subsequent proceedings on May 29, 1924. The plaintiffs appealed.

Jowitt, *K.C.*, and *Langton* for the plaintiffs.
Dunlop, *K.C.*, and *Dumas*, for the Soviet Union, were not called on to argue.

BANKES, L.J.—This appeal raises the question whether or not the learned judge was right in setting aside a writ in an action in rem, which the plaintiffs, a French company describing themselves as the owners of the steamship *Jupiter*, issued against "the steamship *Jupiter* and all persons claiming any right or interest in the said steamship." We know from the affidavits the circumstances in which the plaintiffs are claiming that this vessel is their property. In order to assert that claim they have elected to take proceedings in rem. It is a procedure in which the writ is directed to all persons claiming any right or interest in the steamship. The only persons who have appeared are the Soviet government who claim to be the owners of the vessel and protest against the exercise by the courts of this country of any jurisdiction over them. They appear under protest. The motion to set aside the writ was served and came before HILL, J. He has set aside the writ, in my opinion, rightly, on the ground which he expressed, I think quite accurately, in *The Gagara* (1). There the action was commenced in rem, and the effect of the action is described by the learned judge in these words:

> "In the first place the Esthonian government is in actual possession of the ship; and that government states that the ship is being used by it for public purposes. . . . The plaintiffs invite the court to take that possession away by arrest of the ship and ultimately by decree to transfer it to the plaintiffs."

In substance that is exactly what the plaintiffs are seeking to do here. Then he goes on:

> "But to permit the arrest is to compel the Esthonian government, either to submit to the jurisdiction of the court or to lose their de facto possession, and to compel the Esthonian government to submit to this court the question of the ownership of *The Gagara*."

In my opinion, that is contrary to all the principles upon which this court has acted where a claim is made by a duly recognised independent sovereign State. It seems to me that the necessary result of these pleadings is to call upon the Soviet government to assert its title and to have the question of the ownership, or the right to possession of this vessel, impleaded in the courts of this country.

That is not admissible. I think the judgment of HILL, J., is quite right, though I do not attach the importance which he does to the fact that this vessel was registered at Odessa.

SCRUTTON, L.J.—A writ in rem is issued by a company with a French name, which at any rate it is not a company registered under the English Acts, addressed to the steamship *Jupiter* which is a steamer now lying in English waters, and "all persons claiming any right or interest in the said steamship." Whereupon an application is made to this court by the Union of Socialist Soviet Republics to set aside the writ on the ground that the *Jupiter* is the property of the Union, a recognised foreign independent State. It is agreed that the Union has been recognised de jure and de facto by the British government. It appears to me, without going any further, without investigating whether the claim is good or bad, that the court on having that statement made to it must decline jurisdiction.

There was some obscurity as to the nature of a writ in rem in Admiralty, but since the judgment of SIR FRANCIS JEUNE in *The Dictator* (2), which was affirmed by this court in *The Gemma* (3), that obscurity has been cleared up. By the old practice of the Admiralty Court the appearance of a person interested in property used to be enforced either by seizing him to make him appear, or by seizing his ship, or by seizing his property other than his ship—but the object of all the processes of seizing was to make the man appear so that he might be a personal defendant to the action. If he did appear, he at once became personally liable to the judgment of the court. If he did not appear, the court, having given him the opportunity of appearing, might take away his property. This writ being addressed to the steamship *Jupiter* and all persons claiming any right or interest in the steamship, the foreign government which does claim a right or interest in the ship must do one of three things. First, it may appear to defend, but it cannot be compelled to appear; secondly, if it were not to appear, and let the action go on, the court might feel able to forfeit the property of a foreign sovereign; thirdly, it can simply come to the court and say: "I am not going to discuss what my title is; I say I am a foreign sovereign; I claim a right in this property, and you cannot compel me to come to your court to show you that I have good cause for saying that it is my property." I think that the law is accurately stated by MR. DICEY. He says:

> "The court has no jurisdiction to entertain an action against any foreign sovereign. Any action against the property of a foreign sovereign is an action or proceeding against such person." (CONFLICT OF LAWS (3rd Edn.), p. 215.)

On that ground, without going into any discussion whether the claim is right or wrong, without basing my decision on the fact that the port of registry of the ship is Odessa, without discussing whether the result at which the plaintiffs in this case are aiming can be achieved by another method, this particular method appears to me to violate the principles of international comity and to make a foreign sovereign appear in these courts as defendant to defend what he alleges to be his property. Consequently, it should be set aside.

I desire to reserve the question whether in any circumstances the Admiralty Court would entertain an action for possession between foreigners except in a case where the foreign sovereign consented. The matter is discussed in *The Annette*, *The Dora* (4), where the foreign sovereign consented because he was one of the parties; but according to the old practice of the court I do not think that the Admiralty would have such an action. However, I am content to rest my decision in this case on the fact that this writ requires a foreign sovereign to appear in these courts to defend what he alleges to be his property, and by the principles of international comity, the courts of this Kingdom do not allow such steps to be taken against foreign sovereigns.

ATKIN, L.J.—The plaintiffs in this case are a company who appear to have been registered in Russia, and to have had property at one time in a ship called

the *Jupiter*. The *Jupiter* was registered at the port of Odessa—though this appears to me to be quite an irrelevant fact to the decision which I, at any rate, am going to give. A

The *Jupiter* left Odessa in the year 1919 and since then has been in waters other than Russian territorial waters in the possession of the plaintiffs through their servant the master of the ship. For the last year or year and a half she has, in fact, been lying in British territorial waters at Dartmouth. It appears that at the beginning of this year the Russian Soviet government induced the master of the ship to repudiate the possession and ownership of the plaintiffs and to hold the ship for them, and the master procured a provisional registration from the Russian consul which is a different registration from the registration at Odessa. Those being the facts, the plaintiffs issued their writ in rem against the steamship *Jupiter* and all persons claiming any right or interest in the said steamship. It is quite plain from these facts (a) that the plaintiffs intended all persons claiming any right or interest in the said steamship to include the right of the Russian Soviet government who are the only people who claim to have any rights and whose claim has given rise to these proceedings; and (b) it is quite certain that "all persons claiming any right or interest in the ship" did in fact include the Russian Soviet government. Therefore, it is quite plain to my mind that this writ so addressed to these persons and commanding them within eight days after the service of the writ to cause an appearance to be entered, is a writ by which the British courts purport to exercise jurisdiction over a sovereign independent State. It also is quite plain upon the authorities that the British courts have no jurisdiction to do any such thing, and that when such a writ is issued it is the right of a foreign sovereign in these courts to apply to have that writ set aside. That is the motion which has been made here; and, to my mind, it must be acceded to. B C D E

It is on those simple grounds that I, and I think the rest of the court, determine this appeal. We do not determine it on the footing that this ship is in fact the property of the Russian Soviet government. That may or may not be the fact. We do not determine it on the ground that, as the Russian Soviet government claims the ship as their property, that is conclusive proof in these courts that it is their property. These questions do not appear to me to be necessary for the decision of this appeal and I certainly do not decide it on that ground. I decide it on the simple ground that this process by the very nature of it is an attempt to implead the Russian Soviet government, and the court has no jurisdiction to do that. I think, therefore, that the appeal should be dismissed. F G

Solicitors: *William A. Crump & Son*; *Wynne-Baxter & Keeble.*

[*Reported by* Geoffrey Hutchinson, Esq., *Barrister-at-Law.*]

A

Re MEREDITH. DAVIES *v.* DAVIES

[Chancery Division (Romer, J.), May 9, 14, 1924]

[Reported [1924] 2 Ch. 552; 94 L.J.Ch. 87; 131 L.T. 800]

B *Will—Bequest—Lapse—Statutory exception from lapse—"Contrary intention"—Testator ignorant of statutory provision—Recital that gift had lapsed—No express disposition to prevent lapse—Gift by codicil to children of dead child—Wills Act*, 1837 (7 *Will.* 4 *&* 1 *Vict.*, *c.* 26), *s.* 33.

A "contrary intention" to the provision of s. 33 of the Wills Act, 1837, that a legacy to a child of the testator who predeceases the testator, but leaves C issue, shall not lapse, appears if the testator has shown an intention that, notwithstanding such issue, the legacy should nevertheless lapse, even though the will shows that the testator had never heard of s. 33.

A testator, by his will, gave a legacy of £100 to his son J.M., and declared: "I give the residue of my real and personal estate to my trustees upon trust . . . to pay an annuity of £31 4s. to my said wife during her lifetime and to D divide what remains thereafter between my said five children in equal shares, and I direct that on the death of my said wife the said annuity shall fall into and form part of my residuary estate." By a codicil the testator provided: "Whereas since the date of my said will my son J.M. has died and the legacy and share of residue given to him by my said will have lapsed now with a view of making some provision for the two children namely T.J.M. and V.M.M. E I give to each of them a legacy of £100 free from duty such sums to be invested by my trustees and handed over to the said children with all interest on their respectively attaining the age of twenty-one years."

Held: by not disposing of J.M.'s share of residue and legacy and by reciting that those bequests had lapsed and then making no express disposition to prevent such lapse, and by bequeathing the £200 to the children, the testator F had shown a desire that J.M.'s share of residue and legacy should not be paid to J.M.'s executors as part of his estate, but that, subject to paying the two children £100 each, they should lapse, and, accordingly, they had lapsed.

Per **Curiam**: if the codicil had contained nothing but a statement of J.M.'s death and then the gift of a legacy of £100 to each of his children, it would not have shown a contrary intention within the meaning of s. 33.

G **Notes.** As to statutory exceptions from lapse, see 34 Halsbury's Laws (2nd Edn.) 138–140; and for cases see 44 Digest 502–506. For the Wills Act, 1837, see 26 Halsbury's Statutes (2nd Edn.) 1326.

Case referred to:

(1) *Re Morris, Corfield* v. *Waller* (1916), 86 L.J.Ch. 456; 115 L.T. 915; 44 Digest 502, *3216.*

H Also referred to in argument:

Campbell v. *French* (1797), 3 Ves. 321; 30 E.R. 1033, L.C.; 44 Digest 364, *1974.*

Re Churchill, Taylor v. *Manchester University*, [1917] 1 Ch. 206; 86 L.J.Ch. 209; 115 L.T. 769; 61 Sol. Jo. 131; 44 Digest 342, *1716.*

Adjourned Summons.

I By his will dated Sept. 26, 1916, the testator, after appointing John Davies and Thomas Lloyd executors and trustees thereof, gave the whole of his household furniture to his wife, Ann Meredith, for her use during her life, and after her death gave the whole of the said household furniture equally between his five children: "James Meredith, Eliza Ann Davies, Edith Meredith, Nellie Lewis, and Lucy Lloyd." He also gave to his son the said James Meredith a legacy of £100, and proceeded as follows:

"I give the residue of my real and personal estate to my trustees upon trust to receive the rents, issues, and profits of the same, and thereout to pay an

annuity of £31 4s. to my said wife during her lifetime, and to divide what remains thereafter between my said five children in equal shares, and I direct that on the death of my said wife the said annuity fall into and form part of my residuary estate."

The said James Meredith, the son of the testator, died before Aug. 1, 1917, leaving his widow and two infant children surviving him. By a codicil, dated Aug. 1, 1917, to his will, the testator directed as follows:

"Whereas since the date of my said will my son James Meredith has died and the legacy and share of residue given to him by my said will have lapsed now with a view of making some provision for the two children namely Thomas James Meredith and Violet May Meredith of my said son James Meredith I give to each of them a legacy of £100 free of duty such sums to be invested by my trustees and handed over to the said children with all interest on their respectively attaining the age of twenty-one years."

Then after a gift to his wife, the testator, in all other respects, confirmed his said will. The testator having died, this summons was issued by the plaintiffs as the executors and trustees of the will and codicil to determine whether the £100 legacy and the share of furniture and residue given by the testator by his will to his son James Meredith had lapsed in consequence of a contrary intention to the operation of s. 33 of the Wills Act, 1837, having been expressed in the codicil. Section 33 provided:

"Where any person, being a child or other issue of the testator to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person, shall die in the life-time of the testator leaving issue, and any such issue of any such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will."

R. W. Turnbull for the executors.

J. F. Carr for the widow and children of the testator.

W. F. Swords for the widow and the two children of the son, James Meredith.

Cur. adv. vult.

ROMER, J., read the following judgment.—In this case I have to determine whether the testator has expressed "a contrary intention" within the meaning of s. 33 of the Wills Act, 1837. [His Lordship read the section and also the will of the testator and continued:] So that what he has given by his will to his son, James Meredith, was a share of his household furniture after his wife's death, a legacy of £100 and a one-fifth share of his residuary estate subject to his wife's annuity. In point of fact James Meredith died in the lifetime of the testator, leaving issue, who survived the testator. Therefore, if the testator had died without making any other testamentary disposition, s. 33 would have applied, and the share of furniture, the legacy of £100 and the share of residue would have devolved as if James Meredith had died after the testator and would have formed part of his estate because the testator had not by his will shown any contrary intention. But on Aug. 1, 1917, shortly after the death of James Meredith, the testator made a codicil in these terms. [His Lordship read the codicil and continued:] Counsel for the widow and children of James Meredith has contended that the testator has shown by the recital in the codicil that he had never heard of s. 33 of the Wills Act, and that having obviously never heard of that section it is not possible to say that the codicil shows any intention that that section shall not operate. However, the fallacy in that argument lies in this, that s. 33 does not say that the section shall apply unless the will says in terms that it shall not apply, but that in the event specified in the section the device or bequest shall

operate in a particular way unless the testator by his will indicates an intention to the contrary. There may, therefore, be a "contrary intention expressed by the will" even though the testator had never heard of the provisions of the section. What I have to consider is whether the testator has shown an intention that notwithstanding that James Meredith was dead leaving issue who might survive the testator the share and legacy should nevertheless lapse.

Approaching this codicil to see whether it shows such an intention, it appears to me that it does. For although the testator recites that the legacy and share had lapsed, no lapse at that moment had taken place because the testator was still living, and he could still make such testamentary disposition as he thought fit to meet the case that had arisen. When, therefore, he recites that the legacy and share had lapsed what he means is: "Whereas since the date of my will my son James Meredith has died, and having regard to the dispositions made by my will, the legacy and share of residue given to him by my will will lapse if I do not make some other disposition of them." Now he could, had he so wished, have provided that notwithstanding the death of James Meredith in his lifetime the legacy and share of residue should be paid to James Meredith's executors as part of James Meredith's estate, or he could have given the legacy and share direct to the children of James Meredith, or he could have said that as James Meredith has died I will not make any provision as to his legacy and share of residue, but I will let them lapse. It seems that by not disposing of the share and legacy and by bequeathing the £200 to his son's two children, he has in effect said: I do not desire that the said legacy and share shall be paid to my son's executors as part of his estate, but that subject to paying his children £100 each, the legacy and share of residue shall lapse. For these reasons, I come to the conclusion that the codicil shows a contrary intention within the meaning of s. 33.

There does not appear to be any direct authority on the point. I was, however, referred to *Re Morris, Corfield* v. *Waller* (1). In that case the testatrix after a gift to certain of her children by name had expressly provided that in case any child should die in her lifetime leaving issue surviving her, the bequests therein-before contained to her children should take effect in the same manner as if the child so dying had survived her and died immediately after her—so far providing quite unnecessarily for what would have been effected by s. 33 of the Wills Act—but the testatrix went on to say:

> "But so that the share or shares of my said estate bequeathed to him or her or which he or she would have taken if surviving me, shall devolve to his or her next-of-kin or legatees as part of his or her estate accordingly."

The learned judge had to consider whether he could give effect to that last declaration which was, of course, different from the provisions of s. 33 and he came to the conclusion that he was obliged to give effect to it. If, and so far as, he came to the conclusion that that declaration indicated a contrary intention within the meaning of s. 33, it is perhaps an authority in favour of the view I have taken; but I think that the learned judge was merely determining which of two inconsistent clauses in the will should take effect. I was also referred to a note to p. 448 of Jarman on Wills, vol. 1 (6th Edn.), which is as follows:

> "It is submitted that any expression of a contrary intention is sufficient to prevent the operation of s. 33."

So far I agree. But the note goes on:

> "Thus if a testator bequeathed £1,000 to his son A. and proceeded, 'but if my said son shall die in my lifetime, then I bequeath the sum of £200 to each of his children,' would not this be sufficient to exclude the operation of s. 33 whatever the number of the son's children might be?"

With all respect I cannot agree with that. If I had nothing in this codicil but a statement of James Meredith's death and then the gift of a legacy of £100 to each of his children, I should not be prepared to hold that the codicil showed a

contrary intention within the meaning of the section. For if the section operated the children of the deceased son would not take directly any part of the legacy or share of residue bequeathed to them and would not even be benefited by the bequest except in so far as they might be interested in his personal estate under his will or his intestacy. I could not therefore regard a direct gift to the children as an indication of the testator's intention that he did not wish the legacy or share of residue to form part of the deceased son's estate. In the present case I rely on the fact that the testator, after expressly reciting in his codicil that owing to the death of his son the legacy and share of residue given to him by the will have lapsed, makes no express disposition to prevent such lapse taking effect. This, in my opinion, amounts to an expression of his intention that the legacy and share of residue given to the son by the will shall lapse. There is no mention of the furniture in the codicil, and, therefore, the gift of that in the will takes effect by virtue of the section, but the legacy of £100 and the share of residue lapse, and as to them there is an intestacy.

Solicitors: *Churchill, Clapham & Co.*, for *Herbert Oliver*, Llandrindod Wells.

[*Reported by* G. P. Langworthy, Esq., *Barrister-at-Law.*]

POSTMASTER-GENERAL *v.* BECK AND POLLITZER

[Court of Appeal (Bankes, Scrutton and Atkin, L.JJ.), May 19, 1924]

[Reported [1924] 2 K.B. 308; 93 L.J.K.B. 1017; 131 L.T. 750; 88 J.P. 137; 68 Sol. Jo. 883; 22 L.G.R. 657]

Telegraph—Damage to line—Damage by lorry in private ownership—Absence of negligence—Liability for expenses of making good damage—Telegraph Act, 1878 (41 & 42 *Vict.*, *c.* 76), *s.* 8.

A fire alarm post in a public highway which formed part of the telegraphic lines in the pavement was damaged by a servant of the defendants while driving a motor lorry in the course of his employment. On a claim by the Postmaster-General under s. 8 of the Telegraph Act, 1878, for the expenses of making good the damage, the Postmaster-General admitted that the damage had been done without negligence.

Held: the word "person" in s. 8 must be read in its ordinary and unrestricted sense, and not limited to such persons only as were or might be said to be in statutory relation with the Postmaster-General, and, therefore, the Postmaster-General was entitled to succeed.

Per Scrutton, L.J., Atkin, L.J., agreeing: I decide this case on the assumption that some act of the defendants' servant brought the lorry into contact with the post, but that act was not negligent. I do not decide what the position would be if no act of the servant brought the lorry into contact with the post, e.g., where some other lorry knocked it into the post, or, although the article or animal which did the damage had been under the control of the defendants' servant, it was not under such control or guidance when the damage was done.

Notes. As to civil remedies for the violation of certain provisions of the Telegraph Acts, see 32 Halsbury's Laws (2nd Edn.) 43, 44; and for cases see 42 Digest 895, 896. For Telegraph Act, 1878, see 24 Halsbury's Statutes (2nd Edn.) 1013.

A Cases referred to:

(1) *River Wear Comrs.* v. *Adamson* (1876), 1 Q.B.D. 546; 46 L.J.Q.B. 83; 35 L.T. 118; 24 W.R. 872, C.A.; affirmed (1877) 2 App. Cas. 743; 47 L.J.Q.B. 193; 37 L.T. 543; 42 J.P. 244; 26 W.R. 217; 3 Asp.M.L.C. 521, H.L.; 41 Digest 974, *8643*.

B (2) *Arrow Shipping Co.* v. *Tyne Improvement Comrs., The Crystal*, [1894] A.C. 508; 63 L.J.P. 146; 71 L.T. 346; 10 T.L.R. 551; 7 Asp.M.L.C. 513; 6 R. 258, H.L.; 41 Digest 822, *6807*.

Appeal by defendants from an order of the Divisional Court (SHEARMAN and ACTON, JJ.) affirming a decision of the judge of the Mayor's Court of the city of London.

C The plaintiff, the Postmaster-General, claimed, under s. 8 of the Telegraph Act, 1878, the sum of £15 16s. 9d., being the amount of expenses incurred by him in making good a destruction or injury caused to a telegraphic line of the plaintiff situate in the pavement of the highway known as Galleons Road, North Woolwich, in the county of London, by the defendants or by their agent, on or about Nov. 10, 1922. A statement of facts was agreed to between the parties from

D which it appeared that the defendants admitted that at all material times the plaintiff maintained a telegraphic line in the pavement of Galleons Road under the powers conferred on the plaintiff by the Telegraph Act, 1863–1922. On Nov. 10, 1922, the servant of the defendants, acting in the course of his employment, drove a motor lorry along the road in question and brought the lorry into contact with a fire alarm post which formed part of the telegraphic line of the plaintiff, thereby injuring the telegraphic line. The expense incurred by the plaintiff in

E making good the injury to the line amounted to £15 16s. 9d. The plaintiff admitted that neither the defendant nor his servants were guilty of any negligence. The learned judge of the Mayor's Court entered judgment for the plaintiff for the amount claimed, and an appeal by the defendants was dismissed by the King's Bench Divisional Court. The defendants now appealed to the Court of Appeal.

F By the Telegraph Act, 1878, s. 8:

> "Where any undertakers, body, or person, by themselves or by their agents, destroy or injure any telegraph line of the Postmaster-General, such undertakers, body, or person shall not only be liable to pay to the Postmaster-General such expenses (if any) as he may incur in making good the said destruction or injury, but also, if the telegraphic communication is carelessly or wilfully

G interrupted, shall be liable to a fine not exceeding £20 per day for every day during which such interruption continues. . . ."

J. B. Matthews, K.C., and *Thomas Scanlan* for the defendants.

The Attorney-General (*Sir Patrick Hastings, K.C.*) and *Harold Murphy*, for the Postmaster-General, were not called on to argue.

H **BANKES, L.J.**—This case raises a point of very considerable general importance, and that is whether a person who, without any negligence on his part, destroys or injures any part of a telegraph line of the Postmaster-General is liable under s. 8 of the Telegraph Act, 1878, to pay the expense of making good the destruction or injury which he has caused. The matter came in the first instance before the learned judge of the Mayor's Court of the city of London and then from

I him by appeal to the Divisional Court. The learned judge of the Mayor's Court and both the learned judges in the Divisional Court dealt very fully and very clearly, and, as I think, quite satisfactorily with the arguments that were put forward on behalf of the defendants, namely, that such a person was not liable under the statute.

It has, however, been strenuously argued here that the ordinary meaning ought not to be put upon the language of s. 8, and that where that section speaks of a person who destroys or injures a telegraph line being made responsible, the court should put some restrictive meaning upon the word "person," it being suggested

that the expression "person" should be applied only to such persons as are in statutory relation with the Postmaster-General, whatever exactly that may mean. The argument is, as I understand it, that that expression is used for the purpose of excluding persons whom I may refer to as being members of the general public. That argument is based on two grounds, namely (i) that taking this statute and reading it with reference to the statutes which have preceded it and dealt with the telegraph undertakings, the court should say that the legislature has not used, and did not intend to use, the word "person" in a general sense so as to include the general public; and (ii) that the court should be careful not to impose such a liability as this upon members of the general public using the highway lawfully, in the absence of clear words indicating that such was the intention of the legislature. Speaking for myself, the reference that counsel for the defendants has made to the Telegraph Act, 1863, so far from assisting him, seems to me to point rather to the opposite conclusion, because, speaking generally of that statute, it seems to me that the word "person" when used in it is used quite generally and not in a limited sense at all. It is admitted that there is no decision which has actually any bearing upon the construction which the court should put upon this statute, and, therefore, I approach it with the desire to place the interpretation upon it which the language of the statute itself seems to me to indicate is the right one, and I cannot see any reason whatever for placing any limitation upon the word "person" as used in ss. 8 and 9 of the Act. Indeed, I think I see every reason why the legislature should have intended to include members of the general public within the purview of those sections, because by, and indeed long before, the Act of 1878 the importance of the maintenance of continuous telegraphic communication was well established, and it was known that the principal telegraph lines throughout the country existed either on or alongside public roads or in public places—in places, therefore, where they required protection from the general public, and, as it seems to me, the statutes have provided the means by which the protection is to be afforded.

I will deal first with s. 9, which deals with the penalties for obstruction, and the language used there is this:

> "Where any undertakers, body, or person or their agents obstruct the Postmaster-General or his agents in placing, maintaining, altering, examining, or repairing any telegraphic line in pursuance of this Act . . . such undertakers, bodies, or persons and agents respectively shall for every act of obstruction be liable to a fine not exceeding £10."

I ask myself, in the absence of some language to indicate the intention, why should the legislature intend to exclude from a section dealing with obstructors a member of what counsel for the defendants refers to as the ordinary public, even if he is exercising his lawful right of walking along the road which adjoins or alongside which the telegraph line is maintained. I then turn to s. 8, where again the words are: "Any undertakers, body, or person, by themselves or by their agents." Thus the statute deals with two matters, one is the destruction or injury of the telegraphic line, in which case the person committing the destruction or injury is required to pay the expenses of making good; and, secondly, if the destruction and injury have the effect of interrupting the telegraphic communication, and that interruption is careless or wilful, then, in addition to paying the expenses, the interrupter is liable to a fine. Again I ask myself why should the proposed limitation be introduced into the language of the section, and again I answer that I cannot see any reason for doing so, indeed I see every reason why the language should be read in its ordinary meaning and in an unrestricted sense. Then, if I look at the earlier sections of the statute, I find that different language is used in reference to every particular subject-matter dealt with in the section. For instance, in s. 3, the persons dealt with there are the "proprietors, lessees, directors, or persons having the control of any railway or canal"; the expression "persons" is there limited to persons having the control of any railway or canal. Section 4

applies to "any body or person having any power, jurisdiction, or control over or relating to a street or public road." Again, the term "person" is confined to that particular class. In s. 7 one finds no reference at all to persons—the reference is to "the undertakers or their agents"—but when one comes to s. 8 one finds the language extended to "undertakers, body, or person" without any limitation. In these circumstances I think the judgments given below are quite right, and that the appeal fails and must be dismissed with costs.

SCRUTTON, L.J.—This is a case raising questions of considerable public importance, and also of some legal difficulty. The court is quite familiar with cases where it is desired to cut down the general words of a statute into a narrower application than they would ordinarily have by considerations derived from the object of the statute and provisions in it. I want in the first place to make clear the assumption upon which I am deciding this case. I think if parties come to trial upon admissions of fact they might be a little more precise as to what they mean. I am told that I am to decide this case upon the admission that "the servant of the defendants acting in the course of his duty drove a motor lorry along the said highway, and brought the said motor lorry into contact with a fire alarm post, which formed part of the said telegraphic line of the plaintiff, and thereby injured the said telegraphic line," whereby the Postmaster-General claims damages against the defendants whose servant caused the injury. That leaves me absolutely in the dark as to what has happened, but from the language of the admission the servant of the defendants drove the lorry, brought it into contact with the fire alarm post, and thereby injured the telegraphic line of the plaintiff. I decide this case upon the assumption that the facts are that some act of the servant brought the lorry into contact with the post, but that act was not negligent. I do not decide what the position would be if no act of the servant brought the lorry into contact with the post, e.g., where some other lorry knocked it into the post, or, although the article or animal that did the damage had been under the control of the servant, it was not under the control of the servant or guided by the servant at the time when the damage was done.

I do not propose to decide those points because of the extreme difficulty to which they have given rise in the very similar case under the Harbours, Docks, and Piers Clauses Act, 1847, s. 74 of which provides:

> "The owner of every vessel . . . shall be answerable to the undertakers for any damage done by such vessel . . . or by any person employed about the same . . ."

A case arose where, owing to bad weather, a vessel was abandoned and, with nobody on board controlling it, drifted into a pier and did damage to it, and on that state of facts a case was taken to the House of Lords as to whether there was any limitation to be placed upon the wide words that the owner should be answerable for any damage done by such vessel. The members of the House of Lords gave many different interpretations of what that section means. The case is *River Wear Comrs.* v. *Adamson* (1), and it is criticised and to some extent explained by the House of Lords again in *Arrow Shipping Co.* v. *Tyne Improvement Comrs.*, *The Crystal* (2). Most of the Law Lords there were disposed to take the view that at any rate there was this limitation, that the liability of the owner and the right to recover by the dock did not apply where the vessel was not under the control of anybody at the time when the damage was done, and the reason why that result was arrived at seems to be partly the reason put by LORD BLACKBURN in *Adamson's Case* (1) (2 App. Cas. at p. 768), repeating the language which had been used by MELLISH, L.J., in the Court of Appeal.

> "It seems to have occurred to those who framed the statute, that in most cases where an accident occurs, it is from the fault of those who were managing the ship—and in most cases those are the servants of the owners—but that these were matters which in every case must be proved, and consequently that

there was a great deal of litigation incurred before the owner, though he really was liable, could be fixed: and with a view to meet this, the remedy proposed was that the owner, who was generally really liable (though it was difficult and expensive to prove it), should be liable without proof either that there was negligence, or that the person guilty of neglect was the owner's servant, or proving how the mischief happened, and this is expressed by saying that the owners shall be 'answerable for any damage done by the vessel or by any person employed about the same' to the harbour."

The section that we have to construe in this case, viz., s. 8 of the Telegraph Act, 1878, is something on the same lines and something of the same sort of considerations apply to it. The section provides as follows:

"Where any undertakers, body, or person, by themselves or by their agents, destroy or injure any telegraphic line of the Postmaster-General, such undertakers, body, or person shall not only be liable to pay to the Postmaster-General such expenses (if any) as he may incur in making good the said destruction or injury, but also, if the telegraphic communication is carelessly or wilfully interrupted, shall be liable to a fine. . . ."

I understand that we are to treat a fire alarm post as being a telegraph line for the purposes of the statute. It is said, on the one hand, by the Crown: Here is a perfectly plain case where a person by himself or by his agent—the owner of this lorry by his servant driving it—destroys the telegraph line, i.e., the fire alarm post, and what can be plainer? On the other hand, it is said by counsel on behalf of the owners of the lorry, that when you look at this Act, you find that it is all about undertakers who have statutory rights which may clash with those of the Postmaster-General, and, consequently, when the section uses the words "undertakers, body, or person," it is only thinking of that class of people and not of the ordinary public who have no particular statutory rights and are not undertakers carrying out any undertaking sanctioned by Parliament. It is argued that the ordinary person was not intended to be hit by this section and made liable for matters for which he would not be liable at common law unless he was guilty of negligence. When one looks into the definitions it is not at all clear, upon that view, why the word "person" should have been used at all. "Undertakers" are defined in s. 2 of the Act to mean "the parties, whether company, . . . or private persons," so that "undertakers" includes "persons." When we look at the Telegraph Act, 1863, s. 3, the definition of the term "body" is followed by these words: "any provision referring to a body applies to a person, as the case may require." So in this legislation one has already got "person" in twice, once in the definition of "undertakers," and once in the definition of "body," and yet one finds it a third time, and it occurs to one that it is put in a third time because it was meant to say something by it, not upon the lines that because I tell one three times it is true, but because the legislature meant to add something additional by putting in the word "person." Junior counsel for the defendants suggests that it may have been put in to deal with people who are empowered to give consents. It is not quite clear why people who are merely empowered to give consents should be allowed to destroy or injure telegraph lines. It seems much more likely that the people who would destroy or injure telegraph lines are the persons who are using the highway on which the telegraph line happens to be, and upon the best consideration I can give to the body of the statute, having followed the arguments on behalf of the defendants to the best of my ability, it seems to me that there is not sufficient in the Act to lead me to think that the legislature used the word "person" in any other than the ordinary sense of a person who does damage, and that it is impossible to limit it in the way that they suggest to persons who are in some statutory relation with the Postmaster-General.

I should not have thought myself that that was a very happy definition. I should have thought that the limitation, if any, which Parliament intended was as to persons who have to perform some statutory obligation which may lead to

their coming into conflict with the rights of the Postmaster-General, but, looking at the wide language of s. 8 which is much wider, as ATKIN, L.J., has pointed out, than s. 7, I do not see my way to put any limitation upon the word "person," and as I find an admission that the defendants' servant destroyed the telegraph line, it appears to me that under the section they must pay. As I have said, I do not propose to deal with the cases where it may be said that the defendant did not destroy the telegraph line because something got loose and destroyed the telegraph line, or where the something destroys the telegraph line because it is knocked into it by the action of some third person. When it is meant to raise these cases, they must be raised by admissions clearly stating the facts. Upon the admission in the present case, I limit it to the cases where an agent of the owner of the property is in control of the property, and so the person or his agent may be said actively to have destroyed the telegraphic line. For these reasons, which I have stated at some little length, because it is an important case which may govern a number of others, I come to the conclusion that the judgments below were right and that the appeal should be dismissed.

ATKIN, L.J.—I agree. I also should like to reserve the hypothesis which has been reserved by SCRUTTON, L.J., and I am particularly pleased to be able to do it, because otherwise one would have to try to elicit the true ratio decidendi of the decision of the majority of the House of Lords in *River Wear Comrs.* v. *Adamson* (1). As that is a task which has already severely tested much greater authorities than I profess to be, I am very glad to be relieved of the task. Apart from that, however, I find, I am bound to say, very little difficulty in this case. I agree that the words "undertakers, body, or person" are to some extent tautologous; quite apart from the somewhat unexpected, though not unusual, collocation of an undertaker and a body, one still has in this case the use of the word "person" which has been already introduced into both the preceding terms by statutory definition. Indeed, it would have been sufficient, apparently, to have said: "Where anybody by himself or his agent" destroys or injures any telegraphic line. However, the use of the word "person" in some collocations in the Telegraph Acts is quite unrestricted and means any legal person, and it appears to me that the words of s. 8 in themselves are perfectly plain and do not admit of any ambiguity or doubt or any such restricted meaning as is sought to be imposed upon them by counsel for the defendants. I am not quite sure that if they had to define what they meant by a person who was in statutory relation with the Postmaster-General they would find it very easy to do so, but whether they could or could not, it appears to me that there is no reason for giving to the word "person" any other than its ordinary meaning, and the obligation said to be imposed by the Act of Parliament seems to me to be one which it is perfectly possible to suppose that Parliament intended. I think it is the plain result of the language which they use, and, therefore, I think that this appeal should be dismissed.

Solicitors: *F. J. Berryman*; *Solicitor to the General Post Office.*

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

A

VORST *v.* GOLDSTEIN AND OTHERS

[KING'S BENCH DIVISION (Bailhache and Sankey, JJ.), April 15, 1924]

[Reported [1924] 2 K.B. 372; 93 L.J.K.B. 965; 131 L.T. 569]

Moneylender—Registration—Registration of partnership—Partners' names registered—Loan by one partner as individual—Validity of transaction—Moneylenders Act, 1900 (63 & 64 *Vict.*, *c.* 51), *s.* 2 (1) (*b*). B

By the Moneylenders Act, 1900, s. 2 (1): "A moneylender as defined by this Act . . . (b) shall carry on the moneylending business in his registered name, and in no other name and under no other description. . . ." The plaintiff L.V. was registered under the Moneylenders Act, 1900, as carrying on in C partnership with his son, S.V., the business of moneylenders under the name of L. and S.V. In the course of his business as a moneylender, the plaintiff lent a sum of money, the security being taken by him in his own name. On a claim by the plaintiff to recover from the borrowers the balance due of the money lent,

Held: the plaintiff having taken the security in his own name had failed to D comply with s. 2 (1) (b) of the Act of 1900, and, therefore, could not recover, although his full name appeared on the register and his only default was to fail to add the name of his partner when taking the security.

Notes. The Moneylenders Act, 1900, s. 2, has been repealed by the Moneylenders Act, 1927, s. 19 (3) and Sched. 2. See now s. 1 (3) (b) of the 1927 Act.

As to restrictions on carrying on moneylending businesses, see 27 HALSBURY'S E LAWS (3rd Edn.) 29 et seq.; and for cases see 35 DIGEST 204 et seq. For the Moneylending Act, 1927, s. 1, see 16 HALSBURY'S STATUTES (2nd Edn.) 377.

Appeal from Bow County Court.

The plaintiff, Louis Vorst, was registered under the Moneylenders Act, 1900, as carrying on the business of moneylending in partnership with his son, Sidney Vorst, under the registered partnership name of Louis and Sidney Vorst. The plaintiff F lent a sum of money on his own account, on two promissory notes, in April, 1923, for £100 each, which the five defendants signed as sureties. The security was taken by the plaintiff in his own name, and not in his registered name. The plaintiff claimed to recover £75, the balance due on one of the promissory notes. The defendants objected that the plaintiff could not recover because he had not taken the security in his registered name, and had committed a breach of the G Moneylenders Act, 1900, by carrying out a loan transaction in a name other than his registered name.

The deputy county court judge who tried the action held that the plaintiff's full name being on the register, the plaintiff was entitled to succeed, as he had not failed to comply with s. 2 of the Moneylenders Act, 1900, when he took the security for the loan in his own name, merely because the name of his partner H did not appear with him as co-lender. He accordingly gave judgment for the plaintiff for the amount claimed. The defendants appealed.

R. J. White for the defendants.

Louis Green for the plaintiff.

BAILHACHE, J.—This case raises an interesting question under the Money- I lenders Act, 1900. The plaintiff Louis Vorst and his son Sidney Vorst were registered under the Moneylenders Act, 1900, as moneylenders. The return made by Sidney Vorst states as follows: "The name of the firm to be registered as carrying on the business of moneylending Louis Vorst and Sidney Vorst." "The persons of whom the firm consists—Louis Vorst, Sidney Vorst," and the return by Sidney Vorst went on to certify that it was a true return of the particulars required by s. 2 of the Moneylenders, Act, 1900, and that none of the persons named above was already registered as carrying on the business of moneylending either alone or

as a member of any other firm. Louis Vorst and Sidney Vorst represented themselves as carrying on business in partnership in their full names. The plaintiff carried out a moneylending transaction in his own name and not in that of the partnership. The deputy county court judge held that, as the plaintiff was registered in his own name, he was entitled to take a security for money in his own name. In my judgment, the deputy county court judge has gone wrong, because if his decision is correct it would mean that a person registered in his own name as a firm would be entitled to carry on business in two ways at the same time—namely, in partnership and also separately on his own account. The Moneylenders Act, 1900, however, did not allow that to be done. The deputy county court judge made a mistake and the appeal must be allowed.

SANKEY, J.—I agree.

Appeal allowed.

Solicitors: *Bruce Millar & Co.*; *Windsor & Brown.*

[*Reported by* T. W. MORGAN, ESQ., *Barrister-at-Law.*]

STEWART *v.* MASSETT

[CHANCERY DIVISION (P. O. Lawrence, J.), October 16, 1924]

[Reported 132 L.T. 301; 69 Sol. Jo. 72]

Landlord and Tenant—Lease—Determination—Power to either party to determine lease for twenty-one years at end of first seven or fourteen years—Lessee's option for further term of seven years—Notice given for grant of further term before the expiration of fourteen years—Notice given by lessor determining term at end of fourteen years—Right of lessee to further term.

By an indenture of lease, dated June 12, 1912, premises were demised for a term of twenty-one years from Mar. 25, 1910, to the defendant lessee at a rent of £65 for the first seven years and of £75 for the last seven years of the term. It was provided that the tenancy should be determinable at the end of the first seven or fourteen years by either party on giving to the other six months' previous notice in writing expiring at the end of either of such periods of seven or fourteen years, and it was also provided that, if the lessee should give six months' notice to the lessor prior to the expiration of the term of twenty-one years that he desired a further lease of the premises for a term of seven years, the lessor would grant a further lease of the premises accordingly, the lease to be in the same form as the existing lease with such modifications as the lessor's solicitors might approve and to be considered as commencing on Mar. 25, 1931, at the rent of £80. By a notice dated Aug. 20, 1923, the lessee gave notice to the lessor that he was desirous of exercising his option to have a further term granted to him of seven years from Mar. 25, 1931, at the rent of £80. On Aug. 23, 1923, the lessor gave the lessee notice to determine the tenancy as from Mar. 25, 1924. This summons was issued for a declaration that the tenancy created was duly determined on Mar. 25, 1924, by the notice of Aug. 23, 1923, notwithstanding that the lessee had, by the notice of Aug. 20, 1923, expressed his desire to have a further lease for the term of seven years from Mar. 25, 1931.

Held: the clause in the lease giving the lessee an option to have a further term of seven years was subject to the operation of the clause giving either party power to determine the term at the end of the first seven or fourteen

years; it would not be a reasonable construction that, though the lessor had determined the term in 1924, the lessee still had a right to demand a reversionary lease for seven years commencing from Mar. 25, 1931. A

Notes. As to an option to renew a lease, see 23 HALSBURY'S LAWS (3rd Edn.) 473, 474; and for cases see 31 DIGEST (Repl.) 67 et seq.

Summons. B

The facts are set out in the headnote.

C. E. E. Jenkins, K.C., and *S. Chetwynd Leech* for the plaintiff.
Owen Thompson, K.C., and *C. G. Church* for the defendant, the lessee.

P. O. LAWRENCE, J.—This summons raises a short, but by no means easy, point of construction on a lease which is dated June 12, 1912. To my mind it is C obvious that there has been a drafting blunder in the last two clauses of the lease, on which the whole point turns. The lease is granted for twenty-one years from Mar. 25, 1910, the term of twenty-one years being determinable "as hereinafter provided." That expression refers to the penultimate clause in the lease, which is a proviso that the tenancy created by the lease shall be determinable at the end of the first seven or fourteen years by either party giving the other six calendar D months' previous notice in writing expiring at the end of the period of seven or fourteen years. The ultimate clause is one providing for a further lease of seven years to be granted on certain terms at the option of the lessee, and is as follows:

> "If the lessee should be desirous of having a further lease of the premises for a term of seven years and of such desire shall give to the lessor six calendar months' notice in writing prior to the expiration of the term of twenty-one E years hereby granted, then and in such case the lessor will at the cost of the lessee grant to the lessee a further lease of the said premises accordingly and for such term as aforesaid, the lease to be in the same form as this present lease with such modification as the lessor's solicitors may approve and to be considered as commencing on and the term to be computed from Mar. 25, 1931, and to be at the rent of £80 for the further term of seven years if the same F is granted."

What happened was this. On Aug. 20, 1923, the lessee gave a notice to the lessor that he was desirous of having a further lease of the premises for a term of seven years from Mar. 25, 1931, at the rent of £80. Thereupon the lessor, on Aug. 23, 1923, gave a notice to the lessee to determine the lease on Mar. 25, 1924.

In these circumstances, the question arises, what is the effect of the two clauses G in the lease to which I have referred? I think in a case of this kind it is the duty of the court to endeavour to reconcile the two clauses and give a reasonable meaning, if it can be done in view of the expressions used by the parties, to the bargain which they have come to in the lease. Notwithstanding counsel for the lessee's argument, which is, I may say, forcible and difficult to answer in kind, I have come to the conclusion that the ultimate clause is subject to the operation H of the penultimate clause which immediately precedes it. I think it is obvious, reading this lease as a whole, that the parties bargained for a term of twenty-one years, which was to be determinable at certain fixed periods as expressed by the lease. I think that that is obviously the intention of the parties. I think, further, that it appears from the wording of the ultimate clause that it was the intention of the parties that, if the lease had not been determined by notice prior to that I date, that is to say, if the lease continued until the ultimate period of seven years, the third period of seven years, the lessee was to have an option to get a further lease of seven years; in other words, that the ultimate clause is subject to the operation of the penultimate clause, and the penultimate clause is one which does remain in force throughout the term of twenty-one years, and, therefore, necessarily, if exercised, overrides the provision in the ultimate clause. I do not think that it would be reasonable to construe this lease as entitling the lessee to a reversionary lease at the end of the term in 1931 in circumstances where the lessor

has determined that term in the year 1924, nor do I think it reasonable to construe the lease so as to enable the lessee, by giving a notice for grant of the further lease, to prevent the lessor and himself from determining the lease at the end of the first seven or fourteen years. The only way in which these two clauses can be reconciled, and reconciled in such a manner as to give a reasonable interpretation to the contract between the parties, is in the manner which I have stated at the outset, and I propose to make a declaration on the construction of the lease in that sense.

Solicitors: *Douglas Wiseman & Co.*; *E. C. Kilsby & Son*, for *E. Edwards & Son*, East Ham.

[*Reported by* GEOFFREY P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

STAPLEY *v.* READ BROS., LTD.

[CHANCERY DIVISION (Russell, J.), March 7, 12, 17, 1924]

[Reported [1924] 2 Ch. 1; 93 L.J.Ch. 513; 131 L.T. 629; 40 T.L.R. 442; 68 Sol. Jo. 519]

Company—Dividend—Payment from credit balance of profit and loss account—Debit balance of account for previous year not discharged—Availability for dividend of profits originally applied in writing off or down book value of assets and afterwards written back on ground that such assets stood at less than true value.

In 1906, the balance-sheet of a company showed as an asset £140,000 for goodwill and other things. Between 1906 and 1908, the goodwill was from time to time written down and a reserve fund was built up out of profits. In 1918, the goodwill disappeared from the assets side, and the reserve fund was reduced on the liability side to £10,000. It was stated in the report for 1918 that "the goodwill account has been eliminated from the balance-sheet by writing it off against the reserve account." For the purposes of its accounts the company then treated the goodwill as of no value. In 1921, it issued 100,000 5 per cent. cumulative preference shares of £1 each. At the end of 1922 there was a debit balance on the profit and loss account of £20,504 16s. 6d. In 1923 the directors proposed to pay the dividends on the cumulative preference shares for 1921, 1922 and 1923 out of the current year's profits, and to carry the balance forward to the next year's account. It was further stated that it was recommended "that the debit balance to profit and loss account as at Dec. 31, 1922 (£20,504 16s. 6d.), be carried to suspense account and written off against a reserve of £40,000 to be created by writing back to reserve £40,000 of the profits applied in the past in writing off goodwill (goodwill being restored in the balance-sheet as an asset at that figure), leaving a balance of £19,495 3s. 6d. standing to reserve." The question having arisen whether the company had power to adopt this procedure, this action was commenced and an injunction was asked, on motion, to restrain the company (i) from distributing in dividend the credit balance shown on the company's profit and loss account at Dec. 31, 1923, or any part thereof, until the debit balance on the profit and loss account at Dec. 31, 1922, had been discharged; and (ii) from treating as profits available for dividend any profits originally applied in writing off or down the book value of any of the company's assets and afterwards written back on the ground that such assets stood in the company's books at less than their true value.

Held: the injunction asked for could not be granted because (i) profit and loss was not to be treated as a continuous account so that no dividend could be declared out of profits earned in one year until any debit to profit and loss in a previous year had been made good (dicta of SWINFEN EADY, L.J., WARRINGTON, L.J., and SCRUTTON, L.J., in *Ammonia Soda Co., Ltd.* v. *Chamberlain* (1), [1918] 1 Ch. at pp. 283, 289, 292, 299, applied); and (ii) the shareholders might, if they thought fit, write back to profit account so much of the depreciation written off goodwill as had proved to be in excess of proper requirements.

Notes. Referred to: *Long Acre Press, Ltd.* v. *Odhams Press, Ltd.*, [1930] All E.R.Rep. 237; *Edwards* v. *Saunton Hotel Co.*, [1943] 1 All E.R. 176.

As to payment of dividends by a company, see 6 HALSBURY'S LAWS (3rd Edn.) 396 et seq.; and for cases see 9 DIGEST (Repl.) 632 et seq.

Cases referred to:

(1) *Ammonia Soda Co.* v. *Chamberlain*, [1918] 1 Ch. 266; 87 L.J.Ch. 193; 118 L.T. 48; 34 T.L.R. 60; 62 Sol. Jo. 85, C.A.; 9 Digest (Repl.) 146, *858*.

(2) *Verner* v. *General and Commercial Investment Trust*, [1894] 2 Ch. 239; 63 L.J.Ch. 456; 70 L.T. 516; 10 T.L.R. 393; 38 Sol. Jo. 384; 1 Mans. 136; 7 R. 170, C.A.; 9 Digest (Repl.) 181, *1170*.

Also referred to in argument:

Re Bridgewater Navigation Co., [1891] 2 Ch. 317; 60 L.J.Ch. 415; 64 L.T. 576; 7 T.L.R. 360, C.A.; 10 Digest (Repl.) 1067, *7403*.

Bishop v. *Smyrna and Cassaba Rail. Co.* (*No. 2*), [1895] 2 Ch. 596; 64 L.J.Ch. 806; 73 L.T. 337; 2 Mans. 575; 13 R. 803; 9 Digest (Repl.) 178, *1150*.

Cross v. *Imperial Continental Gas Association*, [1923] 2 Ch. 553; 93 L.J.Ch. 49; 129 L.T. 558; 39 T.L.R. 470; 9 Digest (Repl.) 645, *4289*.

Foster v. *New Trinidad Lake Asphalt Co., Ltd.*, [1901] 1 Ch. 208; 70 L.J.Ch. 123; 49 W.R. 119; 17 T.L.R. 89; 45 Sol. Jo. 100; 8 Mans. 47; 9 Digest (Repl.) 629, *4201*.

Action.

The facts are set out in the judgment of RUSSELL, J.

Courthope Wilson, K.C., and *Dighton Pollock* for the plaintiff.

Bennett, K.C., and *Gordon Brown* for the defendant company.

Cur. adv. vult.

RUSSELL, J.—The defendant company, Read Bros., Ltd., were formed in the year 1898, to acquire the business of the firm, Read Bros. The balance-sheets up to and including the year 1906 show as an asset in respect of goodwill and other things a sum of £140,000. The report for the year 1906 shows an intention to write that asset down by £10,000 out of profits. The report contains this statement:

"The net profit for the year after deducting interest on debenture stock and including the amount of £1,165 2s. 7d. brought forward from the last account is £31,369 8s. 3. Interim dividends on the preference and ordinary shares at the rate of 5 per cent. and 8 per cent. per annum respectively have already been paid, leaving an available balance of £24,869 8s. The directors now propose a further dividend at the rate of 5 per cent. per annum on the preference shares and at the rate of 12 per cent. per annum on the ordinary shares (making for the whole year 5 per cent. on the former and 10 per cent. on the latter), which will absorb £8,500, leaving £16,369 8s. 4. Out of the balance of £16,369 8s. it is proposed to add £4,000 to reserve (making that fund up to £42,000), and to place a further sum of £1,000 to business contingency fund (making that fund up to £3,011 6s. 2d.), to write £10,000 off goodwill, and to carry forward £1,369 8s. to next year's account."

That process was repeated from time to time, and in the balance-sheet for 1917 the goodwill had been written down to £51,000. Meanwhile, a reserve fund had

A been built up out of profits, amounting to £50,000. Out of the 1917 profits £11,000 was added to the reserve fund, making it £61,000, and the report for 1918 shows what was then done. Paragraph 5 of the report is in these words:

"As intimated at the last annual meeting, the goodwill account has been eliminated from the balance-sheet by writing it off against the reserve account,"

B that is to say, goodwill disappears from the assets side and on the liability side the reserve fund, which was £61,000, is reduced to £10,000. The position accordingly was as follows: The company still owned the asset, whatever its true value might be, but, for the purpose of its accounts, the company treated that asset as of no value. The company prospered, and in the year 1920, when they had a reserve fund of £25,000 and nearly £33,000 balance of profits brought forward from the

C previous year, they capitalised the reserve fund and £15,000 of the balance of profits by the issue of 40,000 bonus ordinary shares. Thus, by doing that, the company definitely and irrevocably capitalised £40,000 of their undistributed profits. They turned those into share capital. For the year 1921, the company made a net loss on profit and loss account of £45,802, reduced, after deduction of a business contingency fund and a balance of profits brought forward from the

D previous year, to a sum of £15,717. In 1922 there was a further loss of £4,787, making a total debit to profit and loss account of £20,504 16s. 6d. In 1923 they made a net profit of £13,430 8s. 8d. The preference dividends for 1921, 1922 and 1923 are unpaid, and there have been issued 100,000 5 per cent. cumulative preference shares of £1 each.

E The directors are desirous of paying off the three years' preference dividends, and what they propose to do is clearly shown by the directors' report and by the balance-sheet, which has been certified by the company's auditors. The report is in these terms. Paragraph 1 expresses their pleasure at once more showing a profit. Paragraph 2 is:

"The net profit, after providing for interest on the debenture stock, is

F £13,340 8s. 8d. This is before providing for the debit balance to profit and loss account as at Dec. 31, 1922, which amounted to £20,504 16s. 6d., and the question how the current year's profits shall be dealt with has been engaging the careful consideration of the directors. 3. As will be seen from the accounts, the financial position of the company is very strong, cash and Government securities alone as at Dec. 31, 1923, amounting to over £77,000. This is due

G to the very conservative policy adopted in the past as regards payment of dividends, £180,000 of profits, which might have been dividend, having been retained in the business, and as to £140,000 applied in writing off entirely the amount at which goodwill originally stood in the balance-sheet, and as to the balance of £40,000 capitalised in 1919 by the issue of bonus shares to that amount. 4. As the result of their deliberations, the directors recommend that

H the current year's profits be applied in paying the three years' dividend accrued on the preference shares to Dec. 31, 1923, which will require £11,531 5s., leaving a balance of £1,899 3s. 8d. to be carried forward to next year's account, and that the debit balance to profit and loss account as at Dec. 31, 1922 (£20,504 16s. 6d.), be carried to suspense account and written off against a reserve of £40,000, to be created by writing back to reserve £40,000 of the

I profits applied in the past in writing off goodwill (goodwill being restored in the balance-sheet as an asset at that figure), leaving a balance of £19,495 3s. 6d. standing at reserve. 5. The accounts submitted herewith have been made out accordingly, and subject to their being adopted at the meeting, the directors recommend payment of the three years' dividend accrued on the preference shares to Dec. 31, 1923, amounting (less tax) to £11,531 5s. 6. The directors are satisfied that, having regard to the company's past history as a whole, £40,000 is a conservative value to place upon the goodwill, and that the course which they recommend is financially sound and in the interests of the company,

the profits earned during the calendar year not being required in the business, whilst the existence of arrears of dividend on the preference shares is detrimental to the company's general credit and financial standing. 7. The alternative would be to apply the calendar year's profits towards reducing the debit balance to profit and loss account as at Dec. 31, 1922, and carry forward the balance of such debit, which would mean postponing the resumption of payment of dividends until a future date."

Doubts being raised as to the legality of this procedure and other matters, the present action has been started. By the amended notice of motion, injunctions are asked to restrain the defendant as follows: "1. From distributing in dividend the credit balance shown on the defendant company's profit and loss account as at Dec. 31, 1923, or any part thereof, until the debit balance on the defendant company's profit and loss account, as at Dec. 31, 1922, has been discharged. 2. From treating as profits available for dividend (a) any profits originally applied in writing off or down the book value of any of the defendant company's assets and subsequently written back, on the ground that such assets stand in the company's books at less than their true value; (b) any unrealised profit arising from an estimated increase in the value of any capital asset of the defendant company." As regards para. 1, this raises a question which in no way depends on the question of restoring the goodwill as an asset in the balance-sheet and writing profits back to reserve. It raises the simple question, whether profit and loss is to be treated as a continuous account so that no dividend can be declared out of profits earned in one year until any debit to profit and loss in respect of previous years has been made good. So far as I am concerned, this point is covered by the views expressed by the Court of Appeal in *Ammonia Soda Co.* v. *Chamberlain* (1). SWINFEN EADY, L.J., uses this language ([1918] 1 Ch. at p. 283):

"The plaintiff company contends, however, that, although net profits earned during the period, they were not available for dividend, and cannot really be considered 'profits,' as in the earlier period of the plaintiff company's history a loss had been incurred, and they contend that until such loss has first been made good there cannot be any profits in the true sense of the word. In my judgment this argument is unsound and has been exposed again and again. The Companies Acts do not impose any obligation upon a limited company, nor does the law require, that it shall not distribute as dividend the clear net profit of its trading unless its paid-up capital is intact or until it has made good all losses incurred in previous years."

Again (ibid. at p. 289) he says:

"Mr. Gore-Browne invited the court to lay down that wherever there was a debit to the profit and loss account, irrespective of the way in which it arose, of the stage in the company's operations, and of the nature and business of the company, it was illegal to divide profits subsequently earned without first writing off, out of those profits, the amount of the debit. To do so would be to fall into the error which LORD MACNAGHTEN pointed out should be avoided, and would only serve to harass and embarrass business men and impose upon companies a burden which Parliament has abstained from casting upon them."

WARRINGTON, L.J., says this (ibid. at p. 292):

"It has been asserted in this case, not for the first time, that there is a further restriction—suggested to be a corollary of the rule I have just mentioned—which would make it illegal for a company to pay dividends out of the profits of a current year, unless it first makes good deficiencies in paid-up capital occasioned by losses in previous years; or, to put the contention in a broader form, no dividends can properly be paid out of profits so long as there are losses previously incurred and not made good. In my opinion this alleged restriction has no foundation in law."

SCRUTTON, L.J., expresses his views in these terms (ibid. at p. 299):

"I find nothing in that decision [he is referring to *Verner* v. *General and Commercial Investment Trust* (2)] which renders the views of the Court of Appeal within their legitimate compass no longer binding upon us; and, finding those decisions spread over a period of some twenty years, I adopt them, and I come to the conclusion that on the third and fourth points raised in answer to the attack made on the defendants in this case the decisions of the Court of Appeal bind me to say, first of all, that these dividends were not paid out of capital, for the capital, if lost at all, had been lost in preceding years, and could not be used to pay dividends; secondly, that there was in this case no obligation on the plaintiff company, before paying dividends out of profits accrued in on ordinary period of its working, to make good losses of capital which had accrued in a previous ordinary working period."

I cannot grant the injunction asked.

As regards para. 2 (a) the point is not covered by direct authority. If the company had kept their accounts in a different form, then no difficulty would have arisen. If they had retained goodwill as an asset in their balance-sheet, and if, instead of writing off its value out of profits, they had carried those profits to a goodwill depreciation reserve fund, they would have been at liberty at any time to distribute those profits, at all events to the extent by which the amount of such a reserve fund exceeded the amount of the actual depreciation. Thus, if, as is admitted, the honest value of the goodwill at the present time is at least £40,000, and there was £140,000 to the credit of such reserve, they could have distributed £40,000 of the reserve fund as profits. Does it make any difference that they have kept their accounts in another form, and that, instead of placing the profits to a reserve account, they have purported to apply them in writing off a corresponding amount to the value of the goodwill? The answer seems to me to depend on the further question, have the company finally and irrevocably capitalised those profits so as to disentitle themselves for ever afterwards from restoring them to reserve and dealing with them as profits? No doubt the accounts showing the particular methods adopted were approved every year by the shareholders in general meeting; but I am not satisfied that the shareholders thereby intended or bound themselves for all time and in all circumstances to give up their claims to these profits and to treat them as capital only.

In my opinion, unless there is anything in the Companies (Consolidation) Act, 1908, or in the constitution of the company to prohibit it, the shareholders may, if they think fit, write back to profit account so much of the depreciation written off goodwill as has proved to have been in excess of proper requirements. This is shown in the present case to be a sum of not less than £40,000. There is no provision that I am aware of, either in the Companies (Consolidation) Act, 1908, or in the company's constitution which prevents this being done, nor is there any prejudice to creditors.

I am unable to grant the injunction asked for in para. 2 (a). The question raised in para. 2 (b) does not accordingly fall for decision, and I say nothing about it. The motion is refused.

Solicitors: *Taylor & Humbert*; *Dawson & Co.*

[*Reported by* J. L. DENISON, ESQ., *Barrister-at-Law.*]

A

Re NATIONAL BENEFIT ASSURANCE CO., LTD.

[CHANCERY DIVISION (Eve, J.), March 26, 27, June 24, 1924]

[Reported [1924] 2 Ch. 339; 94 L.J.Ch. 33; 132 L.T. 50; 40 T.L.R. 755; 68 Sol. Jo. 753; [1924] B. & C.R. 231]

B

Insurance—Life assurance—Winding-up of insurance company—Policy mortgaged with company at date of winding-up—Set-off of value of policy against policy-holder's debt—Bankruptcy Act, 1914 (*4 & 5 Geo. 5, c. 59*), *s. 31.*

A policy-holder in a life assurance company had mortgaged his policy with them, which mortgage was still in existence at the time of the winding-up of the company. On the question whether, in ascertaining the sum payable to the company, the policy-holder ought to be credited with the amount at which the policy had been valued under the Assurance Companies Act, 1909,

C

Held: the Bankruptcy Act, 1914, s. 31, applied, and, therefore, the policy-holder was entitled to be credited with the value, and to set it off against his mortgage debt.

Ex parte Price (1) (1875), 10 Ch. App. 648, distinguished.

D

Notes. Approved and followed: *Re City Life Assurance Co.*, [1925] All E.R.Rep. 453.

As to set-off, see 2 HALSBURY'S LAWS (3rd Edn.) 480 et seq.; and for cases see 10 DIGEST (Repl.) 1172–1173. For the Bankruptcy Act, 1914, s. 31, see 2 HALSBURY'S STATUTES (2nd Edn.) 365.

E

Cases referred to:

(1) *Re Lankester, Ex parte Price* (1875), 10 Ch. App. 648; 33 L.T. 113; 23 W.R. 844, L.JJ.; 10 Digest (Repl.) 1172, *8156.*

(2) *Re Daintrey, Ex parte Mant*, [1900] 1 Q.B. 546; 69 L.J.Q.B. 207; 82 L.T. 239; 7 Mans. 107, C.A.; 4 Digest (Repl.) 445, *3914.*

(3) *Re Asphaltic Wood Pavement Co., Lee and Chapman's Case* (1885), 30 Ch.D. 216; 54 L.J.Ch. 460; 53 L.T. 65; 33 W.R. 513, C.A.; 10 Digest (Repl.) 990, *6814.*

F

(4) *Paddy* v. *Clutton*, [1920] 2 Ch. 554; 90 L.J.Ch. 19; 123 L.T. 808; [1920] B. & C.R. 113; 10 Digest (Repl.) 1172, *8158.*

Adjourned Summons taken out by the liquidator of the National Benefit Assurance Co., Ltd., to determine whether, in ascertaining the sum payable to the company by a policy-holder whose debt on the mortgage of his policy to the company was still outstanding at the date of the liquidation, the policy-holder ought to be credited with the amount at which the policy had been valued or with the dividend ultimately payable thereon.

G

Jenkins, K.C., and *Holmes*; *Courthope Wilson, K.C.*, and *Beebee*; *Cunliffe, K.C.*, and *Whinney*; *Archer, K.C.*, and *Spens*; *Hurst, K.C.*, and *Stamp*; *Israel*; *Luxmoore, K.C.*, and *Vernon*; *Grant, K.C.*, and *Wolfe*; *O. Thompson, K.C.*, and *Hodge*; and *Bennett, K.C.*, and *Gavin Simmonds, K.C.*, appeared for the various parties.

H

EVE, J.—The respondent, Paul Wilder Potter, is one of a class of persons who effected policies of assurance on their own lives with the National Benefit Assurance Co., Ltd., and afterwards assigned the policies to the company by way of mortgage for securing advances made to them by the company. The company was ordered to be wound-up compulsorily by the court on July 25, 1922, on a petition presented on July 11. On the making of that order the policies fell to be valued in the manner prescribed by Sched. VI to the Assurance Companies Act, 1909, and the claim of each policy-holder provable in the winding-up was ascertained and fixed at the amount of the valuation so made. The liabilities of the company are considerable, and it seems reasonably certain that the claims of the life policy-holders

I

A will not be paid in full. In these circumstances, the question is raised whether, in ascertaining the sum payable to the company by a policy-holder whose mortgage debt was still outstanding at the date of the liquidation, he ought to be credited with the amount at which the policy has been valued or with the dividend ultimately payable thereon.

The claimant, relying on the mutual credit or mutual dealings section—s. 31 of B the Bankruptcy Act, 1914, applicable in this winding-up by virtue of s. 207 of the Companies (Consolidation) Act, 1908—insists that he ought to be credited with the full amount for which he is entitled to prove, that is to say, the value affixed to the policy. The liquidator, on the other hand, maintains that authority binding on this court, precludes the application of the mutual credits section to the case of the claimant and of the class of mortgagor policy-holders which he has been selected C to represent. Apart from authority, the view put forward on behalf of the claimant would appear to be justified by the statutory provisions on which he relies. They are to be found in the Bankruptcy Act, 1914. By sub-s. (3) and sub-s. (8) of s. 30 of that Act, the value put on the policy is to be deemed to be a debt provable in the winding-up. The amount of the mortgage debt owing to the company by the policy-holder is not in dispute, and the result looks very like a position in which D there are cross-demands or mutual debts. Such a position, it is argued, is precisely the one contemplated by s. 31, which provides that where there have been mutual debts, or other mutual dealings between a bankrupt and any other person proving a debt under the receiving order,

> "an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party shall be E set off against any sum due from the other party, and the balance of the account, and no more, shall be claimed or paid on either side respectively."

For this argument support is to be found in the judgment of the Court of Appeal in *Re Daintrey* (2), where LINDLEY, M.R., in holding that the trustee in Daintrey's bankruptcy was bound to allow the full amount of the debt owing by Daintrey to Messrs. Mant against the debt due from them to the estate, said ([1900] 1 Q.B. F at p. 572):

> "How can the trustee insist upon having 20s. in the £ from Messrs. Mant, and say that Messrs. Mant must be content with a dividend on the debt due to them from Daintrey? Such a contention is, in my opinion, unarguable. It is to remedy such an injustice that the provisions of the old bankruptcy law have been re-cast, and the point has been dealt with by the mutual credit G provisions of s. 38 of the Bankruptcy Act, 1883."

In passing, I may perhaps point out that the particular provisions with which this case is concerned do not materially differ in the Acts of 1869, 1883, and 1914.

Substituting the liquidator of the company for the trustee and the claimant for Messrs. Mant in the passage I have just read, the observations of the lord justice H would appear to be not otherwise than apposite to the present case. But, as has been pointed out on behalf of the liquidator and those opposing the claimant's contention, in *Daintrey's Case* (2) there was an existing debt due from the debtor at the date of the receiving order and the act of bankruptcy on which it was founded, whereas in the present case the claim did not come into existence until the winding-up order was made and the company thereby declared its inability to I perform the contract—facts which indicate the grounds on which policy-holders have been held liable in a winding-up to pay premiums accruing due between the presentation of the petition and the making of the winding-up order. Is the operation of the mutual dealings section excluded by the distinction indicated between this case and *Daintrey's Case* (2)? I think not. *Lee and Chapman's Case* (3) is an authority to the contrary. There the dates were: Dec. 9, 1882, petition; Jan. 13, 1883, order to wind-up; May 25, 1883, notice requiring the company to maintain the streets for fifteen years, the giving of which was a condition precedent to the right to claim the damages which the Commissioners of

Sewers were ultimately held entitled to set off against the debt owing by them to the liquidator. BRETT, M.R., puts it in this way (30 Ch.D. at p. 222):

> "As between them [that is, the commissioners and the liquidator] this claim to damages can be proved in the winding-up. The moment I come to that conclusion I must hold that the Bankruptcy Act, 1869, s. 39 [that was the mutual dealings section in that Act], applies, and that the claim of the commissioners is to be treated by way of set-off, and they are entitled to say that they cannot be called upon to pay more than the amount which they owed the company diminished by that which the liquidator owed them for these damages."

COTTON, L.J., puts it even more pointedly. After stating the terms of the contract as to the company's liability to maintain if notice were given, he goes on (ibid. at p. 223):

> "Of course that breach [that is, breach of the agreement to maintain] has not occurred actually, but the company has put itself in such a position that it cannot possibly perform the contract, and the commissioners are entitled to prove, although the notice had not been given at the date of the liquidation or at the date of the completion of the work by the liquidator; in my opinion, there is a claim for damages capable, as the Vice-Chancellor thought, of being proved in the winding-up. The question is whether it does not come under the mutual credit clause, s. 39. In my opinion it does: mutual dealings in respect of which there are these cross-claims are capable of being proved in the liquidation as well as the other claim which the liquidator has against the commissioners. And why should it not be? It is argued that this is not a liability at the time because there was no breach. At the time when the company commenced its liquidation, it was under a contract which implied a liability to maintain these streets if it were required. It is now rendered impossible by the winding-up for the company to do that, and in my opinion, though no notice has been given before the commencement of the winding-up, that is properly a liability the damages for which are capable of being proved, and, if capable of being proved, are capable under the mutual credit clause of being set off against any claim by the liquidator as against the commissioners."

It is, I think, demonstrated by these authorities that to bring the mutual dealings section into operation it is not necessary that there should be mutual debts existing at the date of the winding-up—that being, according to *Daintrey's Case* (2), the material date; it is sufficient if there are contractual obligations the breach of which may give rise to a claim for damages provable in the winding-up. The decision in *Lee and Chapman's Case* (3) goes even further, in that the winding-up there did not of itself involve a breach, and there was in fact no maintainable claim for damages until the notice to repair had been given five months after the commencement of the winding-up. Why are these principles not applicable to the case of a mortgagor policy-holder? I cannot appreciate any satisfactory grounds on which the breach of a contract of life assurance can be treated as distinguishable from the breach of any other contract in determining whether the mutual dealing provisions apply as between assurer and assured. It is true that, as a general rule, the sum assured will only become payable on the happening of a future event—the death of the assured—if certain recurrent payments are made by the assured in the meantime. But this is not always the case, as many policies assuring a sum to be paid at death are paid up in full by a limited number of premiums, all of which may well have been made before the commencement of the winding-up, and even if the continued payment of premiums is a condition precedent to the ultimate receipt of the sum assured, what distinction can be drawn between that contract and hundreds of others wherein are involved mutual obligations? In all such cases, obligations on the part of the claimant must be a factor in determining the quantum of the damage recoverable from the defaulting party; but their presence in the contract of assurance introduces no distinguishing element, and cannot be

A a ground for placing such a contract in a category of its own. Nor, in my opinion, can the fact that the quantum of the damage suffered by the assured on the insolvency of the assurer and provable in such insolvency is ascertained by special statutory methods alter the fact that the amount so ascertained is damages for breach of contract and provable as such. The result is that, unless I am precluded from so doing by the decision of the Court of Appeal in *Ex parte Price* (1), I am B prepared to hold that the class of respondents represented by Mr. Potter are entitled to be credited with the values of their respective policies against their respective indebtedness to the liquidating company.

Ex parte Price (1) does, no doubt, present a difficulty, but there were, I think, certain facts there which are not present here and one important passage in the judgment of JAMES, L.J., which justify me in distinguishing it from the present C case. There the policies had been valued under the special Act referring the affairs of the assuring companies to arbitration (the European Assurance Society Arbitration Act, 1872); the estates of the assurers and assured were both in liquidation and, as the mutual dealings provisions of the Bankruptcy Act had not at that date been extended to companies in liquidation, the liquidator of the assurers could not claim to deduct the mortgage debt from the value put on the D policies, but had to credit the estate of the assured with dividends on the full value. This being the position of the companies in liquidation, the question arose whether the trustee in the liquidation of the affairs of the assured could successfully claim in his liquidation to set off against the mortgage debt, and thereby wholly extinguish it, the larger sum at which the policies had been valued. The court answered this question in the negative. It is important to see what a E contrary decision would have involved. It would have meant that the liquidating debtor's estate would have received 20s. in the pound on the mortgage debt and interest and a dividend of 3s. or more on the difference between that amount and the £446 8s., at which the policies had been valued. If, in similar circumstances, the mortgage debt and interest had exceeded in amount the value of the policies, the companies in liquidation would have paid 20s. in the pound on the full value F of the policies and would receive only such dividend as the liquidating debtor's estate would pay on the excess. In other words, the application of the mutual dealings provisions to the facts in *Ex parte Price* (1) would have brought about the very injustice which, according to LINDLEY, M.R., they were framed to defeat.

It is true that the judgments are not expressly based on these considerations, but the observations of JAMES, L.J., at the beginning of his judgment, where he points G out that at that time there was no right of set-off under the Companies Acts and, therefore, no set-off in favour of the liquidators against the claim of Dr. Lankester's trustee under the winding-up, tend, I think, to show that he was not unmindful of the difference in the treatment which the trustee was claiming to have meted out to him from that to which the liquidators had to submit.

The result is that, notwithstanding the judgment in *Paddy* v. *Clutton* (4), which H naturally raises a doubt in my mind whether the conclusion at which I have arrived is sound, this case is not controlled by the decision in *Ex parte Price* (1), and the order on the summons must be so framed as to give the mortgagor policy-holders the full benefit of the mutual credits section, and not the restricted right for which the other creditors have contended.

I Solicitors: *Pritchard & Sons*; *Hatchett-Jones & Co.*; *Clifford, Turner & Hopton*; *Johnson, Jecks & Colclough*; *Timbrell & Deighton*; *Marcus & Francis*; *Swepstone, Stone & Co.*; *Peter Thomas & Clark.*

[*Reported by* A. W. CHASTER, ESQ., *Barrister-at-Law.*]

A

Re HAWKINS. WATTS *v.* NASH

[CHANCERY DIVISION (P. O. Lawrence, J.), March 27, 1924]

[Reported [1924] 2 Ch. 47; 93 L.J.Ch. 319; 131 L.T. 446; 68 Sol. Jo. 561]

B

Gift—Donatio mortis causa—Return to donor for safe custody—Effect.

A resumption of possession by the donor of the subject-matter of a donatio mortis causa does not revoke the gift unless it is a resumption of possession coupled with dominion, and so a donor who resumes possession as a mere custodian for the donee does not thereby revoke the gift.

C

Dicta in *Re Wasserberg, Union of London and Smith's Bank, Ltd.* v. *Wasserberg* (1), [1915] 1 Ch. at p. 202, and in *Bunn* v. *Markham* (2) (1816), 7 Taunt. at pp. 231–232, explained and applied.

D

The testator, while on his death-bed, placed banknotes to the value of £5,000 in an envelope endorsed by him with the name of his niece with a direction that it was not to be opened until after his death, and banknotes to the value of £2,000 in another envelope endorsed with the name of his niece's husband, who had been a friend of and employed by the testator for twenty years, with a similar direction. The testator then placed both envelopes in a larger one, which was stuck down, and on which he wrote: "Just a present to two friends and relatives. I have lived and enjoyed their life for many years. God bless them." The testator handed the packet to his niece, saying: "There you are, Maggie. I am glad that is done, so if I don't get over this illness, I know that you both will never want, but mind you, you are not to tell anyone about it, as I am doing this to save you from death duties." His niece thereupon asked the testator whether she should put it in his deed box for safety against fire, and he said "Yes." The envelope was placed by his niece in the deed box, which was under the bed on which the testator was lying, and the key of which was kept hanging on a nail on the wall in the sight of the testator. It remained there until the testator's death shortly afterwards.

E

F

Held: there was a valid and effective donatio mortis causa of the banknotes, because there was in the first instance a complete delivery of them and when they were put in the testator's deed box the donee had no intention of parting with, and the donor had no intention of resuming, dominion over the subject-matter of the gift.

G

Notes. As to revocation of gifts mortis causa, see 18 HALSBURY'S LAWS (3rd Edn.) 405; and for cases see 25 DIGEST 554, *381–384*.

Cases referred to:

(1) *Re Wasserberg, Union of London and Smith's Bank, Ltd.* v. *Wasserberg*, [1915] 1 Ch. 195; 84 L.J.Ch. 214; 112 L.T. 242; 59 Sol. Jo. 176; 25 Digest 553, *378*.

H

(2) *Bunn* v. *Markham* (1816), 7 Taunt. 224; 2 Marsh, 532; Holt, N.P. 352; 129 E.R. 90; 25 Digest 551, *363*.

(3) *Ward* v. *Turner* (1752), 1 Dick, 170; 2 Ves. Sen. 431; 21 E.R. 234, L.C.; 25 Digest 552, *372*.

I

Also referred to in argument:

Edwards v. *Jones* (1836), 1 My. & Cr. 226; 5 L.J.Ch. 194; 40 E.R. 361, L.C.; 25 Digest 535, *248*.

Ashton v. *Dawson and Vincent* (1725), 2 Coll. 363, n.; Cas. temp. King, 14; 25 E.R. 196, L.C.; 25 Digest 542, *289*.

Re Taylor, Taylor v. *Taylor* (1887), 56 L.J.Ch. 597; 25 Digest 553, *376*.

Treasury Solicitor v. *Lewis*, [1900] 2 Ch. 812; 69 L.J.Ch. 833; 83 L.T. 139; sub nom. *Re Dash, Treasury Solicitor* v. *Lewis*, 48 W.R. 694; 16 T.L.R. 559; 25 Digest 552, *371*.

A *Miller* v. *Miller* (1735), 3 P.Wms. 356; 2 Eq. Cas. Abr. 575; 24 E.R. 1099; 25 Digest 556, *404.*

Re Johnson, Sandy v. *Reilly* (1905), 92 L.T. 357; 49 Sol. Jo. 314; 25 Digest 553, *379.*

Originating Summons.

B Prior to the death of Frederick Charles Hawkins on June 14, 1923, the defendant, James Mark Nash, for a period of nineteen years, with exception of war service, lived with him and kept house for him and generally attended to his wants. The defendant, James Mark Nash, in the year 1918, married the niece of the deceased, who came to reside with the deceased in the year 1915, and since that time J. M. Nash and his wife had lived with and attended to the deceased. In November, 1922, the deceased became ill, and on June 5, 1923, he handed to J. M.
C Nash a cheque for £7,000, instructing him to take it to the Tonbridge Branch of the National Provincial and Union Bank of England and cash it and bring back to him the proceeds in Bank of England notes. This was done, and banknotes for £7,000 handed to the deceased by J. M. Nash in the presence of his wife. At the request of the deceased some envelopes were handed to him, on one of which
D the deceased wrote:

"F. C. Hawkins, Niece;
Margaret Leah, née Davis;
Mrs. J. M. Nash, wife of my friend for over twenty years.
Not to be opened until after my death.

F. C. Hawkins."

E On another envelope the deceased wrote the following:

"Mr. James Mark Nash,
My friend for over twenty years and husband to my niece,
Margaret Leah Davis.
Not to be opened till after my death.

Frederick Charles Hawkins."

F The deceased showed J. M. Nash and his wife what he had written on the envelopes, and then sent them out of the room, and, in a few minutes, having called them back, gave his niece an envelope, and at his dictation his niece, M. L. Nash, in the presence of her husband wrote on it:

G "In case of my uncle's death, Frederick Charles Hawkins, this envelope is to be opened by his niece, Margaret Leah Nash, née Davis, in the presence of my great friend, my husband, James Mark Nash."

This latter envelope was found when opened after the death of the deceased to contain the two envelopes endorsed respectively with the name of the niece of the deceased and the name of the husband, in the first of which banknotes were contained to the value of £5,000, and in the other banknotes for £2,000. This
H envelope containing the two smaller ones the deceased then placed in another still larger envelope, and, at his request, his niece wrote thereon the following:

"In case of my (uncle's) death (Frederick Charles Hawkins), this envelope is to be opened by his niece, Margaret Leah Nash, née Davis, in the presence of her husband, James Mark Nash (my true and faithful friend.)"

I The deceased then wrote under the foregoing:

"Just a present to two friends and relatives. I have lived and enjoyed their life for many years. God bless them. F. C. Hawkins."

The last-mentioned envelope was then stuck down and deceased said: "There you are, Maggie, I am glad that is done, so if I don't get over this illness, I know that you both will never want, but mind you, you are not to tell anyone about it, as I am doing this to save you both from paying death duties." The niece then said to the deceased: "Well, uncle, there is sure to be questions asked about the money that was drawn out of the bank." The deceased replied: "Surely I can do what

I like with my own money, promise me to take care of it the same as I have done." They then promised, and deceased kissed them. The niece then asked the deceased if she should put the envelope in his deed box for safety against fire, and he said, "Yes," and she accordingly placed it in the deed box, where it remained until the death of the deceased. The key of the deed box was kept hung on a nail on the wall of the deceased's bedroom, within his sight, and the deed box was under the bed on which he was lying.

The above account of what took place was given in affidavits made by the defendants, J. M. Nash and his wife, on which they were cross-examined. His Lordship was satisfied that the account was truthful.

By a will executed by the deceased on June 11, 1923, he appointed the plaintiff, Harry John Manning Watts, a surgeon of Tonbridge where the deceased lived, and by whom he was attended in his illness, his executor, and, after a direction to pay his debts and funeral expenses and the gift of a specified legacy and £100 to John Arthur Hawkins, the deceased gave to his niece, Margaret Leah Nash, and her husband, James Mark Nash, all his furniture, household goods, utensils, and clothes. He then gave £500 to his niece, Louisa Frances Crossley, and directed that the residue of his estate should be sold and equally divided amongst his twelve nieces, whom he named, including therein his niece, Margaret Leah Nash. The deceased died on June 14, 1923, and his estate, exclusive of the banknotes, was of the value of about £7,000. The defendants, besides James Mark Nash and his wife, were the other eleven nieces, the residuary legatees.

The originating summons, issued by the plaintiff as the executor of the will, asked for the determination of the following questions: (i) Whether the defendant, Margaret Leah Nash, was entitled to delivery over of banknotes for £5,000 (or their value) by the plaintiff upon the footing that such banknotes were the subject of a valid gift inter vivos to her by the testator, or, alternatively, a valid donatio mortis causa made to her.

(ii) Whether the defendant, James Mark Nash, was entitled to delivery over of the banknotes for £2,000 (or their value) by the plaintiff upon the footing that such banknotes were the subject of a valid gift inter vivos to him by the testator, or, alternatively, a valid donatio mortis causa made to him.

(iii) If and so far as questions (i) and (ii) be answered in the negative, whether the banknotes in question formed part of the residuary estate of the deceased.

A. C. Nesbitt for the executor.
G. E. Cruickshank for James Mark Nash and his wife.
J. G. Joseph for some residuary legatees.
Joseph Tanner for other residuary legatees.
Cecil Ince, for other residuary legatees, did not address the court.
F. L. C. Hodson for the remaining residuary legatees.

P. O. LAWRENCE, J., stated the facts and continued: The question which is raised by this summons is whether the gift of the banknotes contained in the envelopes was intended as an absolute gift to Mr. and Mrs. Nash or whether the testator intended to retain control over those notes during his life. The test is whether Mr. and Mrs. Nash can be said to have retained dominion over the notes during the remainder of the testator's life. It has been argued that the endorsements on the envelopes show that the testator never intended to part with control over these notes during his lifetime, as on one envelope the endorsement was really a direction by the testator to his executors and therefore proves that the testator did not part with the dominion over the notes. But that endorsement, I think, if coupled with the fact that the envelope was handed to the donee, can be read as merely a direction as to how the donee was to account to the executor as to the money. The testator was not content with the endorsements he himself wrote, and what he dictated to his niece to write on the envelopes, but added also, in his own handwriting, a note which showed much more his intention, namely: "Just a present to two friends and relatives. I have lived and enjoyed their life

for many years. God bless them," and signed his name. Inside that envelope was another, which he caused to be endorsed by Mrs. Nash, but that only repeated what was endorsed by her on the outer envelope, and is therefore subject to the same comments. Then inside the latter envelope were contained two others, which severed the £5,000 and the £2,000. [His Lordship read the endorsements on these two envelopes.] I do not think that the endorsements on any of these envelopes militate against the view which I have formed, that there was in the first instance a complete delivery of the subject-matter of the donatio mortis causa. The direction only to open in the case of his death, and not to open the smaller two envelopes until after his death, does not show that the testator did not intend to pass the possession of the notes; it was reasonable that he should direct that the envelopes were not to be opened until the gift became effective by his death. There is really no difficulty so far.

I now come to the incident which, in my opinion, creates the only real difficulty in the case, namely, the placing by the donee of the subject-matter of the gift (after it had been actually delivered to her) in the deed box of the donor for safe custody. Did this act of the donee have the effect of terminating the gift? No case has been cited which is precisely on all fours with the present case, but the opinion expressed by SARGANT, J., in *Re Wasserberg, Union of London and Smith's Bank, Ltd.* v. *Wasserberg* (1) ([1915] 1 Ch. at p. 202) helps me very much in coming to a conclusion as to the true effect of what happened here. The learned judge there said:

> "If the testator had actually given the parcel to his wife and she had handed it back to him for the purpose of safe custody, that would probably have been enough to bring the case within the first-class of donationes mortis causa referred to by LORD HARDWICKE in *Ward* v. *Turner* (3)."

It is contended, however, that this opinion is contrary to the well-established rule that the possession of the donee must continue until the donor's death, and in particular is contrary to the decision in *Bunn* v. *Markham* (2), where the following passage occurs in the judgment of GIBBS, C.J. (7 Taunt. at pp. 231, 232):

> "But all the cases agree that, if the donor resumes the possession, it ends the gift. LORD HARDWICKE expressly so holds in *Ward* v. *Turner* (3) (2 Ves. at p. 433), where it suited the purpose of counsel to argue that, if the donor, after making a complete delivery, receives back the article, the donation remains perfect. LORD HARDWICKE immediately denied that proposition, and held, that if the possession of the donee do not continue, the gift is at an end."

In my judgment the word "possession," when used in that case, and in the other cases on this subject, means possession coupled with dominion, and does not cover possession as a mere custodian for the donee.

If this is the right view the opinion of SARGANT, J., in *Re Wasserberg* (1) in no way conflicts with *Bunn* v. *Markham* (2), or with any of the other cases. Of course, it must depend on the particular facts of each case whether the donor has resumed possession under such circumstances as will put an end to the gift. In the present case the donee, after the gift had been perfected by actual delivery, asked for, and obtained, the permission of the donor to place the subject-matter of the gift in his deed box for the sole purpose of safe custody, and then acted on the permission so obtained. Moreover, the subject-matter of the gift remained severed from the other contents of the box belonging to the donor by reason of its being enclosed in the endorsed envelope.

It is, I think, plain that the donee, by acting as she did, had no intention of parting with the dominion which she had acquired over the envelope and its contents, and that the donor, by granting the permission, had no intention of resuming dominion over the subject-matter of his gift. In these circumstances the fact that the donor, after having completed his gift, agreed, at the request of the donee, to take charge of the subject-matter of the gift for her did not, in my opinion, operate to put an end to the gift.

For these reasons I have come to the conclusion that there was a valid continuing donatio mortis causa of the notes in question, and that these notes do not form part of the testator's estate but belong to Mr. and Mrs. Nash.

Solicitors: *Neve, Beck, Son & Co.*, for *Thompson, Jevons & Hillman*, Tonbridge; *Mowll & Mowll*; *W. B. Fairbrother*; *Woodcock, Ryland & Parker*; *James & Charles Dodd.*

[*Reported by* GEOFFREY P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

Re COHEN. Ex parte TRUSTEE

[COURT OF APPEAL (Sir Ernest Pollock, M.R., Warrington and Sargant, L.JJ.), June 27, July 11, 1924]

[Reported [1924] 2 Ch. 515; 94 L.J.Ch. 73; [1924] B. & C.R. 143; 69 Sol. Jo. 35]

Bankruptcy—Fraudulent preference—Onus of proof—Need to prove intention to prefer—Voluntary payment made for no apparent reason—Inference to be drawn—Evidence—Affidavit—Affidavit filed by respondent to application, but not yet read by him—Right of applicant to refer to contents—Bankruptcy Act, 1914 (4 *& 5 Geo.* 5, *c.* 59), *s.* 44 (1).

On June 29, 1923, Messrs. S. & Co. fulfilled an order, received that day from the bankrupt, by delivering to him goods with an invoice, which at the request of the bankrupt was post-dated to July 10, for £449 odd. On July 20 the bankrupt sent to S. & Co. and to 107 other creditors cheques post-dated July 31 for the amount of their respective debts. On July 30 the bankrupt paid to S. & Co. in cash the amount due to them, in exchange for the cheque he had sent them. On July 31 the bankrupt gave notice to his creditors that he was about to suspend payment of his debts. On Aug. 3 a bankruptcy petition was presented, on Aug. 24 a receiving order was made, and on Aug. 24 the bankrupt was adjudicated bankrupt. In the bankruptcy proceedings it was contended that the payment in cash to S. & Co. was a fraudulent preference. During the hearing before LAWRENCE, J., counsel for the trustee read an affidavit filed by the trustee and then invited the learned judge to look at an affidavit in reply sworn and filed by S. & Co., but not used by them, on the ground that it contained relevant admissions. Counsel for S. & Co. objected, but the learned judge overruled the objection, and, after referring to the affidavit, found that S. & Co. were innocent of consciously having done anything against the bankruptcy law, but that the payment in question constituted a fraudulent preference.

Held by the Court of Appeal: under the practice in bankruptcy, the mere filing of the affidavit was not sufficient to make it evidence; the respondent to an application need not elect whether he would put his affidavit in evidence until he came to open his case; and, therefore, the learned judge was wrong in allowing the trustee to refer him to the affidavit.

Re Ottaway, Ex parte Child (1) (1882), 20 Ch.D. 126, applied.

Per WARRINGTON, L.J.: If an applicant, as in the present case, is furnished with the copy of an affidavit filed on behalf of the respondent and finds that it contains facts which are useful to his case, he can always call the deponent as his witness.

Held, further, by WARRINGTON and SARGANT, L.JJ., SIR ERNEST POLLOCK, M.R., dissentiente: it was for the trustee in bankruptcy to make out a

case that a payment was made with a view to preferring a creditor and the mere fact that a payment resulted in a preference being given was not enough, but in the present case the payment was, apparently, purely voluntary, and in all the circumstances it must be inferred that for some unascertained reason, or for no definite reason, the bankrupt had selected S. & Co. and made to them a payment with a view to giving them a preference over his other creditors within s. 44 (1) of the Bankruptcy Act, 1914.

Sharp v. *Jackson* (2), [1899] A.C. 419, and *Re Marsden, Ex parte Lancaster* (3) (1883), 25 Ch.D. 311, applied.

Notes. Distinguished: *Re Drage, Palmer and Roberts* v. *Knight* (1926), 134 L.T. 765. Explained: *Re M.I.G. Trust, Ltd.*, [1933] Ch. 542; *Peat* v. *Gresham Trust, Ltd.*, [1934] All E.R.Rep. 82.

As to fraudulent preference and affidavit evidence in bankruptcy, see 2 Halsbury's Laws (3rd Edn.) 553–561, 597–599; and for cases see 5 Digest (Repl.) 916 et seq., 4 Digest (Repl.) 555–558. For Bankruptcy Act, 1914, see 2 Halsbury's Statutes (2nd Edn.) 321.

Cases referred to:

(1) *Re Ottaway, Ex parte Child* (1882), 20 Ch.D. 126; 51 L.J.Ch. 494; 46 L.T. 118; 30 W.R. 282, C.A.; 4 Digest (Repl.) 556, *4901.*

(2) *New, Prance and Garrard's Trustee* v. *Hunting*, [1897] 2 Q.B. 19; 66 L.J.Q.B. 554; 76 L.T. 742; 45 W.R. 577; 13 T.L.R. 397; 41 Sol. Jo. 511; 4 Mans. 103, C.A.; affirmed sub nom. *Sharp* v. *Jackson*, [1899] A.C. 419; 68 L.J.Q.B. 866; 80 L.T. 841; 15 T.L.R. 418; 6 Mans. 264, H.L.; 4 Digest (Repl.) 58, *501.*

(3) *Re Marsden, Ex parte Lancaster* (1883), 25 Ch.D. 311; 53 L.J.Ch. 1123; 50 L.T. 223; 32 W.R. 483, C.A.; 5 Digest (Repl.) 963, *7814.*

(4) *Re Wilcoxon, Ex parte Griffith* (1883), 23 Ch.D. 69; 52 L.J.Ch. 717; 48 L.T. 450; 31 W.R. 878, C.A.; 5 Digest (Repl.) 916, *7568.*

(5) *Re Bird, Ex parte Hill* (1883), 23 Ch.D. 695; 52 L.J.Ch. 903; 49 L.T. 278; 32 W.R. 177, C.A.; 5 Digest (Repl.) 916, *7569.*

(6) *Re Walker, Ex parte Topham* (1873), 8 Ch. App. 614; 42 L.J.Bcy. 57; 28 L.T. 716; 37 J.P. 628; 21 W.R. 655, L.JJ.; 5 Digest (Repl.) 955, *7767.*

(7) *Re Eaton & Co., Ex parte Viney*, [1897] 2 Q.B. 16; 66 L.J.Q.B. 491; 4 Mans. 111; 5 Digest (Repl.) 931, *7649.*

(8) *Re Laurie, Ex parte Green* (1898), 67 L.J.Q.B. 431; 46 W.R. 491; 42 Sol. Jo. 346; 5 Mans. 48; 5 Digest (Repl.) 916, *7577.*

(9) *Bulteel and Colmore* v. *Parker and Bulteel's Trustee* (1916), 32 T.L.R. 661; 5 Digest (Repl.) 916, *7576.*

(10) *Re Ramsay, Ex parte Deacon*, [1913] 2 K.B. 80; 82 L.J.K.B. 526; 108 L.T. 495; 20 Mans. 15; 5 Digest (Repl.) 931, *7652.*

(11) *Re Goldsmid, Ex parte Taylor* (1886), 18 Q.B.D. 295; 56 L.J.Q.B. 195; 35 W.R. 148; 3 T.L.R. 109, C.A.; 5 Digest (Repl.) 930, *7638.*

(12) *Butcher* v. *Stead* (1875), L.R. 7 H.L. 839; 44 L.J.Bcy. 129; 33 L.T. 541; 24 W.R. 463, H.L.; 5 Digest (Repl.) 963, *7810.*

(13) *Thompson* v. *Freeman* (1786), 1 Term Rep. 155; 99 E.R. 1026; 5 Digest (Repl.) 939, *7685.*

(14) *Re Cheesebrough, Ex parte Blackburn* (1871), L.R. 12 Eq. 358; 25 L.T. 76; 19 W.R. 973; sub nom. *Re Cheesebrough, Ex parte Hitchcock*, 40 L.J.Bcy. 79; 5 Digest (Repl.) 962, *7808.*

(15) *Re Cooper, Ex parte Hall* (1882), 19 Ch.D. 580; 51 L.J.Ch. 556; 46 L.T. 549, H.L.; 5 Digest (Repl.) 938, *7681.*

(16) *Re W. Blackburn & Co., Buckley's Case*, [1899] 2 Ch. 725; 68 L.J.Ch. 764; 81 L.T. 520; 48 W.R. 186; 7 Mans. 47; 10 Digest (Repl.) 1032, *7136.*

(17) *Re Clay & Sons, Ex parte Trustee* (1895), 3 Mans. 31, D.C.; 5 Digest (Repl.) 964, *7822.*

Also referred to in argument:

Re Attree, Ex parte Ward, [1907] 2 K.B. 868; 77 L.J.K.B. 130; 97 L.T. 641; 23 T.L.R. 734; 51 Sol. Jo. 687; 15 Mans. 9, D.C.; 4 Digest (Repl.) 373, *3392*.

Re Bottomley, Ex parte Brougham (1915), 84 L.J.K.B. 1020; [1915] H.B.R. 75; 4 Digest (Repl.) 557, *4903*.

Re Quartz Hill, etc. Co., Ex parte Young (1882), 21 Ch.D. 642; 51 L.J.Ch. 940; 47 L.T. 644; 31 W.R. 173, C.A.; 22 Digest (Repl.) 520, *5786*.

Re Bell, Ex parte Official Receiver (1892), 10 Morr. 15, D.C.; 5 Digest (Repl.) 938, *7674*.

Re Hoyle, Ex parte Trustee, [1924] B. & C.R. 22, D.C.; 5 Digest (Repl.) 916, *7578*.

Appeal from a decision of P. O. Lawrence, J., sitting in bankruptcy on a motion for a declaration that a payment made by the bankrupt was a fraudulent preference.

On June 29, 1923, the appellants, W. R. Snow & Co., who carried on business as silk merchants in the city of London, received an order from Morris Cohen (the bankrupt), a general merchant and shipper, for certain velvet goods, and on the same day, by arrangement with the bankrupt, delivered the goods together with an invoice also dated June 29. The amount of the invoice was £460 16s. 8d., and the terms were $3\frac{3}{4}$ per cent. discount for cash, if paid within seven or ten days, making the total sum, if paid within those dates, of £449 6s. 3d. At the request and for the accommodation of the bankrupt, who alleged want of space to store the goods, the appellants post-dated the invoice to July 10, 1923, which gave the bankrupt further time for payment, that is to say, until July 17 or 20. On July 20 the bankrupt, who at that date was heavily indebted and, as he himself was well aware, hopelessly insolvent, of his own accord sent to 108 creditors of his, including among them the appellants, post-dated cheques in payment of their respective debts. All the cheques were made payable on July 31, 1923, and all of them, with the exception of the cheque that was sent to the appellants, were ultimately dishonoured. As regards the debt which the bankrupt owed the appellants on July 30, 1923, the bankrupt paid the amount thereof—namely, £449 6s. 3d.—in cash to the appellants in exchange for the cheque which he had previously sent to them. At the time of payment the appellants were completely ignorant of the financial difficulties of the bankrupt, and were innocent of any wilful infringement of the bankruptcy laws. On Aug. 3, 1923, a creditor's petition was presented, which was founded on an act of bankruptcy committed by the bankrupt on July 31 when he gave notice to his creditors that he was then about to suspend payment of his debts. On Aug. 24 a receiving order was made, and on Aug. 30 he was adjudicated a bankrupt. The trustee in bankruptcy moved for an order that the payment of £449 6s. 3d. made on July 30 by the bankrupt to the appellants might be declared to be a fraudulent preference and void as against the trustee by virtue of s. 44 (1) of the Bankruptcy Act, 1914, and that the appellants should pay that sum to the trustee. The appellants filed an affidavit in opposition to the motion which contained statements relating to the circumstances attending the payment by the bankrupt of his debt to the appellants and a preliminary question arose whether the trustee had the right, which he claimed, to read those statements as being admissions by the appellants that the payment was made by the bankrupt voluntarily and not under the influence of any pressure on the part of the appellants. The circumstances referred to in the affidavit filed by the appellants and relied upon by the trustee as admissions that the payment was with a view to prefer a creditor were shortly as follows. On July 20, 1923, the time for payment named in the invoice having expired, a representative of the appellants named Preston called on the bankrupt and asked for payment, and the bankrupt or someone in his employment, promised that a cheque would be dispatched forthwith. A cheque was sent to the appellants in due course, but it was post-dated July 31, which effected a further postponement for eleven days. About July 26 or 27, Mr. Preston again called on the bankrupt and reminded him that the cheque would become due shortly. The bankrupt showed some resentment at Preston's calling,

A and asked whether he had any reason to doubt that the cheque would be duly met. Thereupon Mr. Preston assured the bankrupt that he had no such doubt and that he called merely for the purpose of seeing that the matter was in order. However, on July 30, the bankrupt telephoned to the appellants: "As you are so anxious about my cheque, if you will come round I will pay you cash." Preston replied that he would refer to the counting-house manager. Later on the same day the B counting-house manager, who had no suspicion as to the bankrupt's financial condition, telephoned to the bankrupt and suggested that he should pay the cash into the bank to meet the cheque. The bankrupt showed that he was annoyed, and the counting-house manager said that he would call for the money. Later in the same day he, in company with Mr. Preston, did call upon the bankrupt, who paid him the sum of £449 6s. 3d. in cash in exchange for the cheque. P. O. Lawrence, J., C said that he was unable to see that the payment was made with any other view than to prefer the appellants to the bankrupt's other creditors, and, that being so, the appellants, although entirely innocent of consciously having done anything against the bankruptcy law, were liable to repay the money to the trustee in order that the other creditors might share in it. From this decision Messrs. Snow and Co. appealed.

D *Tindale Davis* for the appellants.
Entwistle for the trustee in bankruptcy.

SIR ERNEST POLLOCK, M.R.—This appeal raises a question of some importance as to the practice in the Bankruptcy Court. The point taken on behalf of the appellants is that the learned judge was wrong in looking at the affidavit filed E but not read by the appellants, the respondents to the motion. The trustee in bankruptcy claimed that a certain payment made by the bankrupt to the appellants constituted a fraudulent preference within the meaning of s. 44 of the Bankruptcy Act, 1914, and that the money ought to be repaid to him, and filed an affidavit in support of his case. The appellants also filed an affidavit in opposition to the motion, sworn by a Mr. Preston, an employee in the appellants' firm, which F counsel for the trustee claimed a right to read as containing certain admissions by the appellants. He relied on those admissions as affording additional evidence in proof of the payment in question constituting a fraudulent preference. Counsel for the appellants objected to the trustee reading those statements as admissions, on the ground that, although the affidavit had been filed, it was not in evidence before the court, as the appellants had not then decided whether or not they would G use it. The learned judge, however, applying the practice of the Chancery Division, allowed the affidavit to be used by the trustee for the purpose of establishing his case.

The preliminary point to be decided is whether the learned judge in coming to that conclusion was right. The point is one of practice; but I do not think it is a mere technicality. It involves the question of the onus of proof. The trustee H claimed to rely, for the purpose of proving his case, upon certain statements contained in the appellants' affidavit, but a trustee must succeed, if he can, on the evidence which he himself puts before the court. Can he make use of an affidavit which has been filed by the appellants, but has not been put in evidence by them? The practice in bankruptcy was settled by the Court of Appeal in 1882 in *Ex parte Child* (1). In that case a question was raised whether the applicant had the right, I which he claimed, to cross-examine the respondent on the affidavit which he (the respondent) had filed, but which he had not determined whether or not he would read. The respondent objected to the affidavit being so used on the ground that, although it was before the court in the sense that it had been filed, it was not in evidence until he (the respondent) had elected to use it as such. The Court of Appeal took steps to ascertain what the practice in bankruptcy was by consulting the registrars of the Court of Bankruptcy, and a certificate as to the practice was given by Mr. Registrar Murray, which is set out in 20 Ch.D. at pp. 128 and 129. I will only refer to the following passage in it, which appears on p. 128:

"If, however, on the opening, the respondent alleges that there is no case, and objects to his affidavits being read until that question has been disposed of, such objection is always allowed; and it frequently happens that, by reason of the applicant's evidence failing to establish his case; the respondent is not called upon to read his affidavits, or to enter at all on his defence. The result would be analogous to a non-suit. I have never known a case in which a party has been held compellable to read an affidavit (which he desired to withdraw) merely because it had been filed; but this would not preclude the opposite party from being allowed to examine the deponent as his own witness."

That certificate was accepted by the Court of Appeal as containing a correct statement of the practice in bankruptcy. It is clear, therefore, that a respondent may take the objection that the applicant has not established his claim on the motion, and, if that objection is allowed, the respondent is not compelled to allow his evidence to be read. JESSEL, M.R., in the course of his judgment, said:

"According to the certificate of the registrars it was the undoubted right of the respondent (the present appellant) to say that he would not state whether he meant to read his affidavit or not until his turn came to open his case, and he was entitled to object to be cross-examined on the affidavit until he had determined whether he meant to read it or not."

Acting on that view, the Court of Appeal held that no order could be made on the application, as the applicant had failed to make out his case.

It seems, therefore, quite clear from that case that the mere filing of an affidavit is not sufficient to make it evidence before the court, because the respondent is entitled to exercise his own volition whether or not he will make use of it. That case was decided in 1882, and since that date the rules in bankruptcy have, from time to time, been amended. The present rules relating to the filing of affidavits are [rr. 39 and 60 (1) (2) of the Bankruptcy Rules, 1952, and by r. 35 the successor to] r. 29, which was made in 1915 [Bankruptcy Rules, 1915], long after the decision in *Ex parte Child* (1), it is provided that:

"Where a respondent intends to use affidavits in opposition to a motion he shall deliver copies of such affidavits to the applicant not less than two days before the day appointed for the hearing."

The effect of that rule is that in order to put himself in a position to be able to determine whether he will use his affidavits or not, the respondent must give his opponent copies thereof beforehand. The word "intends" in the rule clearly connotes a future decision. It is at the time when the respondent hears the case made against him that he is to decide whether or not he will use the affidavits which he has filed. I can find nothing in the rules which in any way negatives the rule laid down in *Ex parte Child* (1). The respondent need not elect whether he will put his affidavit in evidence until he comes to open his own case. For these reasons I think the learned judge was wrong in allowing the trustee to pick out and use statements in the affidavit filed by the respondents, because, in my opinion, that affidavit was not in evidence before the court. On this preliminary point, therefore, the learned judge was wrong in allowing those statements to be treated by the trustee as admissions in order to establish his case against the respondents. In this respect the practice in bankruptcy differs from that in the Chancery Division.

WARRINGTON, L.J.—I am of the same opinion. In this case the trustee in bankruptcy has applied by motion for a declaration that a payment made by the bankrupt constituted a fraudulent preference. In support of his application he filed an affidavit. The respondents also filed an affidavit, but they did not read it. They took the objection that on the affidavit of the trustee taken alone he was not entitled to judgment. LAWRENCE, J., however, held that he (the learned judge) was entitled to look at certain statements in the respondents' affidavit and to treat and rely on them as admissions. In my opinion, the practice in bankruptcy on

this point is quite clear and differs entirely from that in the Chancery Division. The mere filing of an affidavit is not in itself sufficient to enable the opposing party to refer to and use parts of it, if the affidavit has not been read by the party filing it. That was clearly decided in *Ex parte Child* (1), a case in which the Court of Appeal approved of the certificate of all the registrars of the Bankruptcy Court. That certificate was adopted by JESSEL, M.R., and his judgment was concurred in by BRETT and HOLKER, L.JJ. It is perfectly true that the concrete question in *Ex parte Child* (1) was not quite the same as in this case, but was whether the trustee was entitled to cross-examine the respondent on his affidavit, which he had not read. That, however, was only an example of the principle, which is that a respondent may up to the last moment withhold his decision whether or not he will use the affidavit which he has filed. The learned judge has distinguished *Ex parte Child* (1) and has held that he is entitled to look at the affidavit to see whether it contains admissions. But, in my opinion, there is no distinction between taking facts out of an affidavit to use as admissions and reading the whole of it. If the affidavit is looked at at all the whole of it must be looked at. Until the affidavit is used by the deponent it forms no part of the materials before the court. Statements in an affidavit are not statements at all until the deponent has decided to use the affidavit. But if the applicant, as in the present case, is furnished with a copy of the affidavit, and finds that it contains facts which are useful to his case, he can always call the deponent as his witness, and consequently no injustice is done. It is quite true, also, that counsel for the appellants was compelled to read the affidavit, but he only did so after passages had been taken out of it and used as admissions against the appellants by the judge. I am clearly of opinion that the learned judge was not entitled to refer to the appellants' affidavit.

SARGANT, L.J.—I am of the same opinion. It seems to me that this case is entirely covered by *Ex parte Child* (1), a very important decision. Under the rules in bankruptcy the respondent files his affidavits and gives copies thereof to the applicant for the purpose of putting the respondent in a position to use these affidavits if he finds it necessary so to do, and also for the purpose of informing the applicant of the case which he may have to meet. The respondent does not by so doing make the affidavits evidence in all events. Nor does it make any difference that an affidavit is one sworn by the respondent himself. Such an affidavit cannot, in my judgment, be used by the applicant as an admission by the respondent. For it is filed and supplied to the applicant only by virtue of the rules for a particular purpose, and provisional only.

The hearing of the appeal on the question of fraudulent preference was continued, and the court reserved judgment.

July 11. The following judgments were read.

SIR ERNEST POLLOCK, M.R.—This is an appeal from an order made by LAWRENCE, J., whereby it was declared that a payment made on July 30, 1923, by the bankrupt to the creditors, who were respondents below, but whom I will hereafter call "the creditors," of the sum of £449 6s. 3d., was a fraudulent preference within the meaning of s. 44 (1) of the Bankruptcy Act, 1914, and it was ordered that the creditors should pay this sum to the applicant, the trustee in Cohen's bankruptcy. Two points were taken by counsel for the creditors. The first was that the learned judge had allowed an affidavit filed by the creditors to be referred to by the applicant for the evidence said to be contained in it before they had elected whether they would use it or not, contrary to the practice in the Bankruptcy Court as laid down by the Court of Appeal in *Ex parte Child* (1). We have already decided this point in the creditors' favour. The second point was that upon the materials put before the court by the applicant in his affidavit, there was not evidence sufficient to discharge the onus which it is contended lies upon the trustee, and to establish that the payment in question was made "with a view of giving the

creditors a preference over other creditors," and thus that the terms of the section had not been complied with. It was admitted (i) that the £449 6s. 3d. had in fact been paid by the debtor to the creditors; (ii) that at the time when the debtor made the payment he was unable to pay his debts as they became due from his own money; and (iii) that the payment was made within three months of the accrual of the trustee's title; for the petition was presented on Aug. 3, 1923, only four days after the payment was made. The issue remains on the question, Was the payment made with a view to give the creditors a preference over the other creditors?

To complete the facts presented by the applicant, the trustee in Cohen's bankruptcy, it appears that the latter purchased goods from the creditors, and that they had been delivered to the bankrupt before June 30, their value as entered in the bankrupt's ledger being £460 16s. 8d., but the invoice was made out as at the date of July 10. The debtor did not pay on July 10, but on July 20 he sent the creditors a cheque post-dated to July 31. On July 30 he called upon the creditors and took up his cheque by paying the sum of £449 6s. 3d. in cash, and receiving a discount of £11 10s. 5d. On July 31 the act of bankruptcy was committed, namely, the giving of notice that the debtor had suspended payment. The learned judge found bona fides and innocence on the part of the creditors, but he held that a primâ facie case of fraudulent preference had been made out, as he says, "chiefly by the admissions" that he allowed the trustee to rely upon, coming from the creditors' affidavit, which admissions so termed we have held inadmissible. In these circumstances counsel for the creditors puts in no evidence and takes the point that the trustee has not established a primâ facie case which requires an answer from the creditors. The fact that the debtor took up the post-dated cheque by a cash payment the day before the cheque became due is not relied upon by the trustee as evidence of an intention to make a fraudulent preference, because the account was overdue when the payment was made, and no valid agreement was made by the creditors to accept the post-dated cheque. But it appears that on July 20 the debtor sent out in all 108 cheques to his creditors, one of which was that which reached the present appellants. All were post-dated to July 31. The trustee affirms that the payment in cash on July 30 to the appellants discharges the onus that lies upon him.

It is important to state what the trustee has to establish in order to prove that a payment has been made as a fraudulent preference. At common law there was nothing to prevent the debtor from preferring one creditor to another and the statute of Elizabeth (13 Eliz., c. 5) left the common law unchanged. The principle now known as fraudulent preference was first formulated in a statute in s. 92 of the Bankruptcy Act, 1869. This section, but slightly altered, was reproduced by s. 48 of the Act of 1883 and its successor forms s. 44 of the present Act. We have to construe this section and apply it to the facts of the present case. I agree respectfully and fully with the observations of the members of the Court of Appeal in *Ex parte Griffith* (4). There Sir George Jessel, M.R., Lindley and Bowen, L.JJ., all affirm that in determining whether a transaction is a fraudulent preference of one creditor over the others, the court now ought to have regard simply to the statutory definition contained in the current section. Lindley, L.J., says:

> "What we have to consider is the true construction of s. 92. I emphatically protest against being led away from the words of the section by any argument that the standard which the legislature has laid down is equivalent to the standard of the old law. It may be so; but the language is different, and our duty is to construe that language": see also per Baggallay, L.J., in *Ex parte Hill* (5), 23 Ch. D. at p. 700.

The conditions which s. 44 requires are plain. First, that the payment is made by a person unable to pay his debts as they become due from his own money. Secondly, that it in fact prefers one creditor over others. Thirdly, that the dominant motive with which the payment was made was with a view to prefer

A that creditor to whom the payment was made. I have separated conditions 2 and 3 purposely, for clearness, for I think it has been decided many times that the mere fact that the payment does in fact prefer one creditor over others does not make it void as against the trustee in bankruptcy. As Mellish, L.J., said in *Ex parte Topham* (6), quoting Bacon, V.-C., then Chief Judge in Bankruptcy:

B "But then [the section] adds another qualification or condition which is the very life and essence of the enactment—the payment so made, must in order to be void, be made in favour of a creditor with a view of giving such creditor a preference over the other creditors. So that unless it can be made apparent, and to the satisfaction of the court which has to decide, that the debtor's sole motive was to prefer the creditor paid to the other creditors, the payment cannot be impeached, even although it be obviously in favour of a creditor."

C Lord Esher's judgment in *New, Prance, and Garrards' Trustee* v. *Hunting* (2) ([1897] 2 Q.B. at p. 27) is to the same effect. He adds that it does not matter much whether the word used is "intention" or "view" or "object." The question is whether in fact he had the intention to prefer certain creditors. He adds:

D "It has been argued that the debtor must be taken to have intended the natural consequences of his act. I do not think that it is true for this purpose. I think one must find out what he really did intend."

When that case was before the House of Lords, it appears to me that the House sustained the view expressed by Lord Esher ([1899] A.C. at p. 421). Lord Halsbury quotes the passage that I have extracted, in his speech, textually. In E that case, in his argument before the House, the Solicitor-General argued that if the debtor acted with mixed views and part of the view or intention was to put one creditor in a better position than another, there was a fraudulent preference. Lord Halsbury rejected that argument as imputing absurdity to the legislature. He says ([1899] A.C. at p. 423):

F "Nothing could have been easier than to have enacted, if they had thought proper to do so, that any preference to one creditor over another creditor, or any greater advantage . . . given by previous payment to one creditor, to which advantage all the other creditors were not a party, should of itself be a preference which should be void under the statute."

But he adds that no such intention is to be gathered from the statute. In my G judgment, therefore, the dictum of Vaughan Williams, L.J., in *Re Eaton & Co.* (7) is not correct. It was not in accord with the opinion of Cotton, L.J., in *Ex parte Lancaster* (3) (25 Ch.D. at p. 318). The latter's judgment has been preferred by Wright, J., in *Re Laurie* (8), and by Younger, J., in *Bulteel and Colmore* v. *Parker and Bulteel's Trustee* (9).

In *Ex parte Lancaster* (3) Cotton, L.J., had definitely stated that the onus lay H on the trustee to give evidence that the view entertained by the debtor was to prefer the creditor. "The dominant or substantial," not necessarily the "sole" view, is that which has since *Ex parte Hill* (5) been interpreted to be the proper meaning of the word: see per Bowen, L.J., 23 Ch.D. at pp. 704–5. Evidence of kinship would, primâ facie, discharge the onus upon the trustee as in *Re Laurie* (8); and see *Ex parte Topham* (6). There are other facts which do likewise; and if the I onus is discharged no doubt the debtor must then displace the primâ facie evidence of a dominant intention to prefer given by the trustee. This can be done by proving that the payment was made under pressure, or for one or other of the many reasons indicated by Phillimore, J., in *Re Ramsay* (10) ([1913] 2 K.B. at p. 85).

But the trustee must discharge the onus that lies upon him. Has he done so here? No doubt all the attending circumstances should be taken into account. I have set out the facts as presented by the trustee. The fact that a number of cheques were sent out by the debtor on July 20 does not appear to be indicative of anything more than that the debtor expected to have means at his service with

which to meet them when they fell due on July 31. No doubt there is the fact of the payment with its attendant result of preference on July 30, but there is no more. We are not at liberty, for the reasons which I have attempted to explain, and in accordance with the authorities, to accept that fact as sufficient. I cannot speculate or surmise in order to supply the deficiency. Without evidence the matter must be left where it is, unexplained, and without any character given to, or purpose proved in relation to, the mere payment. The learned judge, whose experience in bankruptcy is not to be overlooked, felt the difficulty, for he allowed counsel for the trustee to go into sources which we have held inadmissible. When that source is set aside I cannot find any evidence given by the trustee sufficient to discharge the onus which lies upon him, and, in my judgment, the appeal ought to be allowed.

WARRINGTON, L.J.—On July 30, 1923, when the debtor was admittedly unable to pay his debts as they became due from his own money he paid to the appellant creditors the amount of their debt in cash. The trustee alleges and LAWRENCE, J., has held, that such payment was made with a view to giving the appellants a preference over the other creditors, and was, therefore, to be deemed fraudulent and void as against the trustee: see Bankruptcy Act, 1914, s. 44. The creditors appeal. The question is purely one of fact, the answer to which, in the present case at all events—there being no statement by the debtor himself as to his view at the time—must depend on the inference which the tribunal draws from the facts proved or admitted, being, of course, first duly instructed as to the law.

The law is stated by LORD ESHER, M.R., in *New, Prance, and Garrards' Trustee* v. *Hunting* (2), in a passage cited with approval by LORD HALSBURY in the same case in the House of Lords, sub nom. *Sharp* v. *Jackson* (2) ([1899] A.C. at p. 421). The learned Master of the Rolls says ([1897] 2 Q.B. at p. 27):

> "The doctrine with regard to fraudulent preference is well known. The question whether there has been a fraudulent preference depends not upon the mere fact that there has been a preference, but also on the state of mind of the person who made it. It must be shown not only that he has preferred a creditor, but that he has fraudulently done so. It depends upon what was in his mind. Whether it is called 'intention' or 'view,' or 'object' does not appear to me to matter much. The question is whether in fact he had the intention to prefer certain creditors. It has been argued that the debtor must be taken to have intended the natural consequences of his act. I do not think that is true for this purpose. I think one must find out what he really did intend."

SMITH, L.J., said (ibid. at p. 29):

> "I have always understood that, to ascertain whether there has been a fraudulent preference, it is necessary to consider what the dominant or real motive of the person making the preference was; whether it was to defraud some creditors by preferring others, or for some other motive."

I think these passages themselves establish that it is for the trustee to make out some case that the payment was with a view to preferring the creditor and that the mere fact that the payment results in a preference is not enough, but if there is any doubt that this is so it is removed by the judgments of COTTON and LINDLEY, L.JJ., in *Ex parte Lancaster* (3). COTTON, L.J., says (25 Ch.D. at p. 318):

> "I cannot think that the proper inference to be drawn from the evidence is that the debtor did what he did in order to give his father-in-law a preference over the other creditors. This being a matter which it is for the appellant [the trustee] to make out—not of course conclusively but so as to satisfy us—in my opinion he has failed to discharge the onus."

LINDLEY, L.J., says (ibid. at p. 319):

"It has to be proved that the debtor failed to defend the action [the matter complained of in that case] with a view to giving his father-in-law a preference."

We have already decided that the learned judge ought not to have read the statements contained in the affidavit filed on behalf of the appellants for the reasons we gave on that occasion, and we are, of course, under the same obligation. The facts proved on behalf of the trustee are these. On July 31, 1923, the bankrupt gave notice to his creditors that he had suspended or was about to suspend payment of his debts. On Aug. 3, 1923, a petition in bankruptcy was presented, and on Aug. 30 he was adjudicated bankrupt. The bankrupt carried on business as a general merchant and shipper in the city of London. In the bankrupt's ledger there is an account with the appellants in which is an entry under date July 10, 1923: "By goods £460 16s. 8d." This means, of course, that on that day he owed for goods sold and delivered the sum of £460 16s. 8d. The goods were actually delivered prior to July 10, but the date of the invoice was at the bankrupt's request altered from that date to July 10. On July 20 the bankrupt sent to the appellants and to 107 other creditors cheques post-dated July 31 for the amount of their respective debts less the ordinary trade discount where the contract allowed it. The cheque sent to the appellants was for £449 6s. 3d.—the amount of the debt, £460 16s. 8d., less £11 10s. 5d. discount. On July 30 the bankrupt paid to the appellants in cash the £449 6s. 3d. and took up the cheque—the account was dated June 30, but I treat this as a mere slip and attach no sinister or suspicious character to it.

What is the proper inference to be drawn from these facts? The payment was purely voluntary. No threat of proceedings had been held out by the appellants. No special consequences of an unpleasant nature, such as those the effect of which was considered in *Sharp* v. *Jackson* (2), from the non-payment of the debt were to be apprehended. It was not long overdue. The debtor had only ten days earlier taken the step of sending to the 108 creditors post-dated cheques all payable on the same day, July 31, thus putting them all on an equality. Then on July 30, at a time when he must have already determined to give the notice of suspension actually given on the next day, he selects the particular creditor and pays him in full with money which, but for such payment, would have been distributed among the creditors generally. The conclusion seems to me to be inevitable. The payment being purely voluntary, and the circumstances attending it being what I have described, I must and do infer that for some reason or another of which we are ignorant, or for no definite reason, in fact, for no other motive, he selected the particular creditors for preferential treatment, and, therefore, made the payment with a view to preferring them. I can find no rule of law which prevents me from drawing what seems to me an obvious inference. The case is a peculiar one, and it must not be supposed that it will be any authority for questioning the validity of a payment of a debt made in the ordinary course of business by a man who knows he is at the time insolvent, but who may well make such payments in the hope of keeping his business on foot for a time, and, perhaps, even of passing safely through the period of danger. Such payments have been held not to be fraudulent under the provisions of the section, and I desire to throw no doubt on the correctness of such decisions. It is true there is here nothing of any special nature in the relations between the bankrupt and the particular creditors tending to make probable a desire to prefer them. But the absence of such a circumstance, which, if it were present, would make the inference easier, does not prevent its being drawn if the other circumstances lead to it. On the whole, I think the trustee has made out a case which ought to satisfy us that the necessary condition has been fulfilled, and that the payment in question was fraudulent and void. In my opinion, the appeal should be dismissed with costs.

SARGANT, L.J.—In the course of this appeal counsel for the appellants, Messrs. W. R. Snow & Co., has succeeded in withdrawing the affidavit filed by them, and

in leaving the question in issue to be decided solely on the evidence contained in the affidavit filed by the trustee. The relevant paragraphs of this affidavit are five only, and we have to determine whether the uncontradicted and unexplained statements in these paragraphs disclose a sufficient case for holding that there has been that which is to be deemed a fraudulent preference within s. 44 of the Bankruptcy Act, i.e., a payment made with a view of preferring Messrs. Snow to his other creditors. These paragraphs show that the debt to Messrs. Snow of £449 6s. 3d. was in respect of goods invoiced to the bankrupt on July 10, 1923, and that on July 20, 1923, the bankrupt sent to Messrs. Snow and to 107 other creditors, in settlement of their several accounts, cheques which were all post-dated to July 31, 1923. On that day, however, the bankrupt gave notice to his creditors that he had suspended or was about to suspend payment, and thereby committed the act of bankruptcy on which he was shortly afterwards adjudicated bankrupt. No single one of the 108 post-dated cheques appears to have been paid on presentation, but on the day preceding the act of bankruptcy, namely, on July 30, 1923, the bankrupt paid Messrs. Snow alone of these 108 creditors their debt of £449 6s. 3d., and was, therefore, given a receipt dated June 30, 1923, that is, a month before the actual payment. The facts so stated seem, in the absence of any explanation by Messrs. Snow, to involve some element of suspicion as to their conduct as well as that of the bankrupt. But it is only fair to Messrs. Snow to state that no suggestion is made against them that they had any knowledge of the desperate state of the bankrupt's affairs, or that the advantage they gained was anything more than fortuitous.

The case obviously is one in which the bankrupt must be taken on the crucial date not only to have been unable to pay his debts in due course, but to have fully realised that this was the case, and that his failure was imminent. And, further, in the absence of any evidence to the contrary, it must, in my judgment, be taken that the selection of Messrs. Snow as the creditors to be paid in full was quite voluntary. No evidence, or, indeed, suggestion, of threats or pressure on the part of these particular creditors, or of fear on the part of the bankrupt, has been put forward by Messrs. Snow; they have offered no explanation whatever of their selection for payment, nor could the bankrupt have made the payment to them alone with any hope of being able to continue to trade. In these circumstances I should have thought that, no alternate hypothesis being admissible, the only conclusion that could reasonably be drawn would be that the bankrupt intended to do that which he in fact did, namely, voluntarily to prefer Messrs. Snow out of those assets which he must by that time have recognised as liable to become immediately divisible among all his creditors pro rata. It has, however, been strenuously contended by counsel for Messrs. Snow, that under s. 44 (1) of the Bankruptcy Act, 1914, it is not enough to show that a debtor, in immediate prospect of bankruptcy, has made what is in fact a preference in favour of one of his creditors, even though his act was on the face of it voluntary and no other view or intention on the part of the bankrupt is proved or even suggested. It is said that some further affirmative evidence must be produced by the trustee of an intention on the part of the debtor to prefer that particular creditor. For this purpose reference is made to a passage from the judgment of LORD ESHER in *New, Prance, and Garrards' Trustee* v. *Hunting* (2) as quoted and approved by LORD HALSBURY in the same case when under appeal to the House of Lords (*Sharp* v. *Jackson* (2), [1899] A.C., pp. 421–2), and particularly to the two or three sentences following, namely,

> "It must be shown not only that he [the debtor] has preferred a creditor but that he has fraudulently done so. It depends upon what was in his mind, whether it is called 'intention' or 'view' or 'object' does not appear to me to matter much. The question is whether in fact he had the intention to prefer certain creditors. It has been argued that the debtor must be taken to have intended the natural consequences of his act. I do not think that is true for this purpose. I think one must find out what he really did intend."

The passage in question and particularly the sentences I have quoted in full are said to show that a purely voluntary payment to one creditor alone when in imminent prospect of bankruptcy is not even primâ facie evidence of an intention or view to prefer within s. 44. But, in my judgment, notwithstanding the rather unqualified terms of the particular sentences I have quoted, this is not the meaning or effect of the whole passage taken together. For the next sentence of Lord Esher is: "The recitals of the deed seem to me to show that he (the debtor) really did intend." Lord Esher then proceeds to find that the facts in relation to the deed in question disproved the primâ facie intention of preferring the particular creditor, and established that the real intention of the debtor was to benefit himself. In my judgment, the whole passage taken together means this, namely, that the knowledge on the part of the debtor that the creditor would in fact receive a preference was not conclusive of intention to prefer, but might be displaced by evidence that the debtor was really actuated by some other reason, such as pressure, threat of legal proceedings for breach of trust (*Ex parte Taylor* (11)) or even as in *Sharp* v. *Jackson* (2) a definite fear of such proceedings. To the same effect is the much shorter passage quoted by Lord Halsbury from the judgment of Chitty, L.J., namely,

> "I ask myself what was really the view which Prance had in making this conveyance. Was it to prefer these particular trust estates to other creditors? The answer to that case must, I think, be in the negative. It was to protect himself against the charges hanging over him."

That Lord Halsbury quoted and approved of these passages as bearing this sense is, in my judgment, plain from other parts of his speech. Thus he quotes from a judgment of Lord Cairns in *Butcher* v. *Stead* (12) a passage ending with the following sentence, namely (L.R. 7 H.L. at p. 846):

> "The Act appears to have left the question of pressure as it stood under the old law; and, indeed, the use of the word 'preference,' implying an act of free will, would of itself make it necessary to consider whether pressure had or had not been used."

Further on, again in Lord Halsbury's speech, he quotes from a passage in the judgment of Lord Mansfield in *Thompson* v. *Freeman* (13):

> "A bankrupt when in contemplation of his bankruptcy cannot by any voluntary act favour any one creditor; but if under fear of legal process he gives a preference it is evidence that he does not do it voluntarily."

Lord Halsbury adds:

> "There is the principle stated—it is not a voluntary act; and as Lord Cairns says the word preference here imports in it the voluntary act of a person who can do either the one thing or the other as he prefers."

Lord Macnaghten's speech in *Sharp* v. *Jackson* (2) seems to me precisely to the same effect. The word "preference" he says involves and imports a free choice. The debtor in that case was not in a position to exercise a free choice. He was under an overwhelming sense of peril. The whole reasoning of this very concise judgment is precisely to the same effect as that of Lord Halsbury, and obviously implies that, had the actual preference in that case been unexplained by pressure, had there been nothing to show it was not voluntary, the result must have been that the preference was illegal and avoided by the statute.

In view of the authority of *Sharp* v. *Jackson* (2) it may seem unnecessary to quote other cases. But I should like to refer to one or two others as establishing a general current of authority that, when a preference in fact has been given in anticipation of bankruptcy, such preference in fact requires justification by the establishment of some other sufficient dominant intention. In *Ex parte Topham* (6), Mellish, L.J., adopted a test derived from *Ex parte Blackburn* (14), namely, whether the act done could be referred to some other reason or intention than that of giving the particular creditor a preference over the other creditors.

In *Ex parte Hall* (15) the test applied was whether there was an arbitrary selection of the particular creditor. In *Re W. Blackburn & Co., Buckley's Case* (16) it was held that a desire to fulfil a moral obligation towards a particular creditor was not sufficient to justify a preference in fact—a decision which seems to imply that the result must be the same a fortiori, if no reason at all is suggested for the actual preference. Among all the cases referred to in the textbooks we have not been referred to one in which an actual preference in view of imminent bankruptcy has been supported, except by showing affirmatively that the actual preference was caused by some other reason—such as pressure, threats, fear, or the like which the court considered as constituting the dominant motive, and as showing an intention displacing the primâ facie intention to be gathered from the mere fact of preference. No case has been cited to us nor do I think any case can be found where a debtor in imminent expectation of bankruptcy has given a preference in fact to a particular creditor, which is apparently voluntary and is wholly unexplained, and where that preference in fact has been held good. To hold otherwise in this case would, in my judgment, be inconsistent with the whole course of decision in bankruptcy in such cases and would revolutionise the settled law in this respect. I need hardly point out that we are not dealing with a case such as *Re Clay & Sons* (17) where a debtor who knew himself to be insolvent made a payment to a creditor in the course of his business with the object of being able to carry his business on. The facts here are such as to show that the debtor when he made the payment to Messrs. Snow must have known that he was about to suspend payment on the following day; and further had had his post-dated cheque held by Messrs. Snow, apparently without objection, for nine days out of the ten by which it was post-dated. A clearer case of knowledge of immediate impending bankruptcy and of a purely voluntary payment it would be difficult to imagine. The suggestion that the trustee should have obtained direct evidence from the bankrupt that he intended to prefer Messrs. Snow seems to me thoroughly unpractical and hardly worthy of serious consideration. I agree with WARRINGTON, L.J., that the appeal should be dismissed with the usual consequences.

Solicitors: *H. H. Wells & Sons*; *Charles Nordon & Co.*

[*Reported by* J. L. DENISON, ESQ., *Barrister-at-Law.*]

BRITISH THOMSON-HOUSTON CO., LTD. *v.* BRITISH INSULATED AND HELSBY CABLES, LTD.

[COURT OF APPEAL (Sir Ernest Pollock, M.R., Atkin and Sargant, L.JJ.), March 31, April 1, 2, 3, 4, 7, 1924]

[Reported [1924] 2 Ch. 160; 93 L.J.Ch. 467; 131 L.T. 688; 40 T.L.R. 581; 68 Sol. Jo. 560; 41 R.P.C. 345]

Evidence—Admissibility—Evidence given in previous action—Party denying in subsequent action fact proved in previous action—Evidence before Court of Appeal and House of Lords in previous action.

In 1916 the plaintiffs brought an action against D., Ltd., for an injunction to restrain them from infringing a patent of theirs (the plaintiffs), dated 1906, and called three expert witnesses to prove that by following the directions given in the 1906 patent a filament of drawn tungsten wire could be obtained. The action failed, but on a ground which rendered it unnecessary to decide whether such a filament could be so obtained. In the present action the plain-

tiffs contended the reverse, namely, that it was not possible by following the directions of the 1906 patent to obtain a tungsten drawn-wire filament, and in support of that called expert witnesses other than the three called by them in their action in 1916. The defendants claimed to be entitled to put in as evidence the oral evidence given by the three expert witnesses in the action in 1916, and also to use as evidence against the plaintiffs the Case lodged by them when their action of 1916 went to the House of Lords, in which the evidence of their three expert witnesses was printed and relied upon.

Held, by SIR ERNEST POLLOCK, M.R., and ATKIN, L.J., SARGANT, L.J., dissentiente: the evidence of a witness used by a party in proof of any fact during the trial of an action was not admissible in proof of such fact against that party in a subsequent suit in which he denies the fact; that position was not altered by the fact that the evidence was included in material put before the Court of Appeal or in the appendix to the Case on an appeal to the House of Lords in the first action, for the evidence became part of the proceedings when it was first given and its presentation to an appellate tribunal did not stamp it with any fresh mark of adoption by the party who originally put it forward; and, therefore, the evidence was not admissible in the second action.

Per ATKIN, L.J.: I should qualify this proposition with two reservations. Such evidence might be admissible (i) if it is tendered, not in proof of the fact in support of which it was tendered at the first trial, but in proof of a state of mind of the party then using it, on such issues as obtaining the first judgment by fraud, or of malice, or of want of reasonable or probable cause; or (ii) if the evidence given at the former trial was that of a witness who was the agent of the party calling the evidence and authorised to give evidence on his behalf, as, e.g., on a claim for goods sold the seller puts his servant in the box to prove delivery, or to whom credit was given, or the like.

Notes. As to the admissibility in evidence of statements in former proceedings, see 15 HALSBURY'S LAWS (3rd Edn.) 298; and for cases see 22 DIGEST (Repl.) 78, 89.

Cases referred to:

(1) *Boileau* v. *Rutlin* (1848), 2 Exch. 665; 12 Jur. 899; 154 E.R. 657; 22 Digest (Repl.) 296, *3029*.

(2) *Brickell* v. *Hulse* (1837), 7 Ad. & El. 454; 2 Nev. & P.K.B. 426; Will. Woll. & Dav. 610; 7 L.J.Q.B. 18; 2 Jur. 10; 112 E.R. 541; 22 Digest (Repl.) 522, *5820*.

(3) *Gardner* v. *Moult* (1839), 10 Ad. & El. 464; 2 Per. & Dav. 403; 8 L.J.Q.B. 270; 3 Jur. 1190; 113 E.R. 176; 22 Digest (Repl.) 273, *2758*.

(4) *Fleet* v. *Perrins* (1868), L.R. 3 Q.B. 536; 9 B. & S. 575; 37 L.J.Q.B. 233; 19 L.T. 147; affirmed (1869), L.R. 4 Q.B. 500; 9 B. & S. 575; 38 L.J.Q.B. 257; 20 L.T. 814; 17 W.R. 862, Ex. Ch.; 22 Digest (Repl.) 306, *3170*.

(5) *Richards* v. *Morgan* (1863), 4 B. & S. 641; 3 New Rep. 198; 33 L.J.Q.B. 114; 9 L.T. 662; 28 J.P. 55; 10 Jur.N.S. 559; 122 E.R. 600; sub nom. *Richards* v. *Morgan*, *Morgan* v. *Morgan*, 12 W.R. 162; 22 Digest (Repl.) 78, *541*.

(6) *Evans* v. *Merthyr Tydfil Urban Council*, [1899] 1 Ch. 241; 68 L.J.Ch. 175; 79 L.T. 578; 43 Sol. Jo. 151, C.A.; 78, *542*.

(7) *Rushworth* v. *Countess of Pembroke and Currier* (1668), Hard. 472; 145 E.R. 553; 22 Digest (Repl.) 281, *2850*.

(8) *Chambers* v. *Bernasconi* (1834), 1 Cr.M. & R. 347; 4 Tyr. 531; 3 L.J.Ex. 373; 149 E.R. 1114, Ex. Ch.; 22 Digest (Repl.) 47, *296*.

(9) *Cole* v. *Hadley* (1840), 11 Ad. & El. 807; 3 Per. & Dav. 458; 4 Jur. 483; 113 E.R. 621; 22 Digest (Repl.) 284, *2892*.

(10) *Slatterie* v. *Pooley* (1840), 6 M. & W. 664; H. & W. 18; 10 L.J.Ex. 8; 4 Jur. 1038; 151 E.R. 579; 22 Digest (Repl.) 77, *528*.

(11) *Pritchard* v. *Bagshawe* (1851), 11 C.B. 459; 2 L.M. & P. 323; 20 L.J.C.P. 161; 17 L.T.O.S. 199; 15 Jur. 730; 138 E.R. 551; 22 Digest (Repl.) 209, *1959*.

Appeal from an order of RUSSELL, J., in an action in which the plaintiffs sought an injunction to restrain the infringement of a patent.

In 1916 the plaintiffs brought an action against Duram, Ltd. (34 R.P.C. 117), for an infringement of a patent of the plaintiffs dated 1906 and one issue of fact was whether the process disclosed by the patent was workable, that is, whether by following the directions of the 1906 patent it was possible to obtain a drawn wire tungsten filament. The plaintiffs now admitted that in the *Duram* action they contended that, by following the directions given in the 1906 patent, a filament of drawn tungsten wire could be obtained. In support of that contention the plaintiffs called three expert witnesses. The action failed, but on a ground that made it unnecessary to decide that question of fact. In the present action the plaintiffs sued different defendants for infringement of a patent dated 1909. The 1906 patent was pleaded in defence in this action, and the same issue of fact became material. In this action, however, the plaintiffs contended that it was impossible by following the directions of the 1906 patent to obtain a tungsten drawn wire filament. In support of that contention they called expert witnesses, but not any of the experts who gave evidence in the *Duram* case. The defendants now claimed that they were entitled to read the evidence given by the three experts in the *Duram* case on the ground that the putting forward by the plaintiffs of that evidence was an admission by conduct that the evidence so given was true. It was not suggested that such an admission operated by way of estoppel, but it was said that it constituted primâ facie evidence which was now admissible. The defendants, by means of the admission which the plaintiffs had made, established what the contention of the plaintiffs was in the *Duram* action, and in the course of the trial of the present action before RUSSELL, J., the question arose whether the oral testimony called to establish that contention was admissible. The learned judge refused to allow the evidence of the three experts in the *Duram* case to be read. The defendants also claimed to be entitled to read as evidence against the plaintiffs the case lodged by them when the *Duram* action went to the House of Lords (35 R.P.C. 161). The learned judge said that it seemed that the appellants' Case as lodged in the House of Lords, although not strictly a plea, was a document in the nature of a plea, and that he ought to follow the same rule that governed pleas. That rule, as stated in TAYLOR ON EVIDENCE (11th Edn.), p. 559, s. 821, was:

> "With respect to admissions by pleading, the law at present seems to be that statements which are contained in any pleading, though binding on the party making them for all the purposes of the case, ought not to be regarded in any subsequent action as admissions."

Accordingly, the learned judge held that the Case lodged by the plaintiffs in the House of Lords was not admissible as evidence against them in the present action. The defendants appealed.

Sir Duncan Kerly, K.C., Courtney Terrell, R. Stafford Cripps, and *D. H. Corsellis* for the defendants.

Sir Arthur Colefax, K.C., J. Hunter Gray, K.C., J. Whitehead, K.C., and *Trevor Watson* for the plaintiffs.

Cur. adv. vult.

April 7. The following judgments were read.

SIR ERNEST POLLOCK, M.R.—The question the court has to decide upon this application to admit certain evidence is an important one. It must be stated here that it is not suggested that every word stated by the witnesses should be admitted as evidence, but only their testimony so far as it recorded questions of fact. The real ground on which it is contended that this evidence is to be accepted is that the statements of fact made by the witnesses were put forward by the plaintiffs, and were adopted by them, so as to make the evidence given their own—in other words, that their statements are to be treated as admissions of the plaintiffs

A themselves. RUSSELL, J., refused permission, and, in the course of hearing the appeal on the main question in the action, the defendants have invited us to overrule his decision, and to admit the evidence. We have taken time to consider and give our judgment upon the point, for it is one of far-reaching application.

Let me dispose of the second ground on which the appeal is made at once. Unless the evidence was admissible, per se, before the court of first instance, in B my mind, no additional ground for admissibility is afforded by the fact that a party in the course of, or for the purpose of, his appeals, whether to the Court of Appeal or to the House of Lords, made use of or relied upon the evidence given. An appeal is presented upon the materials as a whole which were before the court of first instance. No appellant can exclude any evidence that was before the first court. All must go forward to the higher court. It is not right, therefore, in my C judgment, to treat evidence that must be presented to it as stamped in the appellate court by any fresh mark of adoption which will establish that the evidence is to be treated as part of admissions made by the appellant, if it were not so at an earlier stage, namely, when the evidence was first given. The evidence is to be treated as if it has become part of the proceedings and is not to be qualified with any special character in addition. I prefer to express my view on this point as D above. It accords with the view expressed by RUSSELL, J., though he seems to put his reasoning on rather narrower ground, namely, that the Case lodged by the appellant is to be treated as governed by the rule which governs pleas, that statements of a party in a declaration of plea ought not to be treated as confessions of the truth of the facts stated in them: see per PARKE, B., in *Boileau* v. *Rutlin* (1) 2 Ex. Ch. at p. 681.

E I turn, therefore, to the main ground urged for the admissibility of this evidence, namely, that the plaintiffs in their previous case procured it, put it forward, and made it their own, on the principle that admissions made by a party can be used against him. There is authority for the proposition that affidavits or documents which a party has knowingly used as true in a judicial proceeding, for the purpose of proving a particular fact, are evidence against him in subsequent proceedings to F prove the same fact. The cases which were cited to us establish this. For an affidavit see *Brickell* v. *Hulse* (2); for a deposition see *Gardner* v. *Moult* (3); for an affidavit in answer to interrogatories see *Fleet* v. *Perrins* (4). All these were cases in which the party advancing the document, whether affidavit or deposition, knew of its contents beforehand, and elected to put it forward in support of his case. Indeed, as CROMPTON, J., said in *Richards* v. *Morgan* (5), it must always be remem- G bered that it is not the obtaining the affidavit or deposition, but the making use of it as true, with knowledge of the contents, which is the ground on which such evidence is supposed to be receivable. So PATTESON, J., expressly in *Gardner* v. *Moult* (3) adheres to the distinction pointed out in *Brickell* v. *Hulse* (2) as sound, that is, that the admissibility depends upon knowledge of the nature of the evidence, and an election upon that knowledge to advance and rely upon it: see also H per PARKE, B., in *Boileau* v. *Rutlin* (1), 2 Exch. at p. 680, and the illustration of this rule afforded by *Evans* v. *Merthyr Tydfil Urban Council* (6), where a deposition was held inadmissible, because the proof that it had actually been used and relied upon by the party against whom it was desired to use it failed. These decisions do not, however, govern the present application. In *Brickell* v. *Hulse* (2), *Gardner* v. *Moult* (3), and *Boileau* v. *Rutlin* (1), it is stated expressly that a I party in a cause is not bound by all that his witnesses say at nisi prius; see per LORD DENMAN in *Gardner* v. *Moult* (3) 10 A. & E. at p. 468, and *Boileau* v. *Rutlin* (1) where PARKE, B., says (2 Exch. at p. 680):

> "There could be no reason for holding that his answers would be evidence against the party, any more than there would be for receiving the evidence of a witness examined by a party in an ordinary trial at law as an implied admission by him; which it is conceded can never be done."

But it is said that the decision of the majority in *Richards* v. *Morgan* (5), decided

in 1863, carries the principle much farther, and authorises the admission of the evidence now tendered before us. In that case BLACKBURN, J., was against the admission of the evidence. He goes through the cases now again cited and gives his explanation of the basis of them, that the party tendering the evidence originally did so for the purpose of proving a certain fact. CROMPTON, J., admits the document in question—a deposition of a witness in a previous Chancery suit.—on this ground. He says (4 B. & S. at p. 659):

> "Upon this state of the authorities, I feel bound to hold that a document knowingly used as true by a party in a court of justice, is evidence against him as an admission, even for a stranger to the prior proceedings, at all events when it appears to have been used for the very purpose of proving the very fact for the proving of which it is offered in evidence in the subsequent suit."

He adds his agreement to the exception of evidence at nisi prius, saying (ibid. at p. 659):

> "I think also that it now appears that such depositions as those in question do not fall within the class of cases which establish, as a kind of exception, that a party is not bound by evidence which he adduces without knowing what it may turn out to be, as in the common case of the evidence of witnesses called at nisi prius by a party who cannot tell what they will say."

COCKBURN, C.J., is said to go further. True, it is that he says there is no logical distinction to be drawn between oral and written evidence, but his qualification must not be neglected or overlooked. He says (ibid. at pp. 662, 663):

> "While I concur in the position that the evidence of a witness called at a trial is not necessarily, or to the full extent to which it may go, admissible against the party calling him in a future proceeding, yet, if it can be shown that the witness was called to prove a specific fact, it appears to me that this would be admissible as an assertion of such fact by the party calling the witness. . . . It would be in the highest degree unreasonable to suffer the party using the evidence to be affected by that portion which he may have repudiated or disregarded, on the ground that the statements of the witnesses must be taken to be his."

There is great difficulty in working out such a rule, as indicated by COCKBURN, C.J., on which the evidence is to be admissible, and what parts of it are to be taken as admissions and what not. *Richards* v. *Morgan* (5) is not binding on this court. The observations of COCKBURN, C.J., were not necessary in their entirety to the particular decision. Inasmuch as he concurs (4 B. & S. at p. 662) and thus agrees with the stream of authority, which includes LORD DENMAN, LITTLEDALE, PATTESON, and CROMPTON, JJ., and PARKE, B., I prefer to adhere to the rule, as stated by BLACKBURN, J., in *Richards* v. *Morgan* (5), that viva voce evidence called at nisi prius cannot be taken as an implied admission. For these reasons I agree with RUSSELL, J., and the application must be refused.

ATKIN, L.J., stated the facts and continued: It is contended that any evidence used in a trial by a party in proof of any fact is admissible in proof of such fact against that party in any subsequent suit in which he is a litigant. The proposition reaches my mind with complete novelty. In the course of my own experience I have never heard it broached as a rule of evidence, or sought to be put in practice, and I must confess that I did not know that it had the authority of COCKBURN, C.J., to support it, or that there were so many reported dicta against it.

One must consider the contention on principle and on authority. The first matter that appears material is that admissions can only be given in evidence when made by a party or his agent authorised to make the admission, and that the evidence of a witness is not a statement made by the party, and that the witness is not necessarily, or indeed usually, an agent of the party at all, either to make an admission or for any other purpose. The witnesses whose evidence is tendered in this case were eminent scientific gentlemen, called to give scientific evi-

dence, both as to matters of fact and matters of opinion. There is not the slightest evidence tendered that at any time they were in any sense agents of the plaintiffs. But it is said that by calling a witness to prove a fact the party declares that the evidence given by such witness is true, and that such a declaration is an admission by conduct. In any event it is said, it is such a declaration and admission when the party uses the evidence as proof of the fact. Such a contention appears to me to distort the whole relation of party to witness. In many instances—perhaps in most—witnesses are called to speak to facts of which the party has no knowledge. Often they are called for that very reason. They speak to events when the party was not present, and of facts which he would not have understood if he had been present. Often, indeed, the party himself does not know what witness is going to be called, what he is going to say, or what bearing it has on the suit. Indeed, if admission is made at all in calling or using evidence, I should have thought it was the admission of the advocate, and there is much authority that admissions by advocates, though authorised for the purpose of the particular suit, are not authorised so as to be binding outside the suit. But assuming that the party is identified for this purpose with his advocate, is it true to say that proffering or using evidence is a declaration that it is true? I imagine that the most optimistic litigant would boggle at such a burden. He would say: "I assert the affirmative or negative of the issue of fact found between me and my opponent. I tender the evidence of persons who are prepared to swear to facts which, if true, I believe will support my case; but as the facts are not within my own knowledge, I have no means of judging whether they are true or not." I do not think that morality requires more from a litigant than a belief that the evidence may be true, and the absence of knowledge or belief that it is false. If he is an experienced litigant, there will be many cases where his honest belief may be alleged with some honest distrust; but the evidence given may in fact be obviously exaggerated, or, intentionally or unintentionally, false. It may be contradicted by other evidence, also called by the same litigant, or be conclusively overthrown by the evidence of the opponent. To pledge the party to the truth of evidence in these circumstances seems to me to travesty the facts. But it is said the proposition is only that evidence used is admissible, and that does not necessarily include evidence called.

We are then left with the question to be determined as a preliminary to the admission of the evidence in the subsequent suit: What is meant by "used"? I was unable during the discussion to obtain any answer that satisfied me, though we were told that if the evidence were put forward to the court it was an admission of the party, even though at the first trial the party, before the conclusion, rejected it. It is obvious that if some user other than the mere eliciting of the evidence in examination is necessary, at the subsequent trial there may have to be an elaborate review of all the circumstances of the former trial, the qualifications on that of subsequent evidence, the speeches of counsel, and a decision whether the evidence of that particular witness was or was not used. In this particular case, the only suggestion of user was that the evidence was printed as part of the record in the joint appendix in the House of Lords appeal. This appears to me to take the case no further than the actual eliciting of the evidence, and to constitute no further use. It is, perhaps, needless to refer to the extra burden that would be thrown upon the advocate who would have to consider the bearing of evidence called by him, not only on the issues of the case in which he was concerned, but on the interests of his client in subsequent litigation with other parties, with the details of which he might be imperfectly acquainted, or not acquainted at all. On principle, therefore, I should come to the conclusion that the evidence of third parties used in a trial by a party in proof of any fact is not admissible in proof of such fact against that party in any subsequent suit in which he is a litigant. I should, however, qualify this proposition with two reservations. If the evidence is tendered, not in proof of the fact in support of which it was tendered at the first trial, but in proof of a state of mind of the party then using it, on such issues as obtaining the first judgment by fraud, or of malice, or of want of reasonable or

probable cause, it may become admissible; secondly, if the evidence given is that of a witness who at the former trial was in fact the agent of the party, authorised to give the evidence on his behalf, it may then be admissible. If, for instance, on a claim for goods sold and delivered the plaintiff puts his salesman or carman into the witness-box to prove delivery, or by a servant or agent seeks to prove to whom credit was given, or that a bill was dishonoured, and the like, it may well be that such evidence may be treated as an admission by the party or his agent. I express no final opinion about it.

When the authorities are examined, with the single exception of the judgment of COCKBURN, C.J., in *Richards* v. *Morgan* (5), they are all found to support the view that I have expressed as to the admissibility of parol evidence. A distinction, however, has been drawn as to affidavit evidence, and there are authorities in the courts of first instance which treat affidavit evidence used by a party as admissible against him in subsequent proceedings. Whether these cases are rightly decided or not need not be decided in this case, for all the cases of this description expressly draw the distinction between affidavit evidence and parol evidence, treating an affidavit read on behalf of a party as a statement directly made by him. The state of the law up to 1837 seems to be accurately stated in the judgment of BLACKBURN, J., in *Richards* v. *Morgan* (5). Neither parol evidence nor written evidence in Chancery depositions taken before an examiner were admitted in *Brickell* v. *Hulse* (2). In an action against the sheriff, it appeared that the defendant, who had been instructed to levy several writs of execution against the plaintiff's goods, had applied to a judge in chambers to extend the time for returning the writs in order that he might make an application under the then interpleader Act, and on that application in chambers had put in an affidavit of one White, who said he had seized the goods as officer for the defendant, and was in possession of them. This affidavit was tendered at the trial as evidence that White was acting as agent of the defendant. I should have thought that it might well have been held admissible as evidence that the defendant himself at the hearing of the application, or, at any rate, by his agent, authorised for that occasion, White, had asserted the existence of White's authority. LORD DENMAN, however, puts it on the broader ground. There can, I think, be no question that a statement which a party produces on his own behalf, whether on oath or not, becomes evidence against him. DENMAN, C.J., says (7 A. & E. at p. 456):

> "It is very important that this question should not be left subject to doubt. There can, I think, be no question but that a statement which a party produces on his own behalf, whether on oath or not, becomes evidence against him. There is nothing to distinguish it from a statement made by the party himself. *Rushworth* v. *Countess of Pembroke and Currier* (7) at first seems opposed to this view, for there the defendant was not permitted to use any of the depositions made in an equity suit, where the plaintiff had been defendant. That decision, however, was founded on the nature of the proceedings in equity. A party who uses such depositions does not know beforehand what they are; if he did, such cases would stand on the same footing as the present. He can only refer to what he expects will be produced; it is like the case of a witness called at nisi prius, whose evidence does not bind the party calling him. It is quite different from a case where a party produces, as part of his own statement, an affidavit of which he knows the contents."

COLERIDGE, J., says (ibid. at p. 457):

> "This is a very clear case when we attend to the facts. On one side the defendant makes an application to a judge, and arms himself with the statement, which he makes his own and uses. That is clearly evidence against him afterwards of the facts in the statement. The statement may be of more or less avail; and it may be a matter of remark that the person making the affidavit is present and is not called. But that is not the question here. As to the depositions in equity, they stand on the same footing with viva voce evidence

given in a court of law. A man does not make all that is said by a witness whom he calls evidence against himself hereafter. In Chancery the depositions are sealed up from the time of their being taken until publication passes. That is like the case of a party calling a witness whose evidence he does not hear until it is given. The present is the case of a party using a statement which he has seen before he uses it, and which is neither the more nor the less admissible for being made upon oath."

LORD DENMAN appears to have been mistaken as to the practice in equity, but the ground given by him as the ground for excluding documents clearly covers, as he says, the case of parol evidence.

In *Gardner* v. *Moult* (3) the action was by two assignees in bankruptcy of one Strutton against the public officers of a bank for money had and received. The defendants disputed the act of bankruptcy, on which the plaintiff's title depended. It appeared the fiat in bankruptcy had been issued on the initiative of the bank, and the bank had sent one Hay, the manager of a branch of the bank at Chester, to Manchester to prove an act of bankruptcy, and that a fiat was opened upon the deposition of Hay that an act of bankruptcy had been committed. This deposition was tendered by the plaintiffs as evidence against the defendants of the act of bankruptcy. Here, again, the case seems to turn on agency, and, indeed, seems to be expressly decided on that ground. The judgment is as follows: DENMAN, C.J., says (10 A. & E. at p. 468):

"The examination or deposition of Hay was clearly admissible evidence. The defendants send their servant to prove an act of bankruptcy; and they act on the statement made by him. There is no necessity for entering into the general doctrine. No doubt a party in a cause is not bound by all that his witnesses say at nisi prius, or in their depositions in Chancery. But the defendants are here bound by the particular statement which their agent was seen to make."

LITTLEDALE, J.:

"The deposition is evidence as much as if it had been made by the defendants themselves. They sent him for the purpose of making it, and they adopted it."

PATTESON, J. (ibid. at p. 468):

"The distinction pointed out in *Brickell* v. *Hulse* (2) is a sound one, and I do not intend to depart from it; but it is not material by what name the document is called. It is in substance an affidavit within the meaning of the distinction there laid down, though called a deposition. Hay therein makes a statement of facts which the petitioning creditors had previously ascertained from him that he was able to make. He says nothing but what they knew he would say, and was subject to no cross-examination. *Chambers* v. *Bernasconi* (8) is not in point. The depositions there were offered against the assignees, and not, as here, against the petitioning creditor."

WILLIAMS, J. (ibid. at p. 469):

"The solicitor of the defendants is employed by them to obtain evidence of a certain fact in order to support a fiat. For that purpose he produces the deponent, who swears to the specific fact which he was expressly called to prove. Under such circumstances the affidavit is like one made by the principal, and admissible by the same rule. The question, too, is not what it proves, but whether upon this record it was admissible at all."

In *Cole* v. *Hadley* (9), an action for trespass, the question was raised as to the right of the defendant to put in the deposition of a witness on an information laid against the defendant by the plaintiff, at the Berkeley Petty Sessions, for malicious trespass. The evidence had been admitted, and the case is reported upon a motion for a rule on the ground of misreception of evidence. A rule was refused. The case is shortly reported, and the facts are not clear. The deposition is said to have been that of the vicar of the parish, who had been called at petty sessions to

prove that the plaintiff was his tenant, and, in fact, denied that the plaintiff was his tenant. What the precise procedure was, whether for an indictable offence, as the word "deposition" would suggest, or for some offence within the summary jurisdiction of the justices, one does not know, and if the latter, it is not clear how the deposition came into existence. The vicar had, since the hearing at petty session, gone abroad. The court referred to *Gardner* v. *Moult* (3) and *Brickell* v. *Hulse* (2), but in what connection it is not easy to see. They cannot have been qualifying their express reservation in *Brickell* v. *Hulse* (2) of parol evidence. The case seems to me of little authority. The explanation may be that the deposition was that of a witness who had since gone beyond seas, and was treated as admissible on that ground.

I should not refer to the next case, *Slatterie* v. *Pooley* (10), if it were not treated as an authority in the Court of Common Pleas in *Pritchard* v. *Bagshawe* (11) for what appears to be a different proposition. In *Slatterie* v. *Pooley* (10) the plaintiff, in an action on the covenant, claimed that the defendant had covenanted to indemnify him against the claims of creditors whose debts were entered in the schedule to a certain deed of composition, but who did not execute the deed. The issue was whether the debt of one Thomson was scheduled to the deed. At the trial the deed was rejected, not being duly stamped, but the judge admitted a verbal admission by the defendant that the debt mentioned in the declaration was the same as one contained in the schedule. The decision of the court was that the admission by a party as to the contents of a written document is admissible without production of the written document.

In *Pritchard* v. *Bagshawe* (11) the action was trover, the plaintiffs alleging a conversion by the defendants of plant belonging to their testator. The question was whether dealing with the plant by two persons, Robertson and Dimsdale, bound the defendants. It appeared that the defendants had instituted a suit against a third party for specific performance of a contract relating to the subject-matter of the action, and in the taking of an account ordered in that suit the defendants, before the Master, had used an abstract of title containing particulars of a deed whereby Robertson and Dimsdale had assigned the property to the defendants, and in the suit had used an affidavit by Dimsdale stating in effect that he was manager of the defendants. The plaintiffs tendered in evidence the affidavit and the deed. Mr. Phipson, for the defendants, admitted in argument that the affidavits, having been used by the defendants in the Chancery suit, were no doubt admissible evidence against them; but he contested the admissibility of the abstract, as being merely a recital of extracts from deeds. No question, therefore, was decided by the court as to the affidavit, and they held that the principle of *Slatterie* v. *Pooley* (10) made the abstract admissible. The court seems to have regarded the abstract as a document produced before the Master by the defendants themselves as the deed of themselves or their predecessors in title, and therefore, to have been a direct admission. Except for the admission of counsel, this case seems to have little bearing on the point at issue.

In *Boileau* v. *Rutlin* (1), in an action for use and occupation, the defendant relied upon an agreement to purchase under which he had been let into possession, and in order to prove the agreement tendered a bill in equity in a suit by the plaintiff for specific performance of the same agreement in which the agreement was set out verbatim. Lord Denman, at the Surrey Assizes, had admitted the evidence, but it was held by the Court of Exchequer, Parke, Alderson, Rolfe, and Platt, BB., that it was inadmissible. In *Brickell* v. *Hulse* (2), the party had used an affidavit as a true statement, and, therefore, it was admitted as evidence against him. The court there advert to the distinction between affidavits so used and the depositions made in a suit in equity. Parke, B., says (2 Exch. at p. 675):

> "The marginal note to that case is not quite correct. If a person uses an affidavit containing a hundred different statements, they cannot all be evidence against him."

ALDERSON, B. (ibid. at p. 675):

"The decision itself is quite correct, and the marginal note should have been: 'Where a sheriff, in a case of interpleader before a judge, puts in an affidavit of his officer, that the latter seized the goods, that is evidence as against the sheriff, that the officer did so seize.'"

PARKE, B., says (ibid. at p. 679):

"In this state of the authorities directly bearing upon this question, there can be no doubt that the weight of them is against the reception of a bill in equity as an admission of the truth of any of the alleged facts. But it was argued, that there are many more recent authorities indirectly bearing upon this question, which afford a strong analogy in favour of the reception of a bill in equity as evidence in the nature of a confession. There are the cases of *Brickell* v. *Hulse* (2) and *Gardner* v. *Moult* (3). In the first of these, a party using an affidavit on a motion; in the second, by sending another to state a particular fact, was held to make the affidavit and statement respectively evidence against himself. These cases do not fall under the description of pleadings by parties; they are rather instances of admission by conduct, and are analogous to those in which the declarations of third persons are made evidence by the express reference of the party to them as being true. This is the explanation very rightly given in MR. TAYLOR'S recent treatise on EVIDENCE. In the first of the above-mentioned cases, it may be presumed that the defendant prepared the affidavit which he afterwards exhibited as true; at all events, that he exhibited it for the purpose of proving a certain fact. In the second, it must be taken that he sent the servant to prove a particular act of bankruptcy; for, if he sent him to be examined as a witness, and give evidence generally as to any act to which the commissioner might examine him, there could be no reason for holding that his answers would be evidence against the party, any more than there would be for receiving the evidence of a witness examined by a party in an ordinary trial at law, as an implied admission by him, which, it is conceded, can never be done: see LORD DENMAN'S judgment in both the cases last cited. The case of *Cole* v. *Hadley* (9) was also referred to as an authority. From the short report of that case, it is not clear on what ground the evidence was received. It would seem that it was received as the deposition of a witness on a prior inquiry, between the same parties, on the same question. It could not be on the ground that the statement was evidence against the party, simply because the witness was produced by him, as the contrary was laid down in the two cases of *Brickell* v. *Hulse* (2) and *Gardner* v. *Moult* (3) which were referred to. These authorities, therefore, afford no reason for doubting the propriety of the decisions above referred to as to bills in equity. It would seem that those, as well as pleadings at common law, are not to be treated as positive allegations of the truth of the facts therein for all purposes, but only as statements of the case of the party, to be admitted or denied by the opposite side, and if denied, to be proved and ultimately submitted for judicial decision."

In *Richards* v. *Morgan* (5), in an action of replevin for taking sheep, the defendant averred for damage feasant on the ground that he held, as tenant of one Meyrick, who was the owner in fee. The issue was whether Meyrick was owner of the locus in quo, or whether it was part of the property of the Marquis of Bute, the lord of the manor in which the locus in quo lay. It appeared that in 1842 one Edwards had brought a suit in equity against Meyrick to set aside the purchase from Edwards of the property in question on the ground that Meyrick had been his solicitor, and had bought the property at an undervalue. In order to show the true value, two depositions of former tenants of the farm, Morgan and Harris, had been taken to show the boundaries of the farm, with a view of showing that it was of little value, which tended to exclude the property in question from the subject of the purchase. Those depositions had been read and used as evidence

in the suit by Meyrick's counsel. In the replevin trial those two depositions were tendered as evidence against the defendant, who was Meyrick, defending in the name of his tenant, and were admitted at Glamorganshire Assizes by WILDE, B. On argument for an order for a new trial it was held by a majority of the Court of King's Bench that they were admissible, BLACKBURN, J., dissenting. CROMPTON, J., held that they were admissible as documents knowingly used by a party as true in the previous proceedings. COCKBURN, C.J., held that they were admissible on the ground that where a witness is called for the purpose of proving a particular fact this amounts to an assertion of that fact by the party who so uses his testimony. BLACKBURN, C.J., dissented on the ground that using the evidence of a witness, whether that evidence be viva voce or reduced into writing, does not constitute an admission by the party so as to make it admissible as evidence against him. I do not propose to discuss the judgments at length, for it seems to me plain that the majority judgment must depend upon the reasons given by CROMPTON, J., who confined his reasoning to the use of the depositions as documents the truth of which was asserted by the party, and plainly recognised the distinction as to evidence called at nisi prius. He said (4 B. & S. at p. 659):

> "Upon this state of the authorities I feel bound to hold that a document, knowingly used as true by a party in a court of justice, is evidence against him as an admission, even for a stranger to the prior proceedings, at all events when it appears to have been used for the very purpose of proving the very fact for the proving of which it is offered in evidence in the subsequent suit. I think, also, that it now appears that such depositions as those in question do not fall within the class of cases which establish, as a kind of exception, that a party is not bound by evidence which he adduces without knowing what it may turn out to be, as in the common case of the evidence of witnesses called at nisi prius by a party who cannot tell what they will say."

COCKBURN, C.J.'s judgment appears to me, with respect, to be contrary to every case decided up to that date, so far as parol evidence is concerned. It is, no doubt, limited to the admissibility of evidence only so far as it shall appear to have been used to establish a given fact or facts. I have already pointed out that all evidence is adduced to establish a given fact or facts; and what difficulties there are arise from the necessity of considering the use of it. No doubt, the learned Chief Justice appreciated the logical difficulty of distinguishing between the admissibility of evidence given, on the one hand, in writing, or, on the other, viva voce. The same difficulty would lead me, as at present advised, to concur with the reasoning of BLACKBURN, J., if I had to decide the question of affidavit evidence. It is not binding upon us, and I am not prepared in any case to follow it further than it goes.

Fleet v. *Perrins* (4) is a case of interrogatories administered to the party and of answers admissible as direct admissions of acts by the party. It has no bearing upon this case, and, except for a reference by BLACKBURN, J., to *Richards* v. *Morgan* (5), immaterial to his decision, would appear to be irrelevant. Finally, in *Evans* v. *Merthyr Tydfil Urban Council* (6) the question arose between the plaintiffs and the defendants whether a certain piece of land was common land. It appears that in 1815 a cause was depending in the Court of Chancery of the Great Sessions of Wales between one Clifton and one Gwynne, who was alleged, but not admitted, to be the predecessor in title of the defendants. What the nature of that suit was does not appear from the report. In the suit a deposition of one Williams had been taken, apparently on behalf of Gwynne, though that is not stated in the report. There was no evidence, however, that it had ever been used, and the Court of Appeal held that it was inadmissible. Counsel for the defendants do not seem to have disputed the decision in *Richards* v. *Morgan* (5), and the decisions in the Court of Appeal do not seem to amount to more than that, assuming *Richards* v. *Morgan* (5) to be correct, the case did not fall within it.

I have now reviewed the whole of the authorities on this subject. They show the

law as to the admissibility of affidavit evidence to be in an uncertain and unsatisfactory condition. Up to 1837 such evidence was rejected; in that year there begins in the King's Bench a line of authority based upon a misapprehension of the Court of Chancery procedure, and a mistaken explanation of the former authorities based upon that misapprehension. The authorities are, however, confined to the admissibility of written evidence, treating such evidence as documents the truth of which is declared by the party using them. They, in terms, reject parol evidence as coming within the rule they lay down. In my opinion, to admit parol evidence of witnesses given in the circumstances of the present case would be contrary to established principles of evidence and would reverse the full amount of authority. I desire to say nothing as to the facts of the present case. But that a party should assert in one action what he has denied in another, and should call witnesses in one action in support of a fact which he called witnesses to deny in another, is not uncommon. It can be done with perfect honesty. In the case of a chain of contracts for the purchase of goods where the question of quality is raised it is quite usual for an intermediate purchaser to be compelled to face both ways, putting forward information supplied to him from either end of the chain; and at times he has to support the different views in two actions, relying in the first action on the evidence of witnesses produced by the sellers, and in the second on witnesses produced by the buyer, or vice versa. If the one case is disproved I see no reason at all why he should be assumed, by calling the evidence, to have admitted its truth. In my opinion, there is no reason of public policy why the rule as stated above should not be followed. I think that the evidence tendered should not be admitted.

SARGANT, L.J., stated the facts and continued: Both the decisions and the reasoning of the various judges who have previously dealt with a similar question are at first sight conflicting, and are, perhaps, not completely reconcilable on any view. In *Brickell* v. *Hulse* (2) affidavit evidence put forward on a motion was held to be admissible on a subsequent trial against the party using it; but in so holding, LORD DENMAN drew a distinction between evidence the contents of which were known to the party before he used it, and depositions in Chancery or evidence at nisi prius the whole effect of which was not within the knowledge of the party. COLERIDGE, J., pointed out that in the case of viva voce evidence a man does not make all that is said by a witness whom he calls evidence against himself hereafter; and he put the case of general depositions in Chancery under the old practice on the same footing, because he thought, though wrongly, the party using them did not know their contents, and, therefore, it was "like a case of a party calling a witness whose evidence he does not hear till it is given." In *Gardner* v. *Moult* (3) the question was as to the admissibility against a defendant of a deposition put in at his instance to prove an act of bankruptcy. DENMAN, C.J., and PATTESON, J., were again members of the court and admitted the evidence. LORD DENMAN said (10 A. & E. at p. 468):

> "The examination or deposition of Hay was clearly admissible evidence. The defendants sent their servant to prove an act of bankruptcy, and they act on the statement made by him. There is no necessity for entering into the general doctrine. No doubt a party in a cause is not bound by all that his witnesses say at nisi prius, or in their depositions in Chancery. But the defendants are here bound by the particular statement which their agent was sent to make."

PATTESON, J., re-affirmed the soundness of the distinction taken in *Brickell* v. *Hulse* (2).

Then came what is undoubtedly the most important case on the subject, namely, *Richards* v. *Morgan* (5), which was decided by a court composed of COCKBURN, C.J., CROMPTON and BLACKBURN, JJ. In that case depositions had been put forward and used by a defendant (a solicitor) in a suit in Chancery for the purpose

of minimising the extent or acreage of a property which he had purchased from a client, and in subsequent proceedings by a different plaintiff against the same defendant it was held (BLACKBURN, J., dissenting) that this evidence was admissible in favour of the then plaintiff. The reasoning of the three judges was very different. The Chief Justice and BLACKBURN, J., both thought that oral evidence and written evidence, at any rate so far as used to establish a specific fact such as the extent of the property then in question, stood upon the same footing as regards admissibility against the party using it; but the Chief Justice thought that both were admissible, and BLACKBURN, J., that both were inadmissible. The former, in a passage which has been cited by the learned judge in this case, said (4 B. & S. at p. 663):

> "Bearing in mind that the true ground on which such evidence is admissible is that a party seeking to establish a fact by evidence in a court of justice must be taken to assert the fact he so seeks to prove, it seems to me to follow, on the one hand, that oral evidence, so far as it shall appear to have been used to establish a specific fact, will be evidence against the party using it, as an assertion of that fact, and on the other, that written evidence will be admissible against the party using it in a subsequent proceeding with a different party, not for the purpose of proving all the statements it may contain, but only so far as it shall appear to have been used to establish a given fact or facts."

BLACKBURN, J., in refusing to admit the evidence, pointed out inconveniences and difficulties that might arise from the admission of such evidence. On the other hand, CROMPTON, J., thought that written evidence such as that then in question was admissible, and that what made it admissible was "the making use of it as true with knowledge of its contents"; but he recognised (ibid. at p. 659)

> "as a kind of exception that a party is not bound by evidence that he adduces without knowing what it may turn out to be, as in the common case of witnesses called at nisi prius by a party who cannot tell what they will say."

The cases in which a party in an earlier action brings evidence to prove a particular fact, and then, in a subsequent action brings evidence to prove the contrary, can hardly be numerous. There is no record in the subsequent cases of any such inconveniences having arisen, as BLACKBURN, J., found, at any rate with regard to previous written evidence. Nor do I think that such inconveniences are likely to occur as regards either class of evidence if the admissibility is confined to evidence definitely brought forward to prove a particular fact or facts and does not extend to the whole of the evidence of a witness, whether expected or intended or not. There are two subsequent cases, *Fleet* v. *Perrins* (4) and *Evans* v. *Merthyr Tydfil Urban Council* (6) (the second a case which went to the Court of Appeal) in which the question was the admission of written evidence, and the decision in *Richards* v. *Morgan* (5) was approved. Therefore, if, as the majority of the court in *Richards* v. *Morgan* (5) thought, and as it seems to me rightly thought, the admissibility of written evidence and verbal evidence must be accepted or rejected on the same principles, the weight of authority is, in my judgment, decidedly in favour of the admission of both classes of evidence, so far at any rate as it has been brought forward by a party for the purpose of proving specific facts.

But if, as the learned judge has thought, the matter is still at large, which is the preferable view on general principle? In my opinion, it is that evidence of specific facts which has once been definitely adopted and placed before the court as true by a party to previous proceedings is admissible against him thereafter, as constituting an assertion or statement by him to that effect. An assertion of such facts by the oath of a witness tendered for the purpose is a particularly definite and deliberate assertion by the party of the specific facts in question. I can see no reason or logic in a system of evidence which, while treating as admissible against a party a statement made less solemnly and deliberately by himself, should exclude

and ignore a far more solemn and deliberate assertion which he has caused to be made through the sworn testimony of others. The present case seems to me to be a strong illustration of the unreasonableness of such a system. In the action against Duram the plaintiffs placed before the court the evidence of three distinguished experts to prove the definite specific fact that they had by working under the process disclosed by that specification produced drawn tungsten filament, a specimen of the result of that working being actually produced. To-day, however, the plaintiffs, having failed to support their 1906 patent, for a totally different reason, find it to their interest to deny the sufficiency of the 1906 patent, and to maintain that it is impossible by following the 1906 specification to produce drawn tungsten filaments. They claim when doing so to start entirely afresh, and to be entitled to ignore altogether the deliberate assertion which they caused to be made on oath of specific facts altogether incompatible with their present case. This claim is, to my mind, a rather shocking one, and such as ought not to be recognised by the court. It is not as if the defendants were relying here on an estoppel, or were seeking to prevent the plaintiffs altogether from asserting the insufficiency of the 1906 specification in the above-mentioned sense. It is admitted that the plaintiffs were at full liberty to show that they never knew that their experts were about to give evidence of these specific facts, or, on the other hand, may bring evidence by two of the three experts in question, or by anyone else, to negative, explain or qualify the evidence already given, and to show that notwithstanding that evidence, the real facts are that the 1906 process cannot be successfully worked. All that the defendants say is that the evidence of specific facts already put forward by the plaintiffs is admissible for what it is worth, as a statement of the plaintiffs; and that the plaintiffs are not at liberty to completely ignore the evidence and proceed as if it had never been given or put forward by them. The plaintiffs' position here seems to me the more indefensible because in proceedings such as those in the previous action, and again in the present action, which are instituted by wealthy monopolists and are fought at lavish cost, a monopoly is substantially, though not technically, sought to be enforced, not merely against the defendants, but also against the public. On the plaintiffs' view it is permissible, in support of such monopolies, to put forward a set of specific facts deposed to by experts, and then at a subsequent period entirely to ignore these facts, and to put forward a contrary set of facts, supported by another set of experts, as if no evidence at all had ever been given in favour of the original set of facts. In this particular case, the plaintiffs appear to have originally consulted the three specialists referred to and at least one other, Dr. Oberlander. He seems to have formed a view as to the possibility of working the 1906 specification contrary to the views of the other three; and naturally, therefore, he was not called in the former proceedings, of which no complaint can be made. But the matter is very different when, in the present proceedings, the plaintiffs, while calling the evidence of Dr. Oberlander and a fifth expert, in direct contradiction to the view previously presented by the plaintiffs, claim further that direct evidence of specific facts put forward by them through the first three experts on the previous occasion is entirely inadmissible now, and must be completely ignored. This contention seems to me anomalous, and calculated to give an illegitimate advantage to wealthy monopolists against rival manufacturers, and through them against the general public. In my view, dangers of this kind are greater than those to be apprehended from holding litigants liable to have admitted against them evidence which they have previously adopted and put forward to prove specific facts.

I have dealt with the question on the basis of an admissibility from the original adoption and putting forward by the plaintiffs of the evidence in question at the original hearing of the action against the Duram company. I do not think that the case in this respect against the plaintiffs is altered or strengthened by the printing of the evidence, by its use in the Court of Appeal, or by its inclusion in the appendix to the Case in the House of Lords. All this merely amounts to a

reiteration which was necessitated in the course of appeals which the plaintiffs are fully entitled to bring. Such a reiteration was not, in my judgment, of any greater effect than the original assertion of the specific facts in question. In my judgment, the evidence in question was admissible, as claimed by the appellants.

Solicitors: *H. C. Morris, Woolsey, Morris & Kennedy; Bristows, Cooke & Carpmael.*

[*Reported by* G. P. Langworthy, Esq., *Barrister-at-Law.*]

LEWISHAM UNION *v.* NICE

[King's Bench Division (Lord Hewart, C.J., Avory and Greer, JJ.), January 24, 25, 1924]

[Reported [1924] 1 K.B. 618; 93 L.J.K.B. 469; 131 L.T. 22; 88 J.P. 66; 40 T.L.R. 270; 68 Sol. Jo. 520; 22 L.G.R. 235; 27 Cox, C.C. 606]

Vagrancy—Failure to maintain family—Chargeability to guardians—Refusal to work at less than trade union wages—Vagrancy Act, 1824 (5 *Geo.* 4, *c.* 83), *s.* 3.

The respondent, who was a skilled navvy and a member of a trade union, being out of employment accepted relief work from the guardians at less than trade union wages. Having been told by the secretary of his trade union that he must not work for less than the current trade union rate, he declined to continue the work, and in consequence he was unable to maintain himself and his wife and children and they became chargeable to the guardians. He was convicted under s. 3 of the Vagrancy Act, 1824, of neglecting to maintain himself and his family, and he appealed to quarter sessions where evidence was given that, if he had worked for less than the trade union rate, he would have been reprimanded, fined, or expelled by his trade union, and it might have been difficult or impossible for him to get work in the future. Quarter sessions quashed the conviction on the ground that by continuing to work for less than the trade union rate he would have been losing chances of bettering himself and materially injured his chances of employment in the future.

Held: there was evidence on which quarter sessions could properly decide as they did.

Per Lord Hewart, C.J.: I should have thought it difficult to argue that the condition on which the work was offered to the respondent, that the rate of pay should be less than the trade union rate of wages for the work, had no relation to that work.

Notes. The material words of s. 3 of the Vagrancy Act, 1824, were repealed by the National Assistance Act, 1948 (16 Halsbury's Statutes (2nd Edn.) 932), but that Act, by s. 42, provides that a person is liable to maintain his or her spouse, and s. 51 makes it an offence persistently to refuse or neglect to do so, if in consequence relief under the Act is given. Compare these words with those of s. 3.

As to offences by vagrants, see 10 Halsbury's Laws (3rd Edn.) 697; and for cases see 15 Digest (Repl.) 921.

Cases referred to:

(1) *A.-G.* v. *Merthyr Tydfil Union*, [1900] 1 Ch. 516; 69 L.J.Ch. 299; 82 L.T. 662; 64 J.P. 276; 48 W.R. 403; 16 T.L.R. 251; 44 Sol. Jo. 294, C.A.; 37 Digest 226, *188*.

(2) *Poplar Union* v. *Martin* (1904), 91 L.T. 550; 68 J.P. 526; 2 L.G.R. 1012; 20 T.L.R. 659; 20 Cox, C.C. 742, D.C.; subsequent hearing, [1905] 1 K.B. 728; 74 L.J.K.B. 306; 92 L.T. 197; 69 J.P. 146; 53 W.R. 398; 21 T.L.R. 240; 49 Sol. Jo. 261; 3 L.G.R. 340; 20 Cox, C.C. 785, D.C.; 37 Digest 360, *1617*.

Case Stated by the County of London Quarter Sessions.

On June 15, 1923, an appeal was heard by the County of London Quarter Sessions wherein Arthur Nice appealed against a conviction at the Greenwich Police Court. The conviction was for an offence against s. 3 of the Vagrancy Act, 1824, and the material words thereof were as follows:

"Arthur Nice is convicted of being an idle and disorderly person for that he, on April 6, 1923, at the parish of Lewisham in the county of London, being a person able to work and wholly to maintain himself and his family, unlawfully and wilfully did refuse and neglect so to do by which refusal and neglect himself and his family whom he was then legally bound to maintain became and then were chargeable to the common fund of the Lewisham Union."

On the hearing of the appeal it was admitted or proved on behalf of the respondents that Arthur Nice (the appellant before quarter sessions) was at all material times a skilled navvy able by work to maintain himself and his family which consisted of his wife and two children dependent upon him. On Mar. 1, 1923, the appellant and his family became chargeable to the Lewisham Union, and the appellant received relief from the relieving officer of the union on various dates up to and including Mar. 29, 1923. On Mar. 22, 1923, the union issued a circular letter, a copy of which was received by the appellant, in the following terms:

"Dear Sir,—Unemployment Relief Works, &c. The guardians have come to an understanding with the Lewisham Borough Council whereby a number of unemployed men (preferably those who have served in H.M. Forces and men not in receipt of 'unemployment benefit') may be afforded the opportunity of some work instead of receiving assistance from the rates. I am informed that the work consists mainly of clearing grounds, woods, &c., and the wages will be £2 6s. per week for forty-seven hours. Your name has been chosen from among those appearing on the books of your district relieving officer, and you will please report yourself at seven o'clock next Monday morning, the 26th inst., at the Town Hall Yard, Catford, taking with you your insurance card and this letter. This arrangement and the necessary particulars will be reported to the local Labour Exchange.—Yours faithfully, W. R. Owen, Clerk to the Guardians."

In consequence of the receipt of this letter the appellant started on Mar. 27 to do the work thus offered by the respondents at the wage of £2 6s. per week of 47 hours. The work was suitable work for the appellant and work which he was capable of doing. He worked on Mar. 27, 28, and 29. He was not called upon to work on Mar. 30, which was Good Friday. On Mar. 31 he declined to continue the work on the ground that the rate of pay, £2 6s. per week, was less than the current trade union rate of wages for such work as he was then doing. In consequence of the refusal of the appellant to perform the work at the wage offered he was unable to maintain himself, his wife and two children, and they all became chargeable to the union and obtained relief from the relieving officer on April 6, 11, and 13.

Upon the hearing of the appeal the appellant gave evidence to the following effect. At the time of the receipt of the above-mentioned letter he was anxious to earn his own living and to keep his wife and family by work, and, accordingly, accepted the offer contained in the letter and continued to work up to Saturday, Mar. 31. On that day, after receiving his pay, he saw the secretary of the National Union of General Workers, of which he was a member, and was told by the secretary and by the officials of the trades council to whom he was referred

by the secretary, that he must not work for less than the current trade union rate of wages. He further stated that he was quite willing to work for £2 6s. a week and to keep his wife and family on that wage, and that his sole reason for his refusal to work on Mar. 31 was that the trade union would not allow him to continue to work at that wage. The work which he was doing was skilled work, and if he had continued to work in those circumstances for £2 6s. a week he would have expected to be "blacklegged" in the future, that is, that he would not have been able to get employment. On behalf of the appellant, Sidney James Wright, secretary of the London district of the National Union of General Workers, was called and proved that in the month of March the trade union rate of wages per week of forty-seven hours for the class of work on which the appellant was being employed was £3 2s. 8d., that if the appellant had continued to work for £2 6s. a week he would have been challenged by his union and would have had to give some explanation, and that he might have been reprimanded or fined or expelled from the union, which expulsion would make it difficult for him to get work in the future, but that he (the witness) could not say definitely what would have happened to the appellant because he would not be the deciding party. Quarter sessions were satisfied that the appellant, by continuing to work after Mar. 31 for £2 6s. a week, would have been losing chances of bettering himself, and that on Mar. 31 he was engaged on employment which in fact would have materially hurt his chances of employment in the future. The court, accordingly, allowed the appeal and ordered the conviction to be quashed, but at the request of the union stated a Case for the opinion of the High Court.

By the Vagrancy Act, 1824, s. 3:

> "Every person being able wholly or in part to maintain himself or herself, or his or her family, by work or by other means, and wilfully refusing or neglecting so to do, by which refusal or neglect he or she, or any of his or her family whom he or she may be legally bound to maintain, shall have become chargeable to any parish, township or place . . . shall be deemed an idle and disorderly person within the true intent and meaning of this Act; and it shall be lawful for any justice of the peace to commit such offender (being thereof convicted before him by his own view, or by the confession of such offender, or by the evidence on oath of one or more credible witness or witnesses) to the house of correction, there to be kept to hard labour for any time not exceeding one calendar month."

Schiller, K.C., and *Travers Humphreys* for Lewisham Union.
Purchase, K.C., and *G. F. L. Bridgman* for the respondent, Nice.

LORD HEWART, C.J.—This is a Case stated by quarter sessions on an appeal by the respondent, Nice, from a conviction at Greenwich Police Court under s. 3 of the Vagrancy Act, 1824. When that section is looked at, without reference to any historical facts which have emerged since 1824, it will be seen that in order that a man may be convicted under it three ingredients must be present: (i) The man must be able to work and thereby wholly or partly to maintain himself and his family; (ii) he must wilfully refuse or neglect to maintain himself and his family; and (iii) by reason of his refusal or neglect so to maintain them, he and his family whom he was legally bound to maintain must become chargeable to the common fund of the poor law union. The question for us is whether upon the facts it was open to quarter sessions to allow the appeal by Nice and quash the conviction.

In the consideration of that question our attention was directed to a number of cases, but of these I propose to refer only to two, viz., *A.-G.* v. *Merthyr Tydfil Union* (1) and *Poplar Union* v. *Martin* (2). The first of these cases, it should be observed, did not turn upon the construction of s. 3 of the Vagrancy Act, 1824; it raised certain questions with reference to the position of guardians when asked to give relief to able-bodied persons who were unemployed by reason of a strike. It is quite true that in the course of his judgment in that case Lord Lindley, M.R.,

made observations (concurred in by RIGBY and VAUGHAN WILLIAMS, L.JJ.) which may be thought to have a value upon the meaning of the section we have to construe.

That case, however, was carefully considered four years later in *Poplar Union* v. *Martin* (2). There, too, the particular question now before us was not raised, but nevertheless it was incumbent upon the court in that case to consider the kind of topic which may properly be taken into account on an information laid under s. 3 of the Vagrancy Act, 1824. In his judgment LORD ALVERSTONE, C.J., said (91 L.T. at p. 551):

> "I do not want to criticise the learned magistrate's reasons, but I think certainly some of them with regard to the opportunity that would be given to persons outside to stand and compel labourers to come and work for them at certain terms seem rather far-fetched. . . . I entirely concur in what my brother PHILLIMORE has said that if the condition of work is that a man must bind himself for a definite time so that he would not be able to go away and take work elsewhere, or that he should have to submit himself to matters that a man may properly take objection to, those should be regarded with regard to the question of whether there has been a wilful neglect to maintain."

KENNEDY, J., said:

> "There are many circumstances—it would be absurd to try to enumerate even the majority of them—which, to my mind, would justify a magistrate, although the man is able-bodied, in saying, 'I refuse to convict this man of wilfully refusing or wilfully neglecting.' One of them, I think, would be, speaking for myself—and I understand my Lord takes entirely the same view—if a man being put in the pinch of a particular necessity to ask for poor relief was met by an alternative of signing an agreement of service for any lengthened period at a rate of wage which it might be possible to say would help to maintain him and not charge the ratepayers with his keep, but which would bind him to serve, possibly at an uncongenial trade and occupation, for an indefinite time and lose chances of bettering himself; if a man declines under those circumstances to sign such an agreement, if I were the magistrate, I should be slow to say he was wilfully refusing or neglecting."

If that is right, how much slower would the learned judge have been to say that the magistrate who had taken that view was necessarily and as a matter of law wrong. KENNEDY, J., continued:

> "In the same way, if it were a condition of the employment that he should go to religious or other services to which by conscience he was averse, I should think it would be very good grounds indeed for saying, 'I decline to convict you, if the only opportunity of work shown you is work under those conditions.' Thirdly, suppose a man, whose ordinary occupation had been something of delicate manual industry, had by the stress of that industry or otherwise been obliged to come on the rates; if to that man was offered some employment, which would practically destroy, or at any rate practically injure, his opportunity of earning his livelihood in the skilled industry to which he was accustomed—which, in fact, would ruin his chances for the future—I think that is a matter again that might properly be considered by the magistrate."

To apply those passages mutatis mutandis to the present case, counsel for the appellant argues that it is a similar thing if a man bona fide believes that the work offered to him is fettered with conditions as to wages which would have the effect of ruining for the future not only his own chances but the chances of maintaining his family. In the same case PHILLIMORE, J., said:

> "I do not want to go into unnecessary details fettering the magistrate, but it would seem to me that to a person in the condition of a pauper in the charge of the parish, any remuneration which would give that man shelter and food and the possibility of renewing his clothes when worn out, if not coupled with

extraneous objectionable terms, would be work offered on reasonable terms. Any extraneous objection to the terms, such as undue length of tenure, rigorous conditions of conduct, or anything of that kind, might be very good ground on which the magistrate could find the terms offered were unreasonable."

In the present case it is common ground that there was no evidence as to the probable duration of the employment which in the end Nice declined to continue. Counsel for the respondents, facing the matter frankly, said that his argument would have been the same if the employment offered had been for one day only; in other words, that it is not open to the court to say that what was done by or what was feared from the trade union would avail to protect Nice if he was offered work, subject to the condition to which he objected, for a single day.

Poplar Union v. *Martin* (2), after having been remitted to the justices, came again before the Divisional Court, and I refer to two passages in the judgments on the second hearing. Some discussion took place as to the limits within which what PHILLIMORE, J., termed "extraneous objections" must come, and as to that, LORD ALVERSTONE, C.J., said:

"It being necessary to draw the line at some point, I think that the conditions imposed should be conditions which affect the man's work; and if the terms on which he is offered work are reasonable with reference to the work which he is called on to do, we ought to hesitate before holding that he was justified in refusing to do work offered him on such conditions. Instances of reasonable conditions are easy to suggest; for instance, to come to his work at certain hours, to obey orders relating to his work, to observe the hours for meals, to conduct himself properly during working hours and in connection with his work. But I doubt whether, in considering a question arising under s. 3, we have a right to say that the court may regard conditions which are imposed on a man and made obligatory on him, but which have no relation to his work at all. For example, attendance on Sunday at some place of worship is a thing which is proper in itself, and should be encouraged, and I can see no objection whatever to the respondent's attending the meetings of the particular organisation which offered him the work; and similarly anything that would promote the cause of temperance is an admirable thing in itself and one which a judge would be the last person in the world to consider unreasonable; on the other hand, I doubt whether any of these matters ought to enter into our consideration when we are dealing with a criminal charge of refusing to work. However beneficial such conditions are in themselves, they have no relation to the man's work or to the question whether the man is willing to work, and without going so far as the learned magistrate, who seems, from the statement in the case, to have thought these conditions unreasonable, they are not, in my opinion, such as can properly be taken into consideration where a man is charged under this section with wilfully refusing to work."

RIDLEY, J., said:

"It is difficult to suggest where the line is to be drawn unless we adopt the suggestion of my Lord, that the regulations or conditions must have some relation to the work offered him, or to the wages which he is to receive for it or to his conduct in its performance."

It is said in the present case that what was objected to did not satisfy any of these tests; that the work itself was not open to objection, that it was suitable work, and work which Nice could do, yielding a wage on which he could maintain himself and his family, and that the whole difficulty arose from unwarrantable interference by outside persons. I cannot help thinking that that argument involves a subtle distinction which goes too far. The work was offered subject to the condition, and it was an essential condition, that the payment should be 46s. a week and no more, whereas the current rate was 62s. 8d. a week, so that the work under the contract of service yielded a wage below the trade union rate. I

A should have thought it difficult to argue that that was a condition having no relation to the work offered and having no relation to the wages to be received. In my opinion, it is not necessary and it is far from desirable to attempt to lay down any hard and fast rule as to the kind of conditions which the tribunal of fact may consider when faced with the question whether the man wilfully refused or neglected to maintain himself and his family. It is enough to say that, B looking at the decision in *Poplar Union* v. *Martin* (2), and at the facts of this case, and interpreting the decision of quarter sessions by strict reference to those facts, we cannot say that it was not open to quarter sessions to come to the conclusion at which they arrived. I think, therefore, the appeal from the decision of quarter sessions fails.

C **AVORY, J.**—With some hesitation I agree that this appeal must be dismissed. I have come to that conclusion with reluctance, because I fear that our decision may be quoted as an authority for the proposition that under this statute a man is justified in refusing to work at a wage which he is willing to accept, if, in his opinion, his doing so might interfere with the prospects for the future. Speaking for myself, I am not prepared to accept that as a proposition of law. I do not go D so far as to say, with my Lord, that the conviction was properly quashed. The reason why I agree that the appeal should be dismissed, is because I think that this court cannot say that the acquittal of this man was improperly arrived at by quarter sessions. As the hearing was a re-hearing, quarter sessions were as much at liberty to come to a decision on the facts as the magistrate was; and, as this was a charge of a criminal offence, quarter sessions were not only entitled, but bound, E to acquit Nice unless they were satisfied beyond all reasonable doubt that he had committed it. They had before them, in view of the judgment in *Poplar Union* v. *Martin* (2), materials upon which they might come to the conclusion that in the particular circumstances Nice was not, within the meaning of this statute, wilfully refusing or neglecting to maintain himself and his family. I wish to add that, in view of the judgments of the Court of Appeal in *A.-G.* v. *Merthyr Tydfil* F *Union* (1), the result of this case may be that guardians will have to consider whether they are entitled to afford relief to the man if he again becomes chargeable to the union. Guardians may be in a dilemma. According to *A.-G.* v. *Merthyr Tydfil Union* (1), guardians may refuse relief; on the other hand, if the man is summoned for refusing work the court may arrive at the conclusion that he is justified in refusing it. It is unfortunate that some authoritative decision cannot G be arrived at as to the legality of the action of the trade union in this case in preventing Nice from earning his living and supporting his family by work which he was willing to do.

GREER, J.—I agree that the appeal from quarter sessions should be dismissed. I agree entirely on the ground that we ought to follow, not only the actual decision in *Poplar Union* v. *Martin* (2), but also the reasons given for that decision. If it H were not for that case, I should have very great doubt whether the order of quarter sessions should stand. But in view of that case the tribunal must consider, not merely whether the accused refused to work, but whether there were reasonable grounds for the refusal. If I had had to decide this case, I think that I should have decided it as the police magistrate did, but I cannot say that there were before quarter sessions no facts enabling them to come to the conclusion at which I they arrived. Therefore, I cannot say that their decision was wrong in law.

Appeal dismissed.

Solicitors: *H. Cowper Scard*; *Leonard Bingham & Sharp.*

[*Reported by* J. F. WALKER, ESQ., *Barrister-at-Law.*]

A

R. *v.* BAILEY

[Court of Criminal Appeal (Lord Hewart, C.J., Avory and Sankey, JJ.), March 24, 1924]

[Reported [1924] 2 K.B. 300; 93 L.J.K.B. 989; 132 L.T. 349; 88 J.P. 72; 27 Cox, C.C. 692; 18 Cr. App. Rep. 42] B

Criminal Law—Trial—Summing-up—Prisoner charged on number of counts containing distinct charges—Trial of all counts together—Each count to be considered independently—Indecent assault—Indictment containing a number of counts—Each count charging separate assault on separate person—Evidence on one count not corroboration of evidence on any other count.

C

Where a prisoner is put on his trial on a number of counts in an indictment, each count alleging a distinct charge against him, it is essential that the jury be directed that they must consider each count by itself and weigh with care the evidence referring to each charge, and that they must not supplement the evidence on one count by that relating to another.

The appellant was convicted on an indictment charging him in sixteen counts with indecent assaults on boys, each count being for an assault on a different boy. The trial proceeded upon all the counts taken together, and in the summing-up the jury were not directed to consider each charge by itself, nor were they warned against looking at the evidence given on one charge as corroborative of the evidence given on any other charge. On the contrary, there were some passages in the summing-up which might have conveyed to the jury that they might consider the evidence as a whole. The jury returned a verdict of guilty on all sixteen counts.

D

E

Held: in the circumstances the verdicts could not stand, and the conviction must be quashed.

Notes. Applied: *R.* v. *Southern* (1929), 142 L.T. 383. Considered: *R.* v. *Sims*, [1946] 1 All E.R. 697; *R.* v. *Campbell*, [1956] 2 All E.R. 272. Referred to: *Harris* v. *D.P.P.*, [1952] 1 All E.R. 1044; *R.* v. *Mitchell* (1952), 36 Cr. App. Rep. 79.

F

As to the summing-up in a criminal case, see 10 Halsbury's Laws (3rd Edn.) 423–425; and for cases see 14 Digest (Repl.) 330–343.

Case referred to:

(1) *R.* v. *Cratchley* (1913), 9 Cr. App. Rep. 232, C.C.A.; 14 Digest (Repl.) 525, *5093*. G

Appeal against conviction.

The appellant, a schoolmaster, was tried at the Monmouth Assizes upon an indictment charging him in three counts with committing acts of gross indecency with three boys, and on sixteen counts with indecently assaulting sixteen boys. He was acquitted on the charges of gross indecency, but was convicted upon all sixteen counts charging indecent assault. He appealed against his conviction.

H

S. R. C. Bosanquet for the appellant.

Sir Reginald Coventry, K.C., and *J. H. Thorpe* for the Crown.

LORD HEWART, C.J., delivered the following judgment of the court. The appellant, Lewis David Bailey, was convicted at the assizes at Monmouth of indecent assaults on certain boys, and in the result was sentenced to fifteen months' imprisonment with hard labour. He now appeals by leave against that conviction. The indictment contained nineteen counts. Sixteen of those counts had to do with indecent assaults on sixteen boys, whose ages ranged from thirteen to ten years. The remaining three counts were for acts of gross indecency with three of those boys, but upon those three counts the jury acquitted the appellant.

I

The grounds upon which counsel has founded the appeal against this conviction are four. First it is argued that in such a case as this it was essential to direct

the jury that each count should be separately considered upon its own merits; secondly, that upon the question of corroboration there was misdirection, or such a failure of direction as to amount to misdirection; thirdly, that the jury ought to have been directed that in at least the greater number of the cases there was a failure of corroboration; and, fourthly, that the general verdict, taken in the circumstances in which it was taken, cannot be upheld. It is not necessary that I should review in any detail the circumstances of this most odious and repulsive case. I do not wonder that both judge and jury should have been willing, if they could, to find a concise way of dealing with this mass of filth. But the question for this court is whether this verdict can stand. The general rule where there are many charges against a person is not inadequately or inaccurately stated in the passage referred to in argument in Archibold's Pleading and Evidence in Criminal Cases (26th Edn.), p. 59:

> "Though not illegal, it is hardly fair to put a man upon his trial upon an indictment containing forty counts, involving several distinct charges of false pretences, for it would be almost impossible that he should not be grievously prejudiced as regards each one of the charges by the evidence which is being given upon the others."

The risk, the danger, the logical fallacy, is indeed quite manifest to those who are in the habit of thinking about such matters. It is so easy to derive from a series of unsatisfactory arguments, if there are enough of them, an argument which at least appears satisfactory. It is so easy to collect from a mass of ingredients, not one of which is sufficient, a totality which will appear to supply what is missing. But, of course, that is only another way of saying that when a person is dealing with a considerable mass of facts, in particular if those facts are of such a nature as to invite reprobation, nothing is easier than confusion of mind, and, therefore, if such charges are to be brought in a mass, it becomes essential that the method upon which guilt is to be ascertained should be stated with punctilious exactness.

But what happened here? The appellant was a head-master of a school, as to whom the evidence is that he made himself in various ways unpopular—undeservedly unpopular—not only with the boys, but with some of the parents. The evidence was that he, fifty-three years of age, a certified teacher since about 1892, and having always borne, apart from this matter, an excellent character, had made a series of assaults upon schoolboys—indecent assaults and acts of gross indecency, and in the presence of other boys. On the first three of the counts in the indictment, which contained charges of gross indecency, the appellant was acquitted. But upon the rest of the counts, taken in bulk, he was convicted; and when one looks at the summing-up, repulsive as no doubt it was to deal with a mass of material of this particular kind, not only is it not the case that the jury were invited and directed to consider each charge by itself, but there are undoubtedly passages to which attention has been called where it seems to have been conveyed to the jury that they might judge the part from the whole, and might reinforce the weakness of the particular part by looking at what appears at any rate to be the combined strength of the whole. It is said that no objection was taken to the trial of the appellant upon all these counts taken together. That may be, and it might well have been the case that, if objection had been taken by counsel for the appellant, the prosecution in such a case as this would have been put to their election, and would have been asked to proceed on certain charges, omitting for the moment the rest of the charges. No such course as that was taken. The evidence was taken with reference to the indictment as a whole, and it was with reference to the indictment as a whole that, at the conclusion of the trial, the learned judge was called upon to direct the jury. If in the arguments which have been adduced before us the learned counsel for the Crown had said that, while this summing-up was difficult to support in all respects, nevertheless it was apparent upon a close examination of the evidence that there were particular counts upon which, given an unexceptionable summing-up, the jury must inevitably have come to the same

conclusion, that argument must no doubt had given rise to serious consideration. No such argument has been addressed to this court. On the contrary, it has been expressly said more than once that no distinction is to be drawn between one count and another, and that it is right and proper that in weighing the merits, or it may be the de-merits, of the evidence, with reference to any particular charge, the jury should bring into the scale, by way if need be of make-weight, whatever was to be collected from the evidence upon any other charge. That is a proposition which, in the opinion of this court, cannot be sustained. So far is that from being the true conception of the law, that in such a case as this not only was it right that a careful distinction should be drawn between each count and every other count, but also, in view of the source from which the evidence came, it was right that a particular warning should be addressed to the members of the jury.

Reference has been made to *R.* v. *Cratchley* (1). In that case the then Lord Chief Justice [Lord Reading] used these words:

> "In our view there ought in such cases to be a warning by the judge, and it ought to be brought home to the minds of the jury, that they must act on evidence of this character with extreme care. In such cases it is generally desirable, apart from any rule of law and whether the witnesses are accomplices or not, that a warning should be given to the jury as to acting on the evidence of boys of this age."

In the present case that course was not taken, nor was the jury directed to weigh, and to weigh with care, the evidence with reference to each particular charge, being careful not to fall into the error of supplementing the evidence on any one charge by what might erroneously be conceived to be helpful evidence upon some other charge. It is said on the part of the Crown that, after all, that was evidence proceeding from boys at the same school, and that the unity of the school provided a nexus which made the evidence upon any count available upon any other count. It is a little difficult to follow that reasoning. One would have thought, on the contrary, that the very fact that this evidence did come from boys of the same school, especially if, as was urged in evidence, the master of that school was unpopular alike with boys and with parents, might have provided ground for additional caution and a stronger warning. This court has to deal with the evidence as it is upon the grounds which are adduced and, to leave out the other matters upon which counsel has addressed us on behalf of the appellant, it appears sufficient to say that upon his last ground, namely, that this general verdict, taken in these circumstances, and upon this direction, cannot be supported, the appellant is entitled to succeed. The consequence follows that this appeal is allowed and this conviction is quashed.

Conviction quashed.

Solicitors: *John T. Lewis & Woods*, for *W. J. Everett*, Pontypool; *Director of Public Prosecutions.*

[*Reported by* J. S. Scrimgeour, *Barrister-at-Law.*]

A

Re COWLING. JINKIN *v.* COWLING

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sir Henry Duke, P.), February 14, 1924]

[Reported [1924] P. 113; 93 L.J.P. 43; 131 L.T. 157; 40 T.L.R. 358]

B *Will—Revocation—Tearing—Matters to be considered—Partial tearing—Contents of will still legible—Will found in envelope in writing-desk—No evidence of change of wishes by testatrix—Wills Act*, 1837 (7 *Will.* 4 & 1 *Vict.*, *c.* 26), *s.* 20.

In determining whether a will has been revoked by the testatrix tearing it C the nature of the act and the surrounding circumstances must be taken into consideration. Where a will was partially torn across its face in a way which left every word of it legible, and it had been found folded and enclosed in an envelope in a writing-desk belonging to the testatrix, and there was evidence that the testatrix has shown a desire to die testate and had not changed her wish to benefit those mentioned in the will,

D **Held:** those opposing the will had not discharged the onus which was on them of proving that the testatrix had torn the will animo revocandi.

Notes. As to revocation of a will by destruction, see 34 HALSBURY'S LAWS (2nd Edn.) 83–88; and for cases see 44 DIGEST 348 et seq. For Wills Act, 1837, see 26 HALSBURY'S STATUTES (2nd Edn.) 1326.

Cases referred to:

E (1) *Elms* v. *Elms* (1858), 1 Sw. & Tr. 155; 27 L.J.P. & M. 96; 31 L.T.O.S. 332; 4 Jur.N.S. 765; 6 W.R. 864; 164 E.R. 672; 44 Digest 349, *1793*.

(2) *Doe d. Perkes* v. *Perkes* (1820), 3 B. & Ald. 489; 106 E.R. 740; 44 Digest 352, *1837*.

Also referred to in argument:

F *Davies* v. *Davies* (1753), 1 Lee, 444; 161 E.R. 164; 44 Digest 357, *1897*.

Boughey v. *Moreton* (1758), 2 Lee, 532; 3 Hag. Ecc. 191; 161 E.R. 429; 44 Digest 359, *1917*.

Hare v. *Nasmyth* (1821), 3 Hag. Ecc. 192, n.

Lambell v. *Lambell* (1831), 3 Hag. Ecc. 568; 162 E.R. 1266; 44 Digest 357, *1897*.

In the Goods of Lewis (1858), 1 Sw. & Tr. 31; 27 L.J.P. & M. 31; 30 L.T.O.S. G 353; 4 Jur.N.S. 243; 164 E.R. 615; 44 Digest 357, *1899*.

Bell v. *Fothergill* (1870), L.R. 2 P. & D. 148; 23 L.T. 323; 34 J.P. 679; 18 W.R. 1040; 44 Digest 358, *1904*.

Probate Action in which the plaintiff propounded as executor a will duly executed in March, 1921, by Annie Clark Cowling, an elderly spinster, and found after her death in a writing-desk under her bed in a torn condition, but carefully folded and H enclosed in an envelope.

An earlier will of 1919 was found untorn in the same repository, but it had been expressly revoked by the will in question. The defendants were the next-of-kin of the testatrix, and claimed by their defence and counter-claim that she had died intestate. The testatrix had lodged for some years in the house of the plaintiff and his wife. By the will of 1921 she gave a legacy of £50 and certain articles of I furniture to the plaintiff's wife, and made the plaintiff and his wife her executors and the plaintiff her residuary legatee. Between the execution of the will in question and the death of the testatrix, the plaintiff's wife had died and the testatrix had left the plaintiff's house and gone to live elsewhere, but, apart from those facts, there was no evidence that her feelings towards the plaintiff had changed. The witness who found the will of 1921 after the death of the testatrix was not sure if it was then in the same condition as it was at the hearing, i.e., whether it was wholly or partly torn across. It had been written on the front page of a printed will form, the second page of which only contained printed instructions, and at the

hearing the two pages were completely detached from one another, and the page on which the will had been written was further completely divided along the line of a fold across its centre in two parts, but not so as to affect the legibility of any part of the contents, or the signature of the testatrix, or that of either of the attesting witnesses.

Noel Middleton for the defendants.
H. E. Kingdon (with him *Harold Murphy*) for the plaintiff.

SIR HENRY DUKE, P., after stating the facts, said: The burden of proof of revocation of this will, which I find to have been duly executed, is on the defendants. They have not made out that this document was torn in two. They have made out that there was a tear upon the face of it. But the tear was one which, when it is complete, does not disable any person who sees the document in its two parts from reading every word of it with certainty. The sheet, in its now completely divided state, remains; and the question before the court is whether it is shown as against the plaintiff, who propounds the document as a will, that, within the meaning of s. 20 of the Wills Act, 1837, the testatrix must be found to have torn the paper or otherwise destroyed it with the intention of revoking it.

The tear, such as it was, must be attributed to the testatrix. That is the result of the authorities. Does it appear from an examination of the document in the light of the facts that the testatrix tore the paper, to the extent to which it was torn, with the intention of revoking it? Burning and tearing and other modes of making an end of a testamentary paper are specified in s. 20 of the Act, as they were specified in the Statute of Frauds, but in s. 20 the conduct of the testator which is to be taken to demonstrate conclusively the testator's intention is "burning or tearing or otherwise destroying." I must consider whether it is plain on the whole of the case that the testatrix tore the document within the meaning of the expression as it is there used. Counsel for the defendants referred me to a good many authorities, and in the course of his argument he cited *Elms* v. *Elms* (1), which comes nearer to the present case than most of the others. It so happened that *Elms* v. *Elms* (1) calls attention to *Doe d. Perkes* v. *Perkes* (2), which is also a case very nearly approaching the present facts. The classes of case, which were cited to me, and upon which the text-writers have founded themselves, were cases where the testator had cut out his signature, or where, under the earlier law, the testator had cut off the seal. They were cases where the evidence of the execution, both the signature of the testator and the signatures of the attesting witnesses, had been destroyed. Those are simple cases. The facts in each case speak for themselves, and if they are unexplained, the act done is a patent act of revocation by a definite and unmistakable mode of revocation.

It is not so with regard to tearing. It could not be so in point of authority when *Elms* v. *Elms* (1) was discussed, and *Doe d. Perkes* v. *Perkes* (2) consequently came into consideration. The nature of the act and the surrounding circumstances must be looked at; and the act done here, the act to be attributed to the testatrix, is the partial tearing across the face of this document in a way which left every word of it legible. This must be taken in connection with the fact that the testatrix had demonstrated the desire to die testate, and with the fact that there had been no change in her relationship with those mentioned in the document, i.e., in the sense of her desire for the persons proposed by the will in question to be benefited, and the further fact that this document with the tear upon it, perfectly legible and containing every part of a good will, had been carefully folded up by the testatrix and put in the place where she would naturally put her will.

I ask myself, if I had the assistance of a jury of common-sense people here, what they would say about it—whether they would say they were satisfied that this lady had made an end of her will. I have a very clear view as to what they would say, but I also have a very definite view of my own. The decision of the matter rests with me, and I am not satisfied that this will was torn, so far as it was torn, with the intention of revoking it. I find that the tear was not a tear which in any

material or substantial sense destroyed the will; and I find no evidence to show that the tearing was done by way of a symbol of a determination to make an end to the will. I propose, therefore, to pronounce for the will. This case is a striking illustration of the care people should take about what is often a simple elementary kind of act, the making of so important a document as a will. There has been an inquiry necessitated by acts for which the testatrix herself was responsible, and so I regret to say that the costs of both sides must come out of this very modest estate.

Solicitors: *Law & Worssam*, for *Square, Geake & Windeatt*, Plymouth; *Kenneth Brown, Baker, Baker*, for *Foot & Bowden*, Plymouth.

[*Reported by* J. A. C. SKINNER, ESQ., *Barrister-at-Law.*]

SCHILLER *v.* PETERSON & CO., LTD.

[COURT OF APPEAL (Sir Ernest Pollock, M.R., Warrington and Sargant, L.JJ.), January 18, 21, 1924]

[Reported [1924] 1 Ch. 394; 93 L.J.Ch. 386; 130 L.T. 810; 40 T.L.R. 268; 68 Sol. Jo. 340]

Time—"Month"—Mortgage transaction—Calendar month.

Although at common law the word "month," unless otherwise stated, means lunar month or twenty-eight days, in mortgage transactions it is to be taken to mean calendar month.

Hutton v. *Brown* (1) (1881), 45 L.T. 343, approved.

Notes. By the Law of Property Act, 1925, s. 61, in all deeds, contracts, wills, orders and other instruments executed, made or coming into operation after Dec. 31, 1925, "month" means calendar month unless the context otherwise requires.

Referred to: *Phipps* v. *Rogers*, [1924] 2 K.B. 45.

As to the meaning of month, see 32 HALSBURY'S LAWS (2nd Edn.) 120–122; and for cases see 43 DIGEST 930 et seq.

Cases referred to:

(1) *Hutton* v. *Brown* (1881), 45 L.T. 343; 29 W.R. 928; 3 Digest 92, *240*.
(2) *Dyke* v. *Sweeting* (1745), Willes, 585; 125 E.R. 1333; 42 Digest 932, *47*.
(3) *Anon.* (1740), Barn. Ch. 324; 2 Eq. Cas. Abr. 605; 27 E.R. 664, L.C.; 42 Digest 932, *54*.
(4) *Bruner* v. *Moore*, [1904] 1 Ch. 305; 73 L.J.Ch. 377; 89 L.T. 738; 52 W.R. 295; 20 T.L.R. 125; 48 Sol. Jo. 131; 42 Digest 931, *31*.
(5) *Simpson* v. *Margitson* (1847), 11 Q.B. 23; 17 L.J.Q.B. 81; 12 Jur. 155; 116 E.R. 383; 42 Digest 931, *26*.
(6) *Lang* v. *Gale* (1813), 1 M. & S. 111; 105 E.R. 42; 42 Digest 933, *60*.
(7) *R.* v. *Chawton (Inhabitants)* (1841), 1 Q.B. 247; Arn. & H. 162; 4 Per. & Dav. 525; 10 L.J.M.C. 55; 5 J.P. 290; 5 Jur. 245; 113 E.R. 1123; 31 Digest (Repl.) 63, *2201*.
(8) *Erith Engineering Co., Ltd.* v. *Sanford Riley Stoker Co. and Babcock and Wilcox, Ltd.* (1920), 37 R.P.C. 217, C.A.; 42 Digest 933, *57*.

Also referred to in argument:

Helsham-Jones v. *Hennen & Co.* (1914), 84 L.J.Ch. 569; 112 L.T. 281; [1915] H.B.R. 167; 42 Digest 930, *17*.

Smith v. *Anderson* (1880), 15 Ch.D. 247; 50 L.J.Ch. 39; 43 L.T. 329; 29 W.R. 21, C.A.; 9 Digest (Repl.) 70, *270*.

Legott v. *Barrett* (1880), 15 Ch.D. 306; 51 L.J.Ch. 90; 43 L.T. 641; 28 W.R. 962, C.A.; 17 Digest (Repl.) 347, *1538*.

Millbourn v. *Lyons*, [1914] 2 Ch. 231; 83 L.J.Ch. 737; 111 L.T. 388; 58 Sol. Jo. 578, C.A.; 17 Digest (Repl.) 348, *1549*.

Franco v. *Alvares* (1746), 3 Atk. 342; 26 E.R. 998, L.C.; 32 Digest 350, *326*.

Governments Stock and Other Securities Investment Co. v. *Manila Rail. Co.*, [1897] A.C. 81; 66 L.J.Ch. 102; 75 L.T. 553; 45 W.R. 353; 13 T.L.R. 109, H.L.; 10 Digest (Repl.) 782, *5084*.

Appeal from an order of EVE, J.

By a mortgage deed, dated Mar. 9, 1917, and made between the defendant company (the mortgagors) and the plaintiff (the mortgagee), the mortgagors, in consideration of £5,000 paid to them by the mortgagee, conveyed to him some 500 acres of freehold land with the mines and minerals of whatsoever description lying thereunder, with a proviso for redemption. The £5,000 was not to be called in before Mar. 9, 1923, if the defendants should pay interest at 6 per cent. half-yearly on Sept. 9 and Mar. 9, or within twenty-eight days after each of such days. The deed also contained the following proviso:

"... in case a company shall be formed with limited liability within six months of the declaration of peace, which company shall acquire the said premises, then and in such case the mortgagee will, at the request of the mortgagor or his successors in title, accept first mortgage debentures of the said company for the sum of £5,000 (such debentures to comprise the whole issue and to be a first charge by way of floating security on the undertaking of the company), and to be in full satisfaction and discharge of the principal moneys hereinbefore mentioned, and will, on receipt of the said debentures, forthwith re-convey the said premises to the mortgagor, or his successors in title, as he or they shall direct."

On Feb. 20, 1922, the defendants formed and incorporated with limited liability Altarnum Mines, Ltd. A conveyance of the mortgaged property to the company purporting to be made between the mortgagee, the mortgagors, and the company was prepared, and on Feb. 27, 1922, was executed by the mortgagors and the company. The mortgagee refused to execute the conveyance, and commenced this action, contending that, although a company had been formed to acquire the premises, it was not such a company as was contemplated by the proviso to the mortgage deed, and, further, even if it were so, that it was not formed within the time stipulated. EVE, J., held that the company was in form, but not in substance, a company which complied with the proviso, and, therefore, the proviso was not satisfied, and, even assuming that it was a company within the meaning of the proviso, it had not been formed within six months of the declaration of peace. The mortgagors appealed.

Edward Clayton, K.C., and *Cecil Turner* for the mortgagors.

J. M. Gover, K.C., and *A. L. Ellis* for the mortgagee.

SIR ERNEST POLLOCK, M.R.—This is an appeal from a decision of EVE, J., who gave judgment for the plaintiff in the action on his claim to recover £5,000 from the defendants, under an indenture of mortgage dated Mar. 9, 1917, whereby the defendants as mortgagors agreed to pay that sum to the plaintiff. The question is whether the defence set up by the defendants has been made good. The learned judge came to the conclusion that the defendants had not established their defence to the action and that, therefore, they were liable to pay the £5,000 to the plaintiff.

Two points have been raised by the defence. In the mortgage of Mar. 9, 1917, there was the following proviso: [His Lordship read the proviso, and continued:] On that proviso the defendants say they are no longer liable to pay the £5,000 to the plaintiff because a company was formed which did acquire the premises in

accordance with the proviso, and, therefore, the mortgagee was bound to accept first mortgage debentures in the company so formed for £5,000, which the company was prepared to give, but he had refused to accept such debentures. The plaintiff, however, said that the so-called company was not a genuine concern, but was formed solely with the view of evading payment of the £5,000 due under the mortgage and compelling the plaintiff under the proviso to accept debentures in lieu of his money, and the offer to him of such debentures was not a good offer, first, because the company, even if it was a company which complied with the terms of the proviso, was not formed within six months of the declaration of peace; and, secondly, was in fact not a company within the terms of the proviso.

First, was there a company with limited liability formed by the mortgagor within six months of the declaration of peace? Everyone is agreed that, by the Treaty of Peace Act, 1919, and the Order in Council dated Aug. 10, 1921, made in pursuance of the statute, the date of the declaration of peace was Aug. 31, 1921. In order to ascertain whether the formation of the company was within six months of the declaration of peace, it is necessary to decide what was meant by the word "months" in the proviso. The date of incorporation of the company was Feb. 20, 1922, and that date would be too late if "months" are to be estimated at twenty-eight days and no more, and it is said that the word "months" in the proviso meant periods of twenty-eight days, and that, therefore, this company was incorporated outside the limit of six months from the declaration of peace. It becomes necessary, then, to determine whether months as used in the proviso to the mortgage was intended to be periods of twenty-eight days or calendar months.

I have looked carefully at the authorities on the meaning of the word "month," which go back as far as 1745. In *Dyke* v. *Sweeting* (2), which was reported by WILLES, C.J., in 1745, it is said that the court thought, though there was no judgment given on that point, that "months" were to be calendar months. That case is important as showing that it was possible to look at the indenture in which the word "months" occurred in order to determine whether the context would show what was intended to be the meaning of "months," whether calendar months or not. At common law the word "month" means a lunar month of twenty-eight days, but there are exceptions to that common law meaning in the case of mercantile transactions in the city of London and in matters ecclesiastical, and as shown by *Dyke* v. *Sweeting* (2), where one can collect from the context of the deed in which the word occurs that "month" was intended to be a calendar month. LORD HARDWICKE in *Anon.* (3), where an order for foreclosure had been made, held that the word "months" should mean calendar months and not lunar months.

With regard to mortgage transactions, however, the matter appears to be not uncertain. There was as long ago as the first edition of DAVIDSON'S PRECEDENTS IN CONVEYANCING, a note which stated that a month was in law primâ facie a lunar month, but in mortgage transactions it denoted a calendar month. That note is to be found in the edition published in 1881, at p. 309, and has descended from other editions of much earlier date founded on the accepted practice with judicial authority to support it. The cases relied on by MR. DAVIDSON seem to me to support the proposition. In *Hutton* v. *Brown* (1), before FRY, J., during the argument the principle was put before him in clear form: "This is a mortgage transaction, and in a mortgage transaction 'months' mean calendar months," and for that proposition *Anon.* (3), *Dyke* v. *Sweeting* (2), DAVIDSON'S PRECEDENTS, vol. ii, part 2 (4th Edn.), 309, and COOTE ON MORTGAGES (4th Edn.), 250, 1026, were relied on, and that was treated as a proposition of certainty. FRY, J., said (45 L.T. 343):

> "Then it is said that in mortgage transactions months are always calendar months and that this is a mortgage transaction. But the rule as to mortgages only arises from this, that the interest on mortgage money is a fixed yearly sum, and half a year's interest is for six calendar months. I cannot expand this into a mortgage transaction."

And there, though he does not apply the rule, he in no way dissents from it. In *Bruner* v. *Moore* (4), *Hutton* v. *Brown* (1) was cited from the report in the WEEKLY REPORTER, and FARWELL, J., does not make any particular reference to mortgages. It is curious if he was minded to dispute the rule that he never made any reference to mortgages. It seems to me, therefore, that he was not inclined to dissociate himself from the rule that "month" in mortgage transactions means a calendar month, which is founded on the authority of *Hutton* v. *Brown* (1) and on textbooks. In *Bruner* v. *Moore* (4), FARWELL, J., said ([1904] 1 Ch. at p. 309) that, although in Ecclesiastical Courts months meant calendar months, it was well settled that at common law "months" denoted lunar months, and to make an alteration it had been necessary to have recourse to statute, and then he gives illustrations of such statutes. He also mentioned the exception which existed in the case of mercantile transactions and in cases where the context showed that calendar month was intended, and for that he cited *Simpson* v. *Margitson* (5), in which LORD DENMAN said (11 Q.B. at p. 31): "If the context shows that calendar months were intended, the judge may adopt that construction," and he cites as authority for that: *Lang* v. *Gale* (6) and *R.* v. *Chawton* (*Inhabitants*) (7). FARWELL, J., also gave another category, viz., where the circumstances show that the parties intended to use the word not in its primary or strict sense but in some secondary meaning.

Having regard to those authorities, I think there is a rule whereby in mortgage transactions the word "month" is to be taken to mean calendar month. FRY, J., in *Hutton* v. *Brown* (1) and the textbooks recognise that rule. Having come to that conclusion, it will be sufficient for the determination of the meaning of month in this particular case, as I cannot read this transaction as occurring otherwise than in a mortgage transaction. But the context also in this mortgage deed shows that "month" was intended to mean calendar month in this proviso, as, having regard to the term at which the interest is provided to be paid, it is remarkable that, when reference is made to twenty-eight days instead of referring to that as "a month," it is in fact set out in words "twenty-eight days," and the contra-distinction thus brought out between the word "month" used as meaning "calendar month" and a term of twenty-eight days, justify the meaning of calendar months being assigned to the word "months" in this proviso. So much on the first point, and I think EVE, J., came to a wrong conclusion, therefore, when he held that this company had been formed outside the time limit allowed.

On the second point, it is necessary to observe in the first place that EVE, J., said that there had been nothing in the formation of the company which was deserving of adverse comment or in the conduct of either of the parties, and, therefore, we must look into this case as one where no sinister motive can be attributed to either side. EVE, J., also said that opinions on such a matter might be different. I differ from him with reluctance. The parties having carried out in form the terms of the proviso without having adopted any nefarious device, the company is one formed in accordance with the proviso. There were no precautions laid down in the proviso as to the amount of the shares to be issued, nor any provision for working capital or that the lands to be purchased were to be a part of a group of mines merely. EVE, J., and junior counsel for the plaintiff before us, said that, in view of what had happened, it was curious if such a company as this should be a sufficient compliance with the proviso, but we must look at the proviso and not at what may be the result of any decision we may come to. I think that this company which the defendants formed was sufficient to comply with the terms of the proviso. Whether the resolution to form it was honestly carried, this proviso has been complied with. In my view, it is impossible to say that the terms of the proviso have not been carried out, and, therefore, the company was formed within the time limit, and the terms, which the formation of the company had to comply with, have been fulfilled. Therefore this appeal must be allowed with costs.

WARRINGTON, L.J.—I am of the same opinion. The mortgage deed with which we are concerned in this case is in the ordinary form, but contains a special proviso. [His Lordship read the proviso, and continued:] The defendants say that the company there referred to has been formed and has issued first mortgage debentures for £5,000, which were, in accordance with the terms of the proviso, the total issue of first mortgage debentures, and are a first charge on the undertaking of the company, and that, therefore, the plaintiff is bound to accept those debentures in full satisfaction of the £5,000 lent by him on the security of the mortgage and ought to re-convey the premises to the company. They have been offered to the plaintiff, but he has refused to accept them. Two questions arise on that. There is no doubt that the company was formed and has acquired the property the subject of the mortgage, and an issue of £5,000 first mortgage debentures has also been created, which is there ready for the plaintiff to take up. The questions to be decided are, first, whether the company, though formed and fulfilling the conditions laid down in the proviso, is in reality such a company as is contemplated by the proviso in the mortgage; and, secondly, whether, having regard to the fact that the company was incorporated more than six lunar months after the declaration of peace, it was formed in due time.

As to the first point, it has been said that any company formed under the proviso must be a company which was intended to be a going concern, but, in my judgment, there is nothing contained in the proviso to support such a contention. The company has 500 acres in Cornwall with mines and minerals thereunder. Between the date of the mortgage and the termination of the war the mortgagor did attempt to turn the mines to advantage and spent considerable sums of money for that purpose, which, however, he lost. But the mortgage contained no provision for the carrying on of any mining business by the mortgagor, therefore at the end of six months the property might have been in exactly the same position as at the date of the mortgage with no attempt having been made to exploit the mines. There is nothing in the proviso to show that it was necessary for the company to acquire property which was engaged in a going business, but the only condition was that it should acquire this land, and that it has done.

In the second place, it is said that the company was not formed in due time, but the defendants in their defence allege that six months mentioned in the proviso means six calendar months, and that, therefore, the company was, in fact, formed in good time. In my opinion, there is authority for the proposition that, in regard to mortgage transactions, there exists a rule, excluding the ordinary rule of common law, to the effect that the word "months" mean calendar months. That proposition is stated in a note to DAVIDSON'S PRECEDENTS IN CONVEYANCING as early as the second edition, and also before that in DAVIDSON'S note made in MARTIN'S CONVEYANCING; certainly the rule was accepted as early as 1858, and has been treated as a rule from that time until the present. That note in DAVIDSON'S PRECEDENTS IN CONVEYANCING is set out almost verbatim in COOTE ON MORTGAGES, and no doubt is thrown on the existence of the rule in any textbook. It was referred to, and relied on, in the argument in *Hutton* v. *Brown* (1), but FRY, J., in his judgment threw no doubt on the existence of the rule; and before FARWELL, J., in *Bruner* v. *Moore* (4), the rule was also referred to as existing, though in his judgment the rule was not necessary to be, and was not, referred to. Therefore, I think the rule does exist that the word "months" when used in mortgage transactions, means calendar months, and has been taken out of the common law meaning attached to the word "months" of lunar months, and I think it is fair to say that, this being a mortgage deed, and this proviso being in the nature of a special proviso for redemption, it must be held that the expression "months" is here used in a mortgage transaction. Further, the common law meaning of lunar month will give way to the more popular meaning wherever the context will allow. In my opinion, there is amply sufficient context in this mortgage for that purpose, for wherever a period of time is referred to in the mortgage it is to calendar months, as in the covenant to pay the principal moneys. The covenant is to pay on Sept. 9, being

six calendar months after the execution of the deed; and interest is made payable half-yearly on Sept. 9 and Mar. 9 in every year; that is, every six calendar months. The only place in which anything but a period which is to be ascertained by reference to calendar months occurs is where the reference is to twenty-eight days. I think, therefore, it is impossible to avoid the conclusion that, in the proviso in question in the deed, as well as in the rest of the deed, the meaning of "months" was intended to be calendar months. I will just mention *Erith Engineering Co., Ltd.* v. *Sanford Riley Stoker Co.* (8), decided in July, 1920, in which the Court of Appeal came to the conclusion that the word "months," in a case which was not unlike the present, must mean calendar months, and that is also sufficient authority for saying that you may, where sufficient context exists, hold that the common law meaning of the word "month" is displaced. Therefore, the judgment of EVE, J., ought to be reversed and this appeal allowed.

SARGANT, L.J.—The questions here are: Was the company formed in due time, and whether the company was such a company as complied with the terms of the proviso? The general rule of common law that a month means a lunar month has exceptions in the case of mercantile instruments in the City of London, in ecclesiastical law, and where interpreted otherwise by statutes, and also in the case of domestic service in questions where notice has been given. I think that the authoritites referred to by the Master of the Rolls and WARRINGTON, L.J., tend to the conclusion that a further exception exists, and has been for many years accepted as existing, in the case of mortgage transactions in which, as in the case of the other exceptions I have mentioned, the word "months" means calendar months. Further, whatever the primâ facie meaning may be of the word "month," the word is a very flexible one, and a slight context is sufficient to alter its meaning. It is necessary to look at what is the unit of time, and if in a document the unit is a year that would tend to show that calendar month was intended. That is well illustrated in *Hutton* v. *Brown* (1), in which FRY, J., concluded that the word "month" was there used to denote lunar month, because the main transaction was one providing for weekly payments. Applying that principle, the reference in this mortgage deed in the proviso and all other references to periods of time are to calendar months except one, which is mentioned as twenty-eight days. In *Erith Engineering Co., Ltd.* v. *Sanford Riley Stoker Co.* (8), which was not a mortgage case, the Court of Appeal held the word "months" to be intended to mean calendar months. Under the new Law of Property Act, 1922, it is enacted that the word "month" shall mean calendar month in all documents; that is, there has been in that Act a recognition of the gradual change which has been going on in the meaning of the word "month" from lunar to calendar month.

As to the other question, whether this company was such a company as will comply with the terms of the proviso, in my judgment there is no question that, in the circumstances, this company which was formed was a company formed in compliance with the requirements of the special proviso. The appeal must, therefore, be allowed.

Appeal allowed.

Solicitors: *Maxwell & Co.*; *May, May & Deacon*, for *Cowlard, Grylls & Cowlard*, Launceston, Cornwall.

[*Reported by* G. P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

YORK CORPORATION *v.* HENRY LEETHAM & SONS, LTD.

[CHANCERY DIVISION (Russell, J.), January 29, 30, 31, February 5, 6, 7, 8, 27, 1924]

[Reported [1924] 1 Ch. 557; 94 L.J.Ch. 159; 131 L.T. 127; 40 T.L.R. 371; 68 Sol. Jo. 459; 22 L.G.R. 371]

Corporation—Limitation of powers—Powers fettered by agreement—Agreement ultra vires—Invalidity ab initio—Effect of estoppel, ratification, or delay on void agreement.

A body charged with statutory powers for public purposes is not capable of divesting itself of those powers or of fettering itself in their use, and an agreement by which it seeks to do so is ultra vires and void. Such an ultra vires agreement cannot become intra vires by reason of estoppel, lapse of time, ratification, acquiescence, or delay.

Accordingly, where, in 1888, a corporation bound themselves for a period the duration of which depended on the volition of the other party to the agreement not to exercise their statutory powers to charge dues and charges on a certain scale for navigation on two rivers, of which navigation they were, in the one case, trustees, and, in the other, owners, but, in effect, charged less,

Held: in an action begun by writ issued in 1921, the agreement was ultra vires and unenforceable against the corporation.

Notes. Doubted: *Birkdale District Electric Supply Co.* v. *Southport Corpn.*, [1926] A.C. 355. Considered: *Brown* v. *Dagenham U.D.C.*, [1929] 1 K.B. 737. Referred to: *Re Salvin's Indenture*, *Pitt* v. *Durham County Water Board*, [1938] 2 All E.R. 498; *Re Jon Beauforte (London), Ltd., Applications of Grainger Smith & Co. (Builders), Ltd., John Wright & Son (Veneers), Ltd., and Lowell Baldwin, Ltd.*, [1953] 1 All E.R. 634.

As to limitation of powers of corporations, see 9 HALSBURY'S LAWS (3rd Edn.) 62 et seq.; and for cases see 13 DIGEST (Repl.) 269 et seq.

Cases referred to:

(1) *Ayr Harbour Trustees* v. *Oswald* (1883), 8 App. Cas. 623, H.L.; 11 Digest (Repl.) 103, *5*.

(2) *Staffordshire and Worcestershire Canal Navigation Proprietors* v. *Birmingham Canal Navigation Proprietors* (1866), L.R. 1 H.L. 254; 35 L.J.Ch. 757, H.L.; 38 Digest 403, *948*.

(3) *Mulliner* v. *Midland Rail. Co.* (1879), 11 Ch.D. 611; 48 L.J.Ch. 258; 40 L.T. 121; 43 J.P. 573; 27 W.R. 330; 11 Digest (Repl.) 122, *145*.

(4) *Taff Vale Rail. Co.* v. *Pontypridd U.D.C.* (1905), 93 L.T. 126; 69 J.P. 351; 3 L.G.R. 1339; 26 Digest 291, *228*.

(5) *Great Western Rail. Co.* v. *Solihill R.D.C.* (1902), 86 L.T. 852; 66 J.P. 772; 18 T.L.R. 707, C.A.; 11 Digest (Repl.) 123, *149*.

(6) *Hungerford Market Co.* v. *City Steamboat Co.* (1860), 3 E. & E. 365; 30 L.J.Q.B. 25; 3 L.T. 732; 25 J.P. 213; 7 Jur.N.S. 67; 121 E.R. 479; 44 Digest 99, *787*.

(7) *Strick* v. *Swansea Canal Co.* (1864), 16 C.B.N.S. 245; 4 New Rep. 63; 33 L.J.C.P. 240; 10 L.T. 460; 12 W.R. 711; 143 E.R. 1121; 8 Digest (Repl.) 200, *1274*.

Also referred to in argument:

Anderson v. *Midland Rail. Co.*, [1902] 1 Ch. 369; 71 L.J.Ch. 89; 85 L.T. 408; 50 W.R. 40; 18 T.L.R. 5; 46 Sol. Jo. 14; 8 Digest (Repl.) 222, *1397*.

A.-G. v. *Great Eastern Rail. Co.* (1880), 5 App. Cas. 473; 49 L.J.Ch. 545; 42 L.T. 810; 44 J.P. 648; 28 W.R. 769, H.L.; 13 Digest (Repl.) 271, *957*.

County Hotel and Wine Co. v. *London and North Western Rail. Co.*, [1921] 1 A.C. 85; 89 L.J.K.B. 918; 124 L.T. 99; 36 T.L.R. 786; 64 Sol. Jo. 666; 18 L.G.R. 597, H.L.; 38 Digest 306, *317*.

Creyke v. *Hatfield Chase Level Corpn.* (1896), 12 T.L.R. 383; 40 Sol. Jo. 531; 13 Digest (Repl.) 332, *1366.*

Fairweather & Co. v. *York Corpn.* (1900), 11 Ry. & Can. Tr. Cas. 201; sub nom. *Mills, Fairweather & Co.* v. *York Corpn.*, 17 T.L.R. 19; 8 Digest (Repl.) 216, *1364.*

Foster v. *London, Chatham and Dover Rail. Co.*, [1895] 1 Q.B. 711; 64 L.J.Q.B. 65; 71 L.T. 855; 43 W.R. 116; 11 T.L.R. 89; 39 Sol. Jo. 95; 14 R. 27, C.A.; 11 Digest (Repl.) 123, *151.*

Gardner v. *London, Chatham and Dover Rail. Co.* (*No. 1*); *Drawbridge* v. *Same*; *Gardner* v. *Same* (*No. 2*); *Imperial Mercantile Credit Association* v. *Same* (1867), 2 Ch. App. 201; 36 L.J.Ch. 323; 15 L.T. 552; 31 J.P. 87; 15 W.R. 325, L.JJ.; 10 Digest (Repl.) 1273, *8993.*

Great Central Rail Co. v. *Balby-with-Hexthorpe Urban Council, A.-G.* v. *Great Central Rail. Co.*, [1912] 2 Ch. 110; 81 L.J.Ch. 596; 106 L.T. 413; 76 J.P. 205; 28 T.L.R. 268; 56 Sol. Jo. 343; 10 L.G.R. 687; 26 Digest 292, *240.*

Great Northern Rail. Co. v. *South Yorkshire Railway and River Dun Co.* (1854), 9 Exch. 642; 7 Ry. & Can. Cas. 771; 23 L.J.Ex. 186; 23 L.T.O.S. 147; 156 E.R. 274, Ex. Ch.; 38 Digest 254, *25.*

Great North-West Central Rail. Co. v. *Charlebois*, [1899] A.C. 114; 68 L.J.P.C. 25; 79 L.T. 35, P.C.; 21 Digest 147, *112.*

Harris v. *Cockermouth and Workington Rail. Co.* (1858), 1 Ry. & Can. Tr. Cas. 97.

Lancashire and Yorkshire Rail. Co. v. *Greenwood* (1888), 21 Q.B.D. 215; 58 L.J.Q.B. 16; 59 L.T. 930; 8 Digest (Repl.) 222, *1401.*

Duke of Newcastle v. *Worksop Urban Council*, [1902] 2 Ch. 145; 71 L.J.Ch. 487; 86 L.T. 405; 18 T.L.R. 472; 38 Digest 108, *775.*

Perth General Station Committee v. *Ross*, [1897] A.C. 479; 66 L.J.P.C. 81; 77 L.T. 226; 13 T.L.R. 546, H.L.; 8 Digest (Repl.) 173, *1131.*

Rochdale Canal Co. v. *Radcliffe* (1852), 18 Q.B. 287; 21 L.J.Q.B. 297; 19 L.T.O.S. 163; 16 Jur. 1111; 118 E.R. 108; 13 Digest (Repl.) 276, *993.*

Weller v. *Kerr* (1866), L.R. 1 Sc. & Div. 11, H.L.; 37 Digest 518, *1102.*

Action in which the plaintiffs, York Corporation, claimed against the defendant company, Henry Leetham & Sons, Ltd., a declaration that certain agreements entered into between the plaintiffs and the predecessors of the defendant company were illegal and so unenforceable against them. The facts appear in his Lordship's judgment.

Tyldesley Jones, K.C., and *J. E. Harman* for the plaintiffs.

Cunliffe, K.C., Courthope Wilson, K.C., and *Alan Ellis* (*Sheldon* with them) for the defendants.

Cur. adv. vult.

Feb. 27. **RUSSELL, J.,** read the following judgment.—In this case the plaintiffs sue for a declaration that two agreements executed by them in the year 1888 are illegal and invalid on a number of grounds, one of which is that the agreements were and are ultra vires the plaintiffs. The defendants contend that the agreements in question are binding on the plaintiffs, that they have not been determined, and they counter-claim for repayment of a sum of £3,231 5s. 4d. The agreements, which are dated Oct. 1, 1888, were entered into by the plaintiffs as to one (which may be called the Ouse agreement) in their capacity as the persons entrusted with the control and management of the navigation of a portion of the River Ouse, in Yorkshire, with power to charge tolls and dues to persons using the navigation between certain points, and as to the other (which may be called the Foss agreement) in their capacity as the proprietors and persons having the management and control of the navigation of the River Foss, from its junction with the River Ouse to a point above the York union workhouse, with power to charge tolls and dues to persons using such navigation.

It is necessary to state how the plaintiffs acquired the position which they hold

as regards each of these navigations. First, as regards the Ouse, an Act of Parliament (13 Geo. 1, c. 33) was passed intituled "An Act for improving the navigation of the River Ouse in the county of York." It was passed

> "To the intent that the said river as well for the good of the publick in general and of the inhabitants of the said city [York] as also of such as shall trade and pass thither and from thence with merchandises may be effectually repaired, amended, maintained and improved."

By this Act, trustees were appointed for making navigable the River Ouse and were entrusted with powers for that purpose. Commissioners also were appointed for the purpose of settling differences which might arise and for other purposes. The commissioners and trustees were empowered to lay tolls on all wares, merchandise, or other commodities (with certain exceptions) carried on the river above Wharfmouth, not exceeding the various rates for the various goods there specified; and it was to be lawful for the trustees, their successors, assigns and nominees "and no others" from time to time and at all times to recover and take "such reasonable tolls or rates as shall be so laid as aforesaid and no other." The Act contains a power to mortgage the profits arising by the tolls to secure the repayment of moneys borrowed for carrying on the work, and a proviso that as soon as sufficient money shall, in the opinion of the commissioners, be raised by virtue of the Act for the purposes aforesaid, then, after all borrowed moneys have been repaid, the commissioners may "abridge and moderate the aforesaid duties or rates."

The commissioners and trustees under that Act laid the tolls and rates therein mentioned to the full extent of the power given them, but the income was found insufficient. Accordingly, by a further Act (5 Geo. 2, c. 15), it was enacted that from and after June 24, 1732, all commodities carried on the Ouse above Wharfmouth (with certain exceptions), "shall bear the tolls or rates following." Then follow descriptions of goods and specified payments per ton. The next section provides that it shall be lawful for the trustees, their successors, assigns and nominees "and no others" from time to time and at all times to recover and take "the tolls and rates by this Act directed to be taken and no others," in lieu of the tolls and rates imposed and charged on the goods mentioned in the former Act. The profits arising from the tolls may be mortgaged to raise money for carrying on and improving the navigation, and it is provided that as soon as sufficient money shall, in the opinion of the commissioners, be raised for the purposes of the two Acts, then, after the repayment of all borrowed moneys, the commissioners may "abridge and moderate the said duties or rates."

By s. 72 of the Municipal Corporations Act, 1835 [repealed by Municipal Corporations Act, 1882], it was provided that the body corporate named in the schedules A and B in conjunction with any borough should be trustees for executing by the council of such borough the powers and provisions of all Acts of Parliament made before the passing of that Act other than Acts made for securing charitable uses and trusts. Schedule A names the mayor and commonalty of the city of York in conjunction with the borough of York. This section has not been replaced by s. 134 of the Municipal Corporations Act, 1882, which enacts that the municipal corporation of a borough shall be trustees for executing by the council the powers and provisions of all Acts of Parliament made before the passing of the Municipal Corporations Act, 1835, other than Acts made for securing charitable uses and trusts. Thus, the plaintiffs became and are the successors of the trustees under the Acts of George I and George II and are entrusted with their duties and invested with their powers.

Secondly, as regards the Foss. By an Act (33 Geo. 3, c. 99) which recites that the making and maintaining a navigable communication from the junction of the River Foss with the River Ouse to Stillington Mill will be of public utility, the Foss Navigation Co. was incorporated for making, carrying on, completing and maintaining the said navigable communication, and was invested with divers

powers for that purpose. The company's original capital was to be £25,400 in £100 shares with power to raise an additional £10,000 in similar shares or by borrowing. It was further provided that the company might from time to time and at all times take and recover for their own use for tonnage and wharfage of all goods carried along the navigation, such rates not exceeding the specified amounts per ton per mile. The rates were to be fixed by the company at their first meeting with power to reduce rates, and to advance reduced rates, but no reduction was to be made without the consent of proprietors possessed of at least two-thirds of the shares. By a subsequent Act (41 Geo. 3, c. 115) provision was made for raising further moneys, for restricting the works to a point short of Stillington Mill, and for charging additional rates or duties. By the York Drainage and Sanitary Improvement Act, 1853, provision was made by s. 11 enabling and requiring the York Corporation to acquire the undertaking of the Foss Navigation Co. and all the tolls, rates, duties, rights, powers and privileges of the company in relation thereto, and it was provided (s. 12) that upon payment of the purchase money the corporation from thenceforth might exercise all the powers and rights in the same or like manner as if the name of the corporation had been inserted in the Acts of George III in lieu of the name of the company. Sections 48 and 56 contained provisions for the raising by the corporation and the application of moneys by means of a "sanitary improvement rate." The purchase money was duly paid on Dec. 23, 1853. By the York Improvement Act, 1859, the Foss navigation became restricted to the portion of the river between its junction with the Ouse and a point about 200 yards above the York union workhouse. The result is that the Foss navigation became and is the property of the York Corporation as corporate property.

Let me now refer to the agreements in suit and the circumstances existing when they were entered into. In the eighteen-eighties a firm carried on business as millers and corn merchants at York called Henry Leetham & Sons. They were the predecessors of the defendants who are a limited company incorporated in 1889. The firm's premises, Hungate Mills, were situate on the eastern side of the Foss above the Foss Lock. Their lands lay a little off the river. Their goods were not carried up the Foss but were barged up the Ouse to York where they were landed and carted to the mill, a procedure productive of expense both to the firm, for carting, and to the York Corporation by wear and tear of the streets. The firm were considering the question of transferring their operations from York to the port of Hull, and, in 1885, they approached the corporation. Negotiations ensued which resulted in the two agreements in question. By the Ouse agreement the corporation covenanted to allow the firm, their successors and assigns, the right to carry cargoes on the Ouse in consideration of an annual payment of £600 in lieu of the authorised dues and charges, with a provision that there should be refunded to the firm each year the difference between the £600 and the amount ordinarily chargeable on the traffic actually carried. The firm covenanted to pay the sum of £600 per annum. There was power to the corporation to determine the agreement in the event of the corporation determining the Foss agreement, or in the event of the firm neglecting duly to pay the £600 per annum. By the Foss agreement the corporation covenanted with the firm to construct a new and enlarged lock and to carry out other works involving a total outlay of over £4,500, and, further, that in consideration of the annual payment to them of the sum of £200 by the firm and of a guarantee of such payment as therein contained, they would, so long as the Hungate Mills were not permanently abandoned for the manufacture of flour, allow the firm, their successors and assigns, the use of the Foss navigation freed and discharged from all liability to pay any further sum in respect of dues or rates in the nature of tonnage rates upon goods or merchandise carried by or for them thereon in the ordinary course of their trade or business as corn millers and corn merchants, and, further, that they would demise to the firm for a term of 999 years a plot of land therein mentioned, part of Foss Island, and allow them to connect

Foss Island with their Hungate property by means of a bridge, and, further, that they would, as trustees of the Ouse Navigation, enter into the Ouse agreement. The firm covenanted to pay the £200 for twenty years. The corporation bound themselves to allow the firm, their successors and assigns, the free use of the Foss navigation on payment of £200 per annum in lieu of dues for such further term or terms as the firm, their successors and assigns, might from time to time desire to make such payment. The firm further covenanted to erect a corn mill and other buildings at a cost of not less than £10,000. The corporation were entitled to determine that agreement (i) If there was default in payment of the £200 per annum; (ii) if the firm failed to comply with their covenants; and (iii) if the corporation determined the Ouse agreement. Upon the true construction of those two agreements I am of opinion that their duration depends entirely upon the will of the firm; that so long as the firm desires to keep the corporation bound by them, they can keep them so bound; and that there are no means of escape from them by the corporation against the will of the firm.

The position, accordingly, in 1888 was this. The corporation, whether as trustees of the Ouse navigation or as owners (as part of their corporate property) of the Foss navigation, were managers of undertakings in which the public were interested, and for the management of which they were invested with statutory powers. Pre-eminent among these statutory powers was the power of levying such tolls, within limits, as they should think fit and necessary from time to time for the purpose of managing the respective undertakings. By the Ouse agreement they deprived themselves, it may be for ever, of the right to charge a particular customer of the Ouse Navigation tolls any amount beyond £600 per annum. By the Foss agreement they similarly deprived themselves of the right to charge the same customer tolls beyond £200 per annum. The two agreements, in so far as their provisions required immediate performance, were carried out. The corporation executed the works which they had covenanted to execute. The firm spent large sums (I am told far in excess of the £10,000) in erecting their new buildings. In other respects the agreements were for many years acted upon.

A few further facts remain to be stated. By the Canal, Tolls and Charges, No. 7 (River Ancholme, &c., &c.) Order Confirmation Act, 1894, a provisional order made by the Board of Trade under the Railway and Canal Traffic Act, 1888, was confirmed and given statutory force. By the order it was provided that the maximum tolls which the proprietors of the canals and navigations named in the schedule to the order should be entitled to charge should be the tolls and charges specified in the schedule. The Ouse and Foss navigations are both named in the schedule. The relevant class of merchandise is Class C. In the case of the Ouse the maximum toll for that class is ¾d. per ton per mile; in the case of the Foss it is 3d. per ton. In the year 1908 disputes had arisen between the parties, the defendants having in the year 1899 succeeded to the rights and liabilities of the firm under the two agreements. A further agreement was entered into dated Oct. 29, 1908 (supplemental to the Ouse agreement and the Foss agreement), by which the plaintiffs and defendants made a working arrangement without giving up their respective claims. Clause 3 of that agreement is in the following terms:

> "Until notice in writing is given by the company to the corporation of their intention to cease from making the payment in this clause mentioned or until the corporation give notice in writing to the company of the desire of the corporation that such payment shall no longer be made the company shall make to the corporation a payment of £275 per annum for the purposes and to the account of the Foss navigation, such payment to commence as from the date hereof and to be and be deemed to be as from the date hereof an addition to the sum of £200 per annum which the said Henry Leetham Sidney Leetham Herbert Leetham and Henry Ernest Leetham did by the Foss agreement covenant to pay to the corporation. And to be paid in like manner and subject to the like conditions as apply to the payment of the said

sum of £200. Provided always and it is hereby agreed and declared that if such notice as hereinbefore mentioned is given by either the company or the corporation then and in such case the corporation shall forthwith repay to the company all such annual sum or sums of £275 (but not exceeding in any case twenty such annual sums) which has or have been theretofore paid by the company to the corporation under the provisions of this clause."

This agreement was acted upon, and in due course notice was given by the defendants of their desire to continue the payment of £200 per annum in lieu of dues for the further term of twenty years in accordance with the provisions of the Foss agreement. On July 11, 1921, the defendants gave notice of their intention as from that date to cease from making the payment of the £275 per annum mentioned in cl. 3 of the agreement of Oct. 29, 1908, and requiring repayment of all the annual sums of that amount, namely, £3,231 5s. 4d., paid to the corporation under the provisions of that clause.

The question of the invalidity of these agreements on the ground of ultra vires had long been in the air. As far back as November, 1900, negotiations were on foot with the defendants with a view to avoiding proceedings for testing their validity. Such proceedings were again threatened or suggested in 1904 and counsel's opinion was taken. Ultimately, the writ in this action was issued on Dec. 21, 1921, and the question now falls for decision.

Evidence was given before me as to the practical operation of the agreements, from which it appears that very much less was paid by the defendants under the two agreements for the tonnage carried than would have been paid if the tolls charged to other users of the navigation had been charged on the tonnage of the defendants' goods. For the period of ten years, namely, 1910 to 1921 inclusive, the moneys actually paid by the defendants in respect of the Ouse work out at an average of 0·9d. per ton in respect of the Ouse, and an average figure of 0·7d. per ton in respect of the Foss. Had the prevalent tolls been charged, these averages would have been 3·2d. and 2·6d. respectively. The Foss figures include the extra £275 paid under the agreement of Oct. 29, 1908. This evidence must be considered with this qualification—that it by no means follows that the traffic of the defendants which was carried on the two rivers during the operation of the agreements would have been forthcoming to the same extent, or at all, if the agreements had not been entered into. But, in my opinion, the evidence is immaterial. The question of ultra vires is not to be decided by the pecuniary result of the bargain which was struck. If the bargain was at its date within the powers of the corporation, the fact that it turned out a bad bargain from their point of view would not convert it into an ultra vires transaction. Conversely, if it was at its date beyond the powers of the corporation, the fact that it proved a profitable one for the corporation would not render it intra vires. As I have already indicated, the plaintiffs are invested with statutory powers of charging such tolls, within limits, as they may deem necessary for the purpose of carrying on these two undertakings in which the public are interested. The effect of these two agreements is that they bind themselves for a period, the duration of which depends upon the volition of the defendants, not to exercise those powers as against them. No matter what emergency may arise during the currency of the agreements, the corporation have deprived themselves of the power to charge the defendants such increased tolls as might enable them to cope with the emergency. They have for so long a time as the defendants' desire to that extent wiped out or fettered their statutory power. If that be, as I think it is, the effect of these agreements, they are, in my opinion, agreements which are ultra vires the corporation.

In *Ayr Harbour Trustees* v. *Oswald* (1) the question for decision was whether harbour trustees, in exercising statutory powers of purchase of land, could enter into a binding contract not in the future to exercise powers which they possessed to make erections on the land taken which would affect the frontage of the remaining land of the landowner. It was held that such a contract was void, it

not being competent for the trustees to dispense with the future exercise of such powers. LORD BLACKBURN uses the following language:

"I think that where the legislature confer powers on any body to take lands compulsorily for a particular purpose, it is on the ground that the using of that land for that purpose will be for the public good. Whether that body be one which is seeking to make a profit for shareholders, or, as in the present case, a body of trustees acting solely for the public good, I think in either case the powers conferred on the body empowered to take the land compulsorily are entrusted to them, and their successors, to be used for the furtherance of that object which the legislature has thought sufficiently for the public good to justify it in entrusting them with such powers; and, consequently, that a contract purporting to bind them and their successors not to use those powers is void. This is, I think, the principle on which this House acted in *Staffordshire and Worcestershire Canal Navigation Proprietors* v. *Birmingham Canal Navigation Proprietors* (2), and on which the late Master of the Rolls acted in *Mulliner* v. *Midland Rail. Co.* (3). In both these cases there were shareholders, but, said the Master of the Rolls:

'Now for what purpose is the land to be used? It is to be used for the purposes of the Act, that is, for the general purposes of a railway. It is a public thoroughfare, subject to special rights on the part of the railway company working and using. But it is in fact a property devoted to public purposes as well as to private purposes; and the public have rights, no doubt, over the property of the railway company. It is property which is allowed to be acquired by the railway company solely for this purpose, and it is devoted to this purpose.'

This reasoning, which I think sound, is a fortiori applicable where there are no shareholders and the purposes are all public."

LORD WATSON states the matter in this way:

"The case, according to the view which I take of the provisions of the Harbour Act of 1879, stands thus: The statute expressly says that the trustees shall, in all time coming, possess, and may, whenever they think fit, exercise the power of altering the condition of the harbour works ex adverso of the respondent's land, so as to exclude direct access from it to the harbour. The minute lodged in the arbitration by Provost Steele as representing the present body of trustees, especially declares that in future the trustees shall not possess, or at least shall not exercise, that power. To give effect to the terms of the minute would, in my opinion, be to affirm that the appellants have power to repeal the provisions of the Act, in so far as these apply to the land taken from the respondent; and as I can find no indication of an intention on the part of the legislature to vest any such power in the appellants, I think the minute is altogether invalid."

LORD FITZGERALD says:

"I am of opinion that having so acquired that land for the purposes expressed in s. 4 and amplified in s. 10 of their special Act, they have no power in law to preclude themselves or their successors from the exercise of their statutable powers over it, as should be from time to time required for the purposes of the harbour. The minuters are not bound by their own minute."

As LORD BLACKBURN points out, this case only re-affirms the principles laid down by the House of Lords in *Staffordshire and Worcestershire Canal Navigation Proprietors* v. *Birmingham Canal Navigation Proprietors* (2). I need not state the particular facts of that case; it will be sufficient if I read extracts from the judgments. LORD CHELMSFORD uses the following language:

"But the appellants contended that, although this may originally have been all they were entitled to under the Act of Parliament, yet that they have

since acquired a right to the quantity of water discharged from the respondent's locks into their canal by long user under the Prescription Act, 1832. The second section of that Act applies to a claim to the user of water which may be lawfully made at the common law, by custom, prescription, or grant. Custom and prescription are here out of the question, and if the respondents could not have granted the user of the water to the appellants, the Act is wholly inapplicable; but the respondents have not the water in their canal with an absolute power of dealing with it at their pleasure. When the canal was made under the provisions of the Act of 8 Geo. 3, the public had a right to use it upon the payment of tolls, and the respondents were bound to keep and maintain the canal in an efficient state for the passage of the traffic along it. They could not bind themselves that, for all time to come, a certain quantity of water should be discharged from their canal into that of the appellants, because it was impossible for them to know whether all the water beyond what was necessary to keep open the communication between the two canals would not be wanted for the purpose of their own canal. By a grant of the continual use of the quantity of water flowing from their canal into the canal of the appellants, the respondents would have fettered themselves in the exercise of the powers vested in them by the Act for extending, preserving and improving their canal, for which the application of all the water beyond what was necessary for keeping up the communication between the two canals might have been essential. To impose such a servitude upon the water in their canal as that contended for by the appellants would have been ultra vires of the respondents."

LORD WESTBURY says:

"But if the Prescription Act had been at all applicable it would be incumbent on the appellants to prove that the right founded on the claim by user might, at the beginning of, or during that user, have been lawfully granted to them by the respondents' company. No such proposition can be maintained. Had any grant been made at any time by the respondents' company of the right, now alleged by the appellants to have been acquired against them by user, such grant would have been ultra vires and void, as amounting to a contract by the respondents not to perform their duty by improving their navigation, and conducting their undertaking with economy and prudence."

The same principle underlies many other cases which show the incapacity of a body charged with statutory powers for public purposes to divest itself of such powers or to fetter itself in the use of such powers. I may refer, among others, to *Mulliner* v. *Midland Rail. Co.* (3), *Taff Vale Rail. Co.* v. *Pontypridd U.D.C.* (4), and *Great Western Rail. Co.* v. *Solihull R.D.C.* (5). The defendants relied mainly upon *Hungerford Market Co.* v. *City Steamboat Co.* (6), which, it was said, decided that it was within the powers of the plaintiffs (who had statutory power to charge tolls for the use of a wharf for landing or embarking passengers) to charge a lower rate to another steamboat company than the rate which they charged the defendants. The case decides, undoubtedly, that in the absence of an equality clause there is no obligation to charge the same rates to all. The question of the validity of the agreement with the other steamboat company never arose at all; no one challenged it. Indeed, the plaintiffs were asserting its validity and claiming equality of treatment on the lines of it. No question arose (such as arises here) as to the validity of an agreement which binds a body invested with statutory powers not to exercise them against the will of another. Another decision relied upon by the defendants was *Strick* v. *Swansea Canal Co.* (7). But that case merely decided that, even when an equality section exists, there is no obligation to charge equal rates for different distances and in different circumstances. No such question arose for decision as falls to be decided in the present case.

For the reasons which I have given I am of opinion that the Ouse agreement and the Foss agreement were agreements which were at the date of their execution

ultra vires the plaintiffs. An ultra vires agreement cannot become intra vires by reason of estoppel, lapse of time, ratification, acquiescence or delay. This really disposes of the action, but certain other contentions were raised by the plaintiffs, as to some of which I may properly say a few words. The plaintiffs alleged that the agreements gave an undue or unreasonable preference or advantage to or in favour of the defendants, and were, therefore, void under s. 2 of the Railway and Canal Traffic Act, 1854. I am not, however, satisfied that it is open to the plaintiffs to attack the agreements on that ground before this court in view of the provisions of s. 6 of the same Act. In the action I declare that the Ouse and Foss agreements were and are illegal and invalid on the ground that they were and are beyond the powers of the plaintiffs. As regards the counter-claim, the defence thereto was abandoned at the trial and there will be an order on the plaintiffs to pay to the defendants the sum of £3,231 5s. 4d. As to costs, the plaintiffs have raised some contentions which they failed to establish and they resisted the counter-claim up to trial. In the circumstances I think justice will be done if no order is made as to costs either of the action or counter-claim.

Solicitors: *Sharpe, Pritchard & Co.*, for *Percy J. Spalding*, York; *Halse, Trustram & Co.*, for *A. E. Hewitt*, York.

[*Reported by* J. L. DENISON, ESQ., *Barrister-at-Law.*]

Re CITY EQUITABLE FIRE ASSURANCE CO., LTD.

[COURT OF APPEAL (Sir Ernest Pollock, M.R., Warrington and Sargant, L.JJ.), July 3, 4, 7, 8, 9, 10, 11, 1924]

[Reported [1925] 1 Ch. 407; 94 L.J.Ch. 445; 133 L.T. 520; 40 T.L.R. 853; [1925] B. & C.R. 109]

Company—Auditor—Duty—Verification, not detection—Exercise of reasonable care and skill in circumstances of case—Proper custody of securities—Indemnity against loss incurred by act done or omitted except "wilful neglect or default"—Conduct to which will a party—Reckless carelessness—Validity of article containing indemnity—Companies (Consolidation) Act, 1908, *s.* 113 (2).

Company—Winding-up—Misfeasance summons—Summary procedure—No new rights conferred by Companies (Consolidation) Act, 1908, *s.* 215 (1).

Section 215 (1) of the Companies (Consolidation) Act, 1908 (now s. 333 (1) of Companies Act, 1948), which provides: "Where in the course of winding-up a company it appears that any . . . officer of the company has . . . been guilty of any misfeasance . . . in relation to the company, the court may . . . examine into the conduct of the . . . officer, and compel him to . . . contribute such sum to the assets of the company by way of compensation in respect of the . . . misfeasance . . . as the court thinks just," dealt only with procedure and did not give any new rights. It provided a summary mode of enforcing in the liquidation of a company existing rights which might have been enforced by the company itself or its liquidator in an ordinary action.

The duty of the auditor of a company is verification, not detection. "He is a watchdog, not a bloodhound." He need not be suspicious as distinct from reasonably careful. It is nothing to him whether the business of the company is being conducted prudently or imprudently, profitably or unprofitably. His

duty is confined to verifying the facts which it is proposed to state in the balance sheet, and ascertaining and stating the true financial position of the company at the time of the audit. He is not an insurer; he is not bound to do more than exercise reasonable care and skill in making inquiries and investigations, and what is reasonable care must depend on the circumstances of the case, e.g., whether there are any circumstances giving rise to suspicion. In dealing with the securities of a company he must satisfy himself that they are held by a trustworthy and responsible person, be that person a bank, an individual, or a firm (e.g., stockbrokers). It is for the auditor to use his discretion, judgment, and discrimination as to whom he should trust. Where an auditor found that large blocks of the company's securities were held by a firm of stockbrokers, the senior partner in which was the chairman of the company and accepted a certificate from that firm as to the securities held by them, and their value, **held,** that the auditor should have insisted on the securities being put in proper custody and reported the matter to the shareholders.

Section 113 (2) of the Act of 1908 [see now s. 162 (1) of and Sched. IX to the Act of 1948] prescribes the duties of an auditor. By art. 150 of the articles of a company: "The . . . auditors . . . of the company . . . shall be indemnified and secured harmless out of the assets and profits of the company from and against all losses . . . and expenses . . . which they . . . shall or may incur or sustain by or by reason of any act done, concurred in, or omitted, in or about the execution of their duty . . . except such as they shall incur or sustain by or through their wilful neglect or default. . . ." "Wilful neglect or default" there meant misconduct to which the will was a party as distinguished from accident, and it involved that a person misconducted himself who knew and appreciated that it was wrong conduct on his part in the existing circumstances to do or omit to do the particular thing and yet intentionally did or omitted to do it regardless of consequences, or acted with reckless carelessness, not caring what the results of his carelessness might be. An error of judgment, e.g., in accepting as trustworthy what was later proved to be untrustworthy, did not, therefore, amount to "wilful neglect or default" within the article. Section 113 (2) imposed duties on auditors; it said nothing about how those duties should be performed. That was left to be determined by the general rules which governed the duties of auditors, whether those rules were to be derived from the ordinary law or from the terms under which the auditor was employed. Article 150 specified one of the terms of the employment of the auditors by the company, it did not limit the nature or extent of the auditors' duties as laid down in s. 113 (2), and, therefore, it was not ultra vires as being in conflict with that subsection. An act or omission by an auditor which was excused by art. 150 did not give rise to any liability under s. 215 of the Act of 1908.

Notes. As stated in the judgment of the Master of the Rolls (infra) s. 113 (2) and s. 215 (1) of the Companies (Consolidation) Act, 1908, have been replaced by s. 162 (with Sched. IX) and s. 333 (1) of the Companies Act, 1948 (3 HALSBURY'S STATUTES (2nd Edn.) 452), respectively.

Distinguished: *Re City of London Insurance Co.* (1925), 41 T.L.R. 521. Considered: *Re Munton, Munton* v. *West*, [1927] 1 Ch. 262; *Re Winsor Steam Coal Co.* (1901), *Ltd.*, [1929] 1 Ch. 151; *Re Vickery, Vickery* v. *Stephens*, [1931] All E.R.Rep. 562. Referred to: *Henry* v. *Arthur Foster, Henry* v. *Joseph Foster, Hunter* v. *Dewhurst* (1931), 145 L.T. 225; *Belleville* v. *Palatine Hotel and Buildings Co.* (1944), 171 L.T. 363.

As to the position and duties of auditors, see 6 HALSBURY'S LAWS (3rd Edn.) 383–388; and as to misfeasance proceedings generally, see ibid., pp. 621–628. For cases see 9 DIGEST (Repl.) 586–590 and 10 DIGEST (Repl.) 943–953.

A Cases referred to:

(1) *Re Canadian Land Reclaiming and Colonizing Co., Coventry and Dixon's Case* (1880), 14 Ch.D. 660; 42 L.T. 559; 28 W.R. 775, C.A.; 10 Digest (Repl.) 943, *6479*.

(2) *Re Brazilian Rubber Plantations and Estates, Ltd.*, [1911] 1 Ch. 425; 80 L.J.Ch. 221; 103 L.T. 697; 27 T.L.R. 109; 18 Mans. 177; 9 Digest (Repl.) 492, *3227*.

(3) *Cavendish Bentinck* v. *Fenn* (1887), 12 App. Cas. 652; 57 L.J.Ch. 552; 57 L.T. 773; 36 W.R. 641, H.L.; 10 Digest (Repl.) 945, *6493*.

(4) *Re Jubilee Cotton Mills, Ltd.*, [1923] 1 Ch. 1; 91 L.J.Ch. 777; 128 L.T. 200; 38 T.L.R. 891; 67 Sol. Jo. 62; [1922] B. & C.R. 229, C.A.; reversed sub nom. *Jubilee Cotton Mills, Ltd.* (*Official Receiver and Liquidator*) v. *Lewis*, [1924] A.C. 958; 93 L.J.Ch. 414; 40 T.L.R. 621; 68 Sol. Jo. 663; [1925] B. & C.R. 16; sub nom. *Re Jubilee Cotton Mills, Ltd.*, 131 L.T. 579, H.L.; 9 Digest (Repl.) 42, *81*.

(5) *Re Peveril Gold Mines, Ltd.*, [1898] 1 Ch. 122; 67 L.J.Ch. 77; 77 L.T. 505; 46 W.R. 198; 14 T.L.R. 86; 42 Sol. Jo. 96; 4 Mans. 398, C.A.; 10 Digest (Repl.) 875, *5773*.

(6) *Payne* v. *Cork Co., Ltd.*, [1900] 1 Ch. 308; 82 L.T. 44; 48 W.R. 325; 16 T.L.R. 135; sub nom. *Paine* v. *Cork Co.*, 69 L.J.Ch. 156; 7 Mans. 225; 9 Digest (Repl.) 100, *450*.

(7) *Newton* v. *Birmingham Small Arms Co., Ltd.*, [1906] 2 Ch. 378; 75 L.J.Ch. 627; 95 L.T. 135; 54 W.R. 621; 22 T.L.R. 664; 50 Sol. Jo. 593; 13 Mans. 267; 9 Digest (Repl.) 587,

(8) *Re Kingston Cotton Mill Co.* (*No. 2*), [1896] 2 Ch. 279; 65 L.J.Ch. 673; 12 T.L.R. 430; 40 Sol. Jo. 531; 3 Mans. 171; sub nom. *Re Kingston Cotton Mills Co., Ltd., Ex parte Pickering and Peasegood* (*No. 2*), 74 L.T. 568, C.A.; 9 Digest (Repl.) 587, *3880*.

(9) *Lewis* v. *Great Western Rail Co.* (1877), 3 Q.B.D. 195; 47 L.J.Q.B. 131; 37 L.T. 774; 26 W.R. 255, C.A.; 8 Digest (Repl.) 66, *439*.

(10) *Re Young and Harston's Contract* (1885), 31 Ch.D. 168; 53 L.T. 837; 34 W.R. 84, C.A.; 40 Digest (Repl.) 128, *989*.

(11) *Re London Corpn. and Tubbs' Contract*, [1894] 2 Ch. 524; 63 L.J.Ch. 580; 7 R. 265; sub nom. *Tubbs and London Corpn.'s Contract*, 70 L.T. 719; 10 T.L.R. 481; 38 Sol. Jo. 476, C.A.; 40 Digest (Repl.) 128, *986*.

(12) *Elliott* v. *Turner* (1843), 13 Sim. 477; 60 E.R. 185; 36 Digest (Repl.) 8, *14*.

(13) *Forder* v. *Great Western Rail. Co.*, [1905] 2 K.B. 532; 74 L.J.K.B. 871; 93 L.T. 344; 53 W.R. 574; 21 T.L.R. 625; 49 Sol. Jo. 597; 36 Digest (Repl.) 9, *24*.

(14) *Re London and General Bank* (*No. 2*), [1895] 2 Ch. 673; 44 W.R. 80; 39 Sol. Jo. 706; 2 Mans. 555; 12 R. 520; sub nom. *London and General Bank, Ltd., Theobald's Case*, 64 L.J.Ch. 866; 73 L.T. 304; 11 T.L.R. 573, C.A.; 9 Digest (Repl.) 588, *3886*.

Also referred to in argument:

Bennett v. *Stone*, [1903] 1 Ch. 509; 72 L.J.Ch. 240; 88 L.T. 35; 51 W.R. 338; 47 Sol. Jo. 278, C.A.; 40 Digest (Repl.) 130, *997*.

Chapman v. *Browne*, [1902] 1 Ch. 785; 71 L.J.Ch. 465; 86 L.T. 744; 18 T.L.R. 482, C.A.; 35 Digest 289, *424*.

Drosier v. *Brereton* (1851), 15 Beav. 221; 51 E.R. 521; 35 Digest 290, *425*.

Fenwick v. *Greenwell* (1847), 10 Beav. 412; 11 Jur. 620; 50 E.R. 640; 43 Digest 853, *3008*.

Re Owens, Jones v. *Owens* (1882), 47 L.T. 61, C.A.; 23 Digest (Repl.) 322, *3910*.

Robinson v. *Harkin*, [1896] 2 Ch. 415; 65 L.J.Ch. 773; 74 L.T. 777; 44 W.R. 702; 12 T.L.R. 475; 40 Sol. Jo. 600; 43 Digest 882, *3256*.

Appeal by the liquidator from an order of Romer, J., made on a misfeasance summons in the winding-up of a company taken out against the directors and the

auditors of the company. The appeal related only to the decision of the learned judge dismissing the summons as against the auditors.

Topham, K.C., *Bennett, K.C.*, and *Harold Christie* for the liquidator.
Stuart Bevan, K.C., and *George Phillips* for the defendant auditors.

SIR ERNEST POLLOCK, M.R.—This case is important in the sense that it has arisen in the course of the liquidation of a notable re-insurance company with many and considerable liabilities. The company was at one time prosperous, and in a short time it was brought to a tragic end by the fraud of its chairman, who was later convicted and sentenced to a term of imprisonment. No development of the law is involved in its termination and the problems raised can be solved by the application of principles already well ascertained. In the course of the liquidation of the City Equitable Co. summonses for misfeasance under s. 215 (1) of the Companies (Consolidation) Act, 1908 [now s. 331 (1) of Companies Act, 1948], were taken out by the liquidator against the directors of the company and against Messrs. Langton and Lepine, who had for some years acted as auditors of the company. Messrs. Langton and Lepine are auditors of good standing in the city of London, and the appeal is in respect of a judgment given by ROMER, J., upon the case as presented against them. The learned judge came to the conclusion that the liquidator was not entitled to recover against either the directors or the auditors, and the liquidator has appealed before us claiming that the judgment, so far as it has held that the auditors were not liable, ought to be reversed.

I do not propose to re-state all the facts, but I must, I think, to make my judgment intelligible, first refer to certain features which have been the subject more particularly of discussion in this court. The balance-sheets of the City Equitable Fire Insurance Co. for the years 1919, 1920, and 1921 were all audited by Messrs. Langton and Lepine, and they all contain the proper statement:

> "We have obtained all the information and explanations we have required. In our opinion, such balance-sheet is properly drawn up so as to exhibit a true and correct view of the state of the company's affairs according to the best of our information and the explanations given us as shown by the books of the company."

But it is said as against Messrs. Langton and Lepine that they were guilty of a dereliction of their duty as auditors, and that, if they had fulfilled that duty, the disaster which overtook the company would not have occurred, or, at any rate, would not have been of such magnitude, and some of the losses incurred by the company would have been avoided. It is, I think, important to mention one or two of the features of these balance-sheets. We have before us a very careful and helpful summary of the errors in the balance-sheets presented to us, and it appears that in each of the balance-sheets a course was adopted whereby it was made to appear that there were a larger number of investments in British government securities than was in fact the case. It is also said that a larger amount was represented as being loans at call or short notice than was the fact, that instead of securities being available in the hands of the company itself or of its bankers, some of them were in the hands of Ellis & Co. [see infra], and in fact had been pledged by them, and that if the auditors had been more careful they would have discovered these discrepancies between the real facts and those which were presented in the balance-sheets. Passing to the balance-sheet for 1920, it appears to me that in that there was included in the loans at call or short notice a sum of £52,000, which was due from Mr. Mansell, the general manager of the City Equitable company, and also a sum of £11,000 which was due from Ellis & Co. There were also the same features with regard to apparent investments in government securities which were not truly made, and there was a considerable and increased sum due from Ellis & Co. The last balance-sheet differs in one respect from the other balance-sheets, inasmuch as instead of the loans being described as "at call or short notice" they are described as "loans" only. It appears that the

A loan to Mansell, which had grown from over £6,000 in 1919 to £52,000 in 1920, had reached the figure of £96,000 in 1921. The sum due from Ellis & Co. in 1921 was over £73,000, but was included in "Cash at bank or in hand," and there was, contrary to the fact, a very much larger representation of investments in government securities.

When one approaches this case, quite apart from the question of law with which B I shall have to deal later, it is of the first importance to remember that one is looking into facts which have been subjected to the scrutiny and have been explained by the ability of accountants who have come in to look at all the books—not only the books of the City Equitable company, but also the books of Ellis & Co. It is not easy to reconstruct the true position as it stood before the auditors when they were called upon to do their duty in the three successive years in which their C conduct is challenged. It is also proper to remember that when a big disaster has occurred such as the failure of this company there is, on the part of some, a desire to find a scapegoat who can be made responsible and possibly make good some of the losses which have occasioned disaster to so many. But it is the duty of the court, as far as possible, to endeavour to ascertain what was the problem presented to the auditors, and what was the knowledge available to them at the time. D It is right to say that the audit in these three successive years, which was carried out by Mr. Lepine, the partner entrusted with it, was performed with diligence and care. It occupied something like from six to eight weeks, and in a passage in his judgment, Romer, J., gives a striking testimony from the evidence to which he adds his own authority to show that he was quite satisfied that Mr. Lepine had been both diligent and discriminating and had endeavoured to bring the very best E of his abilities to bear on the problem before him. Romer, J., cites a passage from the evidence of Mr. Van de Linde, who testified to the care and accuracy displayed by Mr. Lepine in the audit, and he sets out the actual passage in his judgment. Mr. Van de Linde says this: "As far as the figures are concerned, I think there is great accuracy right through." Then, in answer to the question: "In fact, throughout, always putting aside these matters we have to address ourselves to, speaking F generally, throughout, the greatest care shown and accuracy achieved?" he said, "Yes." The learned judge, at the close of his judgment, says that he is convinced "that throughout the audits Mr. Lepine conducted he honestly and carefully discharged what he conceived to be the whole of his duty to the company." That judgment was delivered after the learned judge had had an opportunity of hearing a great number of cases cited to him and a good number of addresses from counsel, G and after he had spent many days in the hearing and trial of the case. I should like, myself, to add that upon the facts presented to us it appears that Mr. Lepine did ask for explanations which do him credit, for it must be remembered that he had to overcome, if he was to succeed in the task which it is now suggested he ought to have succeeded in, the cunning of a dishonest chairman, and he had to circumvent the ingenuity of the general manager who was concerned at the same H time in obtaining for himself an agreement which I should describe on its face as fraudulent. Mr. Lepine had, therefore, set before him a task which must be a difficult one at any time, but one about which, if he failed in it, there would only have been recorded of him that he failed to do what would have been a very signal achievement if he had succeeded, because we are to remember, not only what was the position of the City Equitable company, its directors and its chairman, but the I position of Ellis & Co. Ellis & Co., of which the chairman of the company, Gerard Lee Bevan, was the senior partner, was a firm of stockbrokers of good standing and large business on the London Stock Exchange. Bevan was a man credited with very great ability and of high standing as a financier.

Mr. Lepine did discover in the course of his enquiries three points which I desire to mention. With regard to the loan to Mansell, he pointed out in 1920 that it had reached a figure of £52,000, whereas the only minute he could find relating to it authorised the sum of £15,000, and not more, to be advanced to Mansell. He made inquiries, and he received the answer from Bevan himself

that a minute would be duly recorded authorising the loan up to the amount at which it stood, namely, £52,000. It appeared to be all right to Mr. Lepine from this fact that all the cheques by which the loan had been made, and some slips attached to them, if I read the evidence rightly, bore the signatures of directors, so that it was not a case in which the manager appeared to be helping himself to the money of the company, but one in which the directors were placing in the manager's hands, for some reason which Mr. Lepine may or may not have appreciated, sums which totalled up to £52,000. But Mr. Lepine did discover the discrepancy between the amount of the authorised loan and the amount of the actual loan, and he required and was promised that the matter should be regularised in due course by a minute. Again, in 1920, he discovered a matter which he also desired to put right. There was an investment in which the City Equitable company was concerned in some ranch in Brazil, and payments were made, apparently through Ellis & Co., for the development of that ranch. It appeared that at the time the balance-sheet of 1920 was produced a sum of £161,000 had been paid through Ellis & Co. to the account or for the purposes of the development of the ranch, and Mr. Lepine discovered that the actual amount authorised according to the minute was £150,000, and no more. We are told that Ellis & Co. in some way or the partners of Ellis & Co., or Bevan, or, at any rate, one of what I may call the group of persons concerned, who would be in touch with Mr. Lepine, were also interested in this adventure. When Mr. Lepine called attention to the fact that £161,000 had been sent or dispatched, or placed in Ellis & Co.'s hands for the purpose of the ranch, and that that exceeded the authorised amount by £11,000, he was then told, either by Mansell or by Bevan, that in the circumstances Ellis & Co. would debit it to their account. I suppose in business that meant that it was not a matter of very great concern, if all had gone well, whether this money was advanced to the ranch by Ellis & Co. or a partner in Ellis & Co., or one of the persons concerned in it. The sum of £11,000 was comparatively not a very large one, and whether it was debited to one account or another was a matter of little moment. As a matter of fact, in consequence of the information Mr. Lepine received, it was debited to Ellis & Co., and at that time I think there is no doubt from the evidence that Ellis & Co. could have drawn, or certainly were supposed to be able to draw, a cheque for £11,000. That £11,000 is found included in the sums at call or short notice, but it is due to Mr. Lepine to say that his diligence did bring him to discover what, at any rate, was not presented to him in a light which was easy to discover, and which must have required some persistence on his part, first of all to discover, and then to put right. Another matter—there were so-called "window-dressing" schemes, and here I think one has to be very careful because at the end of each year the auditor would discover what had happened down to Feb. 28, the date at which the accounts closed, but he would not necessarily know what had happened in subsequent years during the time he was conducting the audit. It is true that if one takes the three balance-sheets together and casts them in the form of a chart, one can see that an increasing amount of window-dressing was going on, and that there is a rise of the figures which are manipulated for the purpose of window-dressing, and, therefore, it is easy to read a danger signal from such a chart. No such chart was available to Mr. Lepine, and we have to take the books singly which were before him—the books, be it remembered, of the City Equitable company only. Therefore, it is not right to treat the evidence which is now before us, and its significance as being plain in the years 1919, 1920, and 1921 to Mr. Lepine.

The claim is brought in accordance with the procedure which is rendered available by s. 215 of the Companies (Consolidation) Act, 1908 [now s. 333 of the Companies Act, 1948], and as an argument was presented to us for which some foundation could be given in substance based upon s. 215, I desire to say, though this is not the first time that it has been said, that that section deals only with procedure and does not give any new rights. It provides a summary mode of enforcing existing rights, and I think that is abundantly shown by *Coventry and*

Dixon's Case (1), *Re Brazilian Rubber Plantations and Estates, Ltd.* (2), and *Cavendish Bentinck* v. *Fenn* (3). In *Cavendish Bentinck* v. *Fenn* (3) Lord Macnaghten gives in a sentence or so, as he so often does, a really sufficient summary, the other cases being true illustrations of the principle which he enunciates. He says (12 App. Cas. at p. 669):

> "That section creates no new offence, and . . . it gives no new rights, but only provides a summary and efficient remedy in respect of rights which, apart from that section, might have been vindicated either at law or in equity. . . . It has been settled that the misfeasance spoken of in that section is not misfeasance in the abstract, but misfeasance in the nature of a breach of trust resulting in a loss to the company."

I will not refer to the other cases, but *Coventry and Dixon's Case* (1), *Re Brazilian Rubber Plantations and Estates, Ltd.* (2), and *Re Jubilee Cotton Mills, Ltd.* (4), are illustrations which affirm that s. 215 is a procedure section. It is also true that the shareholders of the company are entitled to the protection which is given them by statute. Counsel for the liquidator tried to suggest that some protection is to be found in s. 215, and that for the purposes of the article, which I shall have to deal with in a moment, protection which is given by statute cannot be overcome by an article. There is no doubt that shareholders are entitled to protection, and illustrations of the protection to which they are entitled may be found in *Re Peveril Gold Mines, Ltd.* (5), *Payne* v. *Cork Co.* (6), and *Newton* v. *Birmingham Small Arms Co.* (7). Taking that last case, it was there attempted by means of an article to prevent a disclosure being made of a reserve fund to which a portion of the profits of the company was transferred, and it was held that this could not be done by resolutions or by articles, because any such resolution or article would be inconsistent with the obligations imposed upon the auditors by s. 23 of the Companies Act, 1900, which was then the section in force [see now Companies Act, 1948, s. 162, Sched. IX]. No doubt, therefore, we must take it, as in these cases and in a number of other illustrations, that the shareholders are entitled to receive the protection given to them by statute in the particular case, and by the particular section which has been illustrated or referred to in those cases.

I come, therefore, to consider what is the protection in relation to auditors which is given by statute. That is to be found in s. 113 (2) of the Act of 1908 [s. 162 of and Sched. IX to the Act of 1948]. By that subsection it is provided that

> "The auditors shall make a report to the shareholders on the accounts examined by them, and on every balance-sheet laid before the company in general meeting during their tenure of office, and the report shall state—(a) whether or not they have obtained all the information and explanations they have required; and (b) whether, in their opinion, the balance-sheet referred to in the report is properly drawn up so as to exhibit a true and correct view of the state of the company's affairs according to the best of their information and the explanations given to them, and as shown by the books of the company."

The balance-sheets of the three successive years I have referred to in form complied with that section. They all contain the usual statement made by auditors, so that primâ facie the auditors here have discharged their duty. Then it is said that these auditors have failed particularly in their duty in respect of three matters charged against them. Those three matters are: "(i) Their misdescriptions in the balance-sheets of the debts of Ellis & Co. and Mansell by including them under 'loans at call or short notice' or 'loans,' or in the case of part of Ellis & Co.'s debt under the heading of 'cash at bank and in hand,' and their consequent failure to disclose to the shareholders the existence of those debts. (ii) Their failure to detect the fact that much larger sums were in the hands of Ellis & Co. at the date of each of the balance-sheets than were so included. (iii) Their failure to detect and report to the shareholders the fact that a number of the company's securities

which were in the custody of Ellis & Co. were being pledged by that firm to its customers."

What is the standard of duty which is to be applied to the auditors? That is to be found and sufficiently stated, I think, in *Re Kingston Cotton Mill Co.* (*No. 2*) (8). From what I have already said it is quite easy to charge a person after the event and say: "How stupid you were not to have discovered something which, if you had discovered it, would have saved us and many others from many sorrows." But it has been well said that an auditor is not bound to be a detective or to approach his work with suspicion or with a foregone conclusion that there is something wrong. "He is a watchdog, but not a bloodhound." That metaphor was used by LOPES, L.J., in *Re Kingston Cotton Mill Co.* (*No. 2*) (8). Perhaps, casting metaphor aside, the position is more happily expressed in the phrase used by SARGANT, L.J., who said that the duty of an auditor is verification and not detection. The *Kingston Cotton Mill Case* (8) is important, because a good deal of sanction is given to those rather epigrammatic phrases. LINDLEY, L.J., says ([1896] 2 Ch. at p. 287):

> "It is not sufficient to say that the frauds must have been detected if the entries in the books had been put together in a way which never occurred to anyone before suspicion was aroused. The question is whether, no suspicion of anything wrong being entertained, there was a want of reasonable care on the part of the auditors in relying on the returns made by a competent and trusted expert relating to matters on which information from such a person was essential."

The judgment of LOPES, L.J., as well as that of KAY, L.J., may be looked at in support of the words of LINDLEY, L.J., and also in support of what I have called the epigrammatic way of putting the auditors' duty. Let us apply that to the present case. Mr. Lepine went in and spent six or eight weeks with his clerks upon these books. In many ramifications of the City Equitable company he finds on the whole that all the entries are properly made and all the accounts are in order. He finds in particular that a larger sum has been lent to Mansell than was authorised but he finds that apparently it was the practice of the directors to pay cheques to him. He finds that the amounts of the cheques which were drawn in his favour were entered up. It is not a case in which the cheques had been drawn and not entered or found in the books in which they ought to have been found; but the sum was not the sum authorised, though it was all there in the books, and he turns for guidance and advice to those persons from whom he is entitled to receive guidance and advice. He turns to the chairman, whose position at that time I described, and he turns to Mansell, who is obviously a man of commanding position, and on all occasions on which he does so he gets from them satisfactory answers or satisfactory promises. One applies this test at a time when no suspicion of anything wrong was entertained—was there a want of reasonable care on the part of the auditors in relying on facts given by competent and trusted experts relating to matters in respect of which information from such persons was essential? I think you can put it interrogatively in this way. Who could be trusted, who could give the information, where would you seek for it more authoritatively than from Bevan and from Mansell? It seems to me, therefore, that when you apply the standard of care to be exercised you find that in the course of the audit Mr. Lepine has primâ facie applied or conformed to the right standard as laid down by the Court of Appeal, a standard to which, on the facts, ROMER, J., says he did conform. His diligence is undoubted, and, for my part, I think that, in estimating whether or not you ought to give weight to what Mr. Lepine in fact did discover as indicating that he was on the path to discover, if he possibly could, anything that was awry, you do find in the cases where he was successful in detecting something that was awry, illustration of his diligence and determination to discover what was discoverable.

Dealing, therefore, with the first two claims—that is the claim in respect of the

loans at call or short notice—Mr. Lepine had, it seems to me, information which would justify him in putting down those items as loans, and I agree with the learned judge that the putting in of the words "at call or short notice" really was not misleading and did not cause any wrong result. The learned judge says:

> "If the description of them in the balance-sheet as 'loans' would have induced any director or shareholder to make some inquiry as to their nature, which he was induced to refrain from making by reason of their description as 'loans at call or short notice,' the matter would be different. But not only is this inherently improbable, there is actual evidence that it was not so."

Then he points out that there was a variation between "loans at call or short notice" and "loans" and that the attention of Mr. Milligan, one of the respondent directors, was called to it and he made some inquiries about it, upon which some plausible explanation was received from Bevan merely on the point why the loans were so large, not what their character was and whether they were at call or short notice, because be it remembered at that time the company was in good credit, and I do not suppose that the idea that they would ever be in any difficulty if they required money, and had to turn outside their own circle for it, would have created any difficulty at all in the minds of those who either were directors or were constantly dealing with them. It seems to me, therefore, that the learned judge is quite right in the way he deals with the first claim.

Then I come to the second—the alleged failure of the auditors "to detect the fact that much larger sums were in the hands of Ellis & Co. at the date of the balance-sheet than were so included." I will come to the question of the signed certificates in a moment, but the mere fact that Ellis & Co. at the time owed £73,000, or that they put down £11,000 to Ellis & Co., does not seem to me to indicate a danger signal at all. So far as any answers were to be received, or likely to be received, they would be favourable both to Ellis & Co. and to the City Equitable company. Where you have an atmosphere of complete confidence, indeed of a confidence based on success up to that time in financial matters, it seems to me that there is no reason for the auditors to hesitate about accepting the view which the company at that time presented to them in their draft balance-sheet—that this was a legitimate way of dealing with the overplus of money due on the Brazilian ranch account, or money due at that time from Ellis & Co., and the fact that Mr. Lepine was unsuccessful in detecting the cunning is quite another matter from saying that he failed to use competence and intelligence in conducting his duties.

I now come to the last point, part of which is contained in the third charge, and that is the failure to detect that much larger sums were in the hands of Ellis & Co. at the date of the balance-sheet, and the failure to detect and report that the securities were in the hands of Ellis & Co. Upon that matter I wish to say a word or two as to the evidence. In fact Mr. Lepine inquired of the bank and obtained a certificate from the bank that a certain number of securities were in their hands, and he then turned to Ellis & Co. and he received from them, under the signature of "Ellis & Co.", a certificate attached to the document, apparently not by Mr. Bevan, but by one of the partners, that a number of securities were in the hands of the stockbrokers. It is said it was quite wrong to accept the certificate of the stockbrokers and we are asked to accept the evidence of Mr. Cash and Mr. Van de Linde as meaning that one may accept the certificate of a bank apparently in all cases, but one may never accept the certificate of stockbrokers. I cannot agree that the evidence is so to be read, or was intended by the witnesses to be so understood. What I think the witnesses meant to express was this. Banks in the ordinary course do hold certificates of securities for their customers; it is part of their business to do so, and, therefore, certificates in the hands of bankers are in their proper custody, and if then a bank is a reputable bank, a bank which holds a high position, one may legitimately accept the certificate of that bank because it is a business institution in whose custody one would expect both to find and to put securities, and also it is respectable; but the fact that it calls

itself a bank does not seem to me to conclude the matter either one way or the other. On the other hand, it may be said that it is the duty of an auditor not to take a certificate as to possession of securities except from a person who is not only respectable—I should prefer to use the word "trustworthy"—but is also one of that class of persons who in the ordinary course of their business do keep securities for their customers, and it may be said that a stockbroker does not in the ordinary course of his business keep securities for his customers, and, therefore, he is ruled out because the auditor ought not to accept from a person of that class, whether he be respectable or not, a certificate that he has securities in his hands. Accepting the rule as so stated, that it is right to find the securities in the hands of a bank whose business it is to hold securities, and applying the proviso that the bank must be one that is trustworthy, it seems to me that the rule may primâ facie be a right one to follow, but it is going too far to say that in no circumstances may one be satisfied with a certificate that securities are in the hands of a stockbroker, because it seems to me that in the ordinary course of business one must from time to time, and one legitimately may, place in the hands of stockbrokers securities for the purpose of their dealing with them in the course of their business. With a large institution like the City Equitable company, having a very considerable number of investments to make and securities to sell, it may well be that for the convenience of all parties it may have been a useful method of business, even if examined with the most exiguous care, for the directors to have decided that they would in the interests of their business leave securities of a considerable amount in the hands of their stockbrokers, who, I suppose, at that time held a position not less trustworthy or respected than the City Equitable company itself. I, therefore, do not wish in any way by anything that I say to discharge the auditors from their duties as laid down in the *Kingston Cotton Mill Case* (8), far less do I wish to discharge them from their duty of seeing that securities are held and accepting the certificate that they are so held from a respectable, trustworthy, and responsible person, be that person a bank or an individual; but in applying my mind to the facts of this case I am not content to say that simply because a certificate was accepted otherwise than from a bank, therefore there was necessarily so grave a dereliction of duty as to make the auditors responsible. I think in the light of the evidence which has been given it is for the auditor to use his discretion, judgment, and discrimination as to whom he shall trust; indeed I think that is the right way to put a greater responsibility on the auditors. If one merely discharges him by saying he accepted the certificate of a bank because it was a bank one might lighten his responsibility. I think he must take a certificate from a person who is in the habit of dealing with and holding securities, and whom he, on reasonable grounds, believes to be, in the exercise of the best judgment, a trustworthy person to give such a certificate. Therefore, I by no means derogate from the responsibility of the auditor, I rather throw a greater burden upon him, but at the same time I throw a burden on him in respect of which the test of common sense and common-sense habits can be applied, rather than impose on him a rigid rule which is not based on any principle either of business or common sense.

Then we come to the responsibility which the learned judge finds, and I think rightly, falls upon Mr. Lepine. What is that? He finds that in respect of these securities Mr. Lepine did what he ought not to have done by accepting from Ellis & Co. a statement of the securities which they, at that time, declared that they held. The learned judge says:

> "In my judgment, not only did Mr. Lepine commit a breach of his duty in accepting, as he did from time to time, the certificate of Ellis & Co. that they held large blocks of the company's securities, but he also committed a breach of his duty in not either insisting upon those securities being put in proper custody, or in reporting the matter to the shareholders."

As I have said, the learned judge also finds that in what he did Mr. Lepine acted

honestly and in all good faith, "holding the mistaken belief as to what his duty was." I agree with the learned judge. It seems to me that Mr. Lepine has made a mistake, and a grave mistake. In justification of him it may be said that every artifice was brought into play in order to deceive him, and to maintain the apparent responsibility and trustworthiness of Ellis & Co. But that does not discharge him from having put aside what I have described as the rule of the road applied with this proviso as to business rules and common sense. Therefore Mr. Lepine would, primâ facie, be liable in respect of that dereliction of duty. But then we find that art. 150 contains important words limiting the responsibility of the officers of the company, including the auditors, who are not to be liable for any

> "loss, misfortune, or damage which may happen in the execution of their respective offices or trust, or in relation thereto, unless the same shall happen by or through their own wilful neglect or default respectively."

I do not agree with the argument that that article is ultra vires. It does not seem to me that it offends at all against s. 113 in the sense that it is a contradiction of it. It seems to me that s. 113 laid statutory duties upon the auditor, and in doing so called on him to perform those duties and give the information required to the best of his ability according to the particulars contained in the books of the company. Once one has a duty to be performed according to the information given and explanations offered, obviously a discretion is to have play, and it seems to me that the article may quite properly be valid in the sense that it is to discharge the auditor from what may be called technical errors, in common parlance, defaults for which he may be held liable in law, but which he may have unconsciously committed. What do the words of the article mean? First of all, it is to be observed they are in respect of neglects or defaults, and it is not unimportant to observe that the words are not "acts or omissions," but they are "neglects and defaults," and the observations of Bramwell, L.J., in *Lewis* v. *Great Western Rail. Co.* (9) ought to be borne in mind, in which he deals with the case of wilful misconduct, calling attention to the fact that it is not wilful conduct, but wilful misconduct. It seems to me that we have here to deal with a case where there has been neglect or default, and then to see whether or not it is wilful.

I come, therefore, to consider the meaning of the word "wilful." In *Re Young and Harston's Contract* (10) (31 Ch.D. at p. 175) there is a well-known passage in the judgment of Bowen, L.J., in which he says:

> "It [the word 'wilful'] generally, as used in courts of law, implies nothing blameable, but merely that the person, of whose action or default the expression is used, is a free agent, and that what has been done arises from the spontaneous action of his will. It amounts to nothing more than this, that he knows what he is doing, and intends to do what he is doing, and is a free agent."

There are numerous other cases, to which we have been referred, but in *Re London Corpn. and Tubbs' Contract* (11) ([1894] 2 Ch. at p. 536) it is to be observed that Lindley, L.J., says:

> "I confess that I am more disposed to concur with Lord Bramwell's observations on the term 'wilful misconduct,' in *Lewis* v. *Great Western Rail. Co.* (9). They are, in my opinion, quite consistent with Bowen, L.J.'s observations in *Re Young and Harston's Contract* (10) if it be borne in mind that Bowen, L.J., presupposed knowledge of what was done, and intention to do it, and was not addressing himself to a case of an honest mistake or oversight."

Lopes, L.J., in dealing with *Re Young and Harston's Contract* (10) and *Lewis* v. *Great Western Rail. Co.* (9), says ([1894] 2 Ch. at p. 539):

> "It is difficult to lay down any general definition of 'wilful.' The word is relative, and each case must depend on its own particular circumstances."

He also says this:

"If the neglect or default in this case arose from the voluntary act of the parties, either awake or asleep, with reference to their rights and interests, and did not at all arise from the pressure of external circumstances over which they could have no control, I apprehend that the neglect or default was wilful."

He is there quoting from the judgment of SHADWELL, V.-C., in *Elliott* v. *Turner* (12). KAY, L.J., also agrees with the general view which is presented by LINDLEY, L.J. LORD ALVERSTONE, C.J., in *Forder* v. *Great Western Rail. Co.* (13), a later case, adopting the definition given in an Irish case, with which he expressed his agreement, says ([1905] 2 K.B. at p. 535):

"Wilful misconduct in such a special condition means misconduct to which the will is a party as contradistinguished from accident, and is far beyond any negligence, even gross or culpable negligence, and involves that a person wilfully misconducts himself who knows and appreciates that it is wrong conduct on his part, in the existing circumstances to do, or to fail or omit to do, as the case may be, a particular thing, and yet intentionally does, or fails or omits to do it, or persists in the act, failure or omission regardless of consequences? The addition which I would suggest is, 'or acts with reckless carelessness, not caring what the results of his carelessness may be.'"

I agree with that definition quoted by LORD ALVERSTONE, with the addition he proposes to make to it. It seems to me in close accord with the previous decisions to which I have already referred, and to give a proper meaning to the words which are before us. I then come to consider whether or not within that meaning of "wilful" the conduct of Mr. Lepine was wilful so as to render him responsible, or is he relieved by the terms of art. 150? We find the auditor confronted with a lot of deceit. We find him fulfilling, year by year, his duty in a manner which has certainly received the praise of those who have given evidence about it and of the learned judge who heard the whole of the facts. We find that on a number of occasions he was successful in putting what was wrong, or attempting to put what was wrong, right, and, therefore, one finds that so far as his will and volition went he was attempting to do his duty. In those circumstances, when one finds a default which has been made, and one finds an error of judgment in accepting as trustworthy what is now proved to be untrustworthy, can one say within the definition that he has been guilty of wilful neglect or default? For my part, for the reasons I have indicated, and on the evidence to which I have called attention, it seems to me impossible so to characterise Mr. Lepine's conduct. He did not, to my mind, shut his eyes to conduct which he thought needed criticism; what he did was, in common with a great number of other persons, he thought the persons with whom he was dealing were trustworthy, and, as pointed out in the cases cited to us, but which I do not stop actually to quote, it has been pointed out again and again that in such circumstances he was entitled to accept the statements which were made to him by those whom he was entitled to trust, when he had no reason or cause for suspicion. It seems to me that the learned judge has quite rightly and accurately applied the law to the facts when he says: "If in certain matters he fell short of his real duty it was in all good faith he held a mistaken belief as to what that duty was," and that the auditor conducted the audits honestly and carefully. He committed an error of judgment, an error which might have caused the company or its directors to take a different course, and might have possibly saved some portion of the disaster, but in what he did I cannot find he was guilty of wilful misconduct, and, therefore, it appears to me art. 150 protects him. In those circumstances I am of opinion that the learned judge was right in the judgment which he has given, and that this appeal ought to be dismissed, and dismissed with costs.

WARRINGTON, L.J.—This is an appeal from an exceedingly clear, careful, and thorough judgment of ROMER, J. As I agree with the conclusions at which he has arrived, it is unnecessary to deal in detail with many of the features that have

A been the subject of discussion here, but there is at least one question of general interest and importance on which I think it is desirable in deference to the arguments which have been addressed to us that I should express my own views in as few words as possible. That question is the construction of art. 150, which is, to say the least of it, not uncommonly found in articles of association, and its effect (if any) in modifying or otherwise the ordinary legal obligations of an auditor, B especially having regard to s. 113 and s. 215 of the Companies (Consolidation) Act, 1908.

The ordinary duties and obligations of an auditor without reference to this or any other special article or stipulation as to the terms of his employment, are stated by LINDLEY, L.J., in full in *Re London and General Bank (No. 2)* (14). It is unnecessary to read the whole of that part of his judgment which deals with the C point, but I think it is, perhaps, desirable to read the following passage ([1895] 2 Ch. at p. 682):

> "It is not part of an auditor's duty to give advice, either to directors or shareholders, as to what they ought to do. An auditor has nothing to do with the prudence or imprudence of making loans with or without security. It is nothing to him whether the business of the company is being conducted pru- D dently or imprudently, profitably or unprofitably. It is nothing to him whether dividends are properly or improperly declared, provided he discharges his own duty to the shareholders. His business is to ascertain and state the true financial position of the company at the time of the audit, and his duty is confined to that."

E He proceeds to discuss in what way he is to perform that duty in reference to examining the books of the company and verifying the statements contained therein in order that he may be able truly to certify that which he has to certify under the Companies Acts. Then he goes on to point out that an auditor is not an insurer; that he is not bound to do more than exercise reasonable care and skill in making inquiries and investigations; and, further, that what is reasonable care F in any particular case must depend upon the circumstances of that case. Again, in *Re Kingston Cotton Mill Co. (No. 2)* (8), LINDLEY, L.J., in dealing with one particular point that arose in that case, says ([1896] 2 Ch. at p. 284):

> "It was further pointed out that what in any particular case is a reasonable amount of care and skill depends on the circumstances of that case; that if there is nothing which ought to excite suspicion, less care may properly be G considered reasonable than could be so considered if suspicion was or ought to have been aroused. These are the general principles which have to be applied to cases of this description. I protest, however, against the notion that an auditor is bound to be suspicious as distinguished from reasonably careful."

In that case it was, accordingly, held that the auditor was entitled to accept the H certificate of the company's manager, though on subsequent investigation it turned out that the manager had been for some years defrauding the company, and that his certificate was intended to cover up those frauds. The duty of the auditor is to verify the facts which it is proposed to state in the balance-sheet, and in doing so to use ordinary and reasonable skill. I need say no more about the general duties of an auditor.

I The next question is to consider what is the true construction of art. 150, and whether that article bears upon or modifies what would, in the ordinary course, be his primâ facie duty and responsibilities—not so much his duty as his responsibilities. The relevant part of the article is in these terms.

> "None of them [certain directors and officers who have been enumerated, including the auditors] shall be answerable for any loss, misfortune or damage which may happen in the execution of their respective offices or trusts or in relation thereto, unless the same shall happen by or through their own wilful neglect or default respectively."

In the first place, I think that that article, as the learned judge has held, expressly in the case of the directors, and impliedly, if not expressly, in the case of the auditors, does in such a case as the present form part of the contract between the company and the auditors, and for the reason that auditors are engaged without any special terms of engagement. When that is the case, if the articles contain provisions relating to the performance by them of their duties and to the obligations imposed upon them by the acceptance of the office, I think it is quite plain that the articles must be taken to express the terms upon which the auditors accept their position. Of course, if the terms of their employment are expressed in a separate document, that document must be taken to define the conditions of their engagement, and it would not be proper to assume any implied terms either from the provisions of the articles or elsewhere. But in the present case I think it is quite plain that the terms of art. 150 do, according to their proper construction, whatever that may be, effect a modification in what would primâ facie be, but for that article, the obligation and liability of the auditors. What, then, is the effect of the article? It is, I think, plainly in some way, whatever that may be, when one ascertains its true construction, to excuse the auditors from being answerable for loss occurring in relation to their office, except in the particular events which are therein specified, namely, those which happen by or through their own wilful neglect or default, and that it would be improper to describe as a misfeasance any act or omission of the auditors which, having regard to that article, would not result in their being answerable for the loss which may be occasioned thereby. That last remark becomes important when one has to deal with the argument addressed to us on the construction of s. 215.

What, then, is the meaning of a loss which happens by or through their own wilful neglect or default? Bear in mind that the words are not "by or through their own wilful act or omission." We have, therefore, not merely to look at the act or omission in itself and see whether there was a conscious will impelling the person in question to commit that act or to omit to do the thing which is suggested to be wrongly omitted, but we have to consider whether the neglect or default was or was not wilful. In saying that, I am only really repeating what was said in much better language than I can find to use by BRAMWELL, L.J., in *Lewis* v. *Great Western Rail. Co.* (9). He was there dealing with a case of wilful misconduct with reference to a business document—a contract by a railway company for the carriage of goods by railway—and he says (3 Q.B.D. at p. 306):

> " 'Wilful misconduct' means misconduct to which the will is a party, something opposed to accident or negligence; the misconduct, not the conduct must be wilful. It has been said, and I think, correctly, that, perhaps, one condition of 'wilful misconduct' must be that the person guilty of it should know that mischief will result from it. But to my mind there might be other 'wilful misconduct.' I think it would be wilful misconduct if a man did an act not knowing whether mischief would or would not result from it. I do not mean when in a state of ignorance, but after being told: 'This may or may not be a right thing to do.' He might say: 'I do not know which is right, and I do not care. I will do this.' I am much inclined to think that would be 'wilful misconduct,' because he acted under the supposition that it might be mischievous, and with an indifference to his duty to ascertain whether it was mischievous or not. I think that would be wilful misconduct."

He goes on at the end of his judgment to deal with the facts of the case and says:

> "I cannot think that there was evidence in this case to show, or on which the learned judge could properly find that the men who packed these cheeses—who were in London, a place from which much Cheshire cheese is probably not exported—knew that they were doing wrong, or, at all events, that they were aware that mischief might result, and that they improperly failed to inform themselves as to whether mischief would or would not result from it."

BRETT, L.J., says (3 Q.B.D. at p. 210):

A "In a contract where the term 'wilful misconduct' is put as something different from and excluding negligence of every kind, it seems to me that it must mean the doing of something, or the omitting to do something, which it is wrong to do or omit, where the person who is guilty of the act or the omission knows that the act which he is doing, or that which he is omitting to do, is a wrong thing to do or to omit; and it involves the knowledge of the person B that the thing which he is doing is wrong; I think that if he knows that what he is doing will seriously damage the goods of a consignor, then he knows that what he is doing is a wrong thing to do; and also, as my Lord has put it, if it is brought to his notice that what he is doing or omitting to do, may seriously endanger the things which are to be sent, and he wilfully persists in doing that against which he is warned, careless whether he may be doing damage or not, C then I think he is doing a wrong thing, and that that is misconduct, and that as he does it intentionally he is guilty of wilful misconduct; or if he does, or omits to do, something which everybody must know is likely to endanger or damage the goods, then it follows that he is doing that which he knows to be a wrong thing to do. Care must be taken to ascertain that it is not only misconduct but wilful misconduct, and I think that those two terms together D import a knowledge of wrong on the part of the person who is supposed to be guilty of the act of omission."

ROMER, J., dealing with that point, says:

"But if that act or omission amounts to a breach of his duty, and, therefore, to negligence, is the person guilty of wilful negligence? In my opinion, that E question must be answered in the negative unless he knows that he is committing and intends to commit a breach of his duty, or is recklessly careless in the sense of not caring whether his act or omission is or is not a breach of duty."

With that summary of the result of the authorities I agree. It is said that that view of the meaning of the words "wilful neglect or default" is inconsistent with what has been decided by the courts in certain cases with reference to the duties F of trustees, and also with the judgment, or what is supposed to be the true effect of the judgment of BOWEN, L.J., in a vendor and purchaser's case (*Re Young and Harston's Contract* (10)). With all respect to counsel who cited those trustee cases to us, I think there is great danger of being misled if we attempt to apply decisions on the duties of trustees to a case relating to the conduct of persons in the position of the auditors in this case. In the case of trustees there are certain definite and G precise rules of law as to what a trustee may or may not do in the execution of his trust, and it is no answer for a trustee to say, if, for example, he invests the trust property in his hands in a security which the law regards as an unauthorised security: "I honestly believed that I was justified in doing that." No honest belief will justify him in committing that which is a breach of such a rule of law, and, therefore, the question which we have to determine in expressing a view on H the construction of such words in a contract like the present is not solved by seeing how the question has been determined in a case relating to the duties of a trustee.

With regard to *Re Young and Harston's Contract* (10), when the judgment of BOWEN, L.J., is read in connection with the facts of that case it seems to me that it is not inconsistent either with the decision in *Lewis* v. *Great Western Rail. Co.* (9) or with that at which ROMER, J., has arrived in the present case, and for this I reason. In *Re Young and Harston's Contract* (10) the default in question was that the vendor being under an obligation to execute on Sept. 8 a conveyance of property which he had agreed to sell to the purchasers, went abroad two days before, leaving no address, so that it was impossible for him to execute the conveyance on that day. That was plainly a default—not proceeding from ignorance, but plainly a wilful default—because the vendor had himself put it out of his power, apparently deliberately, to do that which he was bound to do on that day. That was held to be wilful default. The words of BOWEN, L.J., must be read with reference to the facts before him; and there is nothing in his analysis of the mean-

ing of the word "default" and the meaning of the word "wilful" which in any way conflicts with what I venture to say I think is the true mode of dealing with the construction, not of either word by itself, but of the entire expression "wilful neglect or default." I think, therefore, that ROMER, J., was quite right in arriving at the conclusion that a person is not guilty of "wilful neglect or default" unless he is conscious that in doing the act which is complained of, or in omitting to do the act which is said he ought to have done, he is committing a breach of his duty, and also, as he said, recklessly careless whether it is a breach of duty or not.

Then it is said that if the article has that effect, and if, as I think it does, it modifies the primâ facie obligation of the auditors, it is contrary to the provisions of s. 113 and s. 215 of the Companies (Consolidation) Act, 1908. With all respect I cannot agree. Section 113 does not lay down any rule at all as to the amount of care or skill, or investigation, or anything of that kind, which is to be brought to bear by the auditors in performing the duties which are imposed upon them. All that the section imposes upon the auditors is the duty of making a report to the shareholders upon the accounts which they examine and upon every balance-sheet laid before the company in general meeting during their tenure of office, and to state in their report whether or not they have obtained all the information and explanations which they have required, and whether, in their opinion, the balance-sheet referred to in the report is properly drawn up so as to exhibit a true and correct view of the state of the company's affairs, according to the best of their information and explanations given to them and as shown by the books of the company. It says nothing as to what they are to do in order to form that opinion, or to ascertain the truth of the facts to which they are to certify. That is left to be determined by the general rules which, in point of law, are held to govern the duties of the auditors, whether those rules are to be derived from the ordinary law, or from the terms under which they are to be employed. Article 150, therefore, in no way conflicts with s. 113 of the Act.

With regard to s. 215, if I am right in what I have already said, it is plain that nothing is referred to in that section as a misfeasance, except an act or default which would, having regard to the relations between the auditors and the company, be a misfeasance or a breach of trust causing a loss to the assets of the company, and if, therefore, there is some act or omission on the part of the auditors which, having regard to the provisions of art. 150 in the present case, or to a similar article in any other case, does not give rise to any liability to the company, then, in my opinion, it gives rise to no liability under s. 215. I think that is made perfectly plain, especially by the speech of LORD MACNAGHTEN in *Cavendish Bentinck* v. *Fenn* (3) which has always been accepted as accurately stating what was the settled law with regard to the construction of s. 165 of the Companies Act, 1862, which corresponds to s. 215 of the Act of 1908. It seems to me, therefore, that art. 150 has such effect as according to its true construction it ought to have on the obligations and liabilities of the auditors, and that ROMER, J., was quite right in the conclusion at which he arrived in that respect.

That being the true construction and the actual effect of art. 150, was there anything which the auditors in the present case either did or omitted to do, which was such an act or omission, wilful default, or neglect on their part? I do not propose to go through the evidence upon that point. I think it is enough for me to read what ROMER, J., says and to say that I thoroughly agree with his conclusion. He says:

> "I have heard Mr. Lepine's evidence in the witness-box, and I have inspected many of the numerous documents prepared by him for the purposes of the audits which he conducted. I am convinced that throughout the audits that he conducted he honestly and carefully discharged what he conceived to be the whole of his duty to the company. If in certain matters he fell short of his real duty it was because, in all good faith, he held a mistaken belief of what that duty was."

It seems to me that, agreeing with that view, I must agree with the conclusion at which ROMER, J., has arrived that the application of the official receiver against the auditors fails.

I only desire to add this. ROMER, J., came to the conclusion that, but for art. 150 he would have held, and did hold, that there was negligence on the part of the auditors in regard to the inspection of the securities which were, in fact, in the possession or ought to have been in the possession of Ellis & Co., and as to which that firm gave a certificate which was accepted by the auditors. With regard to that, I will only say this: We have not heard counsel for the auditors on that point, and it is at least arguable—I will not say more than that—that in the particular circumstances of the present case there was not in fact negligence on the part of the auditors, even without reference to art. 150. I do not say that I differ from ROMER, J., I only think that it is fair to Mr. Lepine to say that, not having heard counsel for the auditors on that point, the matter is one which is at least worthy of argument.

On the whole, therefore, I agree that the appeal must be dismissed with costs.

SARGANT, L.J.—I would examine the questions here in a different way from that in which they were presented to us. I will take, first, the question whether the terms of art. 150 are effective to limit or restrict the extent of the primâ facie liability of the auditors. As to this the decisions in *Coventry and Dixon's Case* (1) and *Cavendish Bentinck* v. *Fenn* (3) conclusively established that s. 215 of the Companies (Consolidation) Act, 1908, which corresponds in almost precise words with the old s. 165 of the Act of 1862 is a procedure section only, and merely provides a summary remedy for enforcing in the liquidation of a company such liabilities as might have been enforced by the company itself, or by its liquidator, by means of an ordinary action. It is not immaterial to observe that in view of the fact that this principle had been clearly laid down in the Court of Appeal in the year 1880 with reference to s. 165 of the Companies Act, 1862, the provisions of that section with no substantial change are re-enacted by s. 215 of the Companies (Consolidation) Act, 1908. In so re-enacting this section it is, in my judgment, impossible to suppose that the legislature meant to give to the re-enacted section a meaning different from that so authoritatively attributed to the similar section which it replaced.

We have, therefore, to consider whether, if the company here had brought an action against the auditors for neglect or default, the defendants would have been entitled to avail themselves of the protection given to them by the article in question. I can see no reason why they should not do so. The article does not limit the nature or extent of the auditors' duties under s. 113. It is in no way contrary to the scheme of the Act, and such cases as *Re Peveril Gold Mines, Ltd.* (5) and *Payne* v. *Cork Co., Ltd.* (6) seem to me to have no application whatever to this case. The article merely operates to limit the liability of the officers of the company by relieving them from the consequences of certain kinds of neglect or default. It might as well be said that a clause of this kind in trust deeds should be inoperative, because it would tend to induce trustees to be negligent of the interests of their cestui que trust. The truth is that such restrictions on liability may, and, I think, often do, operate to protect rather than harm beneficiaries, because they prevent honest and responsible persons from being frightened away from accepting an office which might otherwise involve them in various unmerited and unexpected losses notwithstanding perfect honesty on their part. That being so, we have to consider how the matter would stand if the company itself was suing the auditors, and for this purpose we must deal with the question what is the extent of the protection given to the auditors by reason of the latter half of art. 150. What is the meaning of the exception "wilful neglect or default" in that article? ROMER, J., has analysed with great care the cases on the subject, and, in my opinion, he has, as a result of that analysis, come to a correct conclusion. In my judgment, the word "wilful" in this phrase is of importance, and means that the

officer in question is consciously acting, or failing to act, in a reprehensible manner. It may, no doubt, be for him to show that this is not so, and I do not think he would be protected if he simply failed to give any consideration at all to the question of his duties if he acted recklessly and without caring whether he was fulfilling them or not. But, in my judgment, these words excuse an officer if, through mere inadvertence or error of judgment, and while endeavouring honestly to carry out his duty he does or omits to do something which, apart from these words might have rendered him liable. I need not carry the definition further, for as will be seen this is enough, having regard to the view I take of the facts.

As to the facts it seems to me that there is little, if any, dispute. There are two circumstances on which special stress should be laid. The first is the very great care exercised by Mr. Lepine in the performance of his duties, a circumstance to which marked attention is drawn in the judgment of the learned judge. There was obviously on the part of the auditors an honest and diligent performance of their duties to the best of their ability, and that is a fact of the utmost importance. The second is that in this particular case Mr. Lepine was, in fact, dealing with a most unusual state of things, a combination in Mr. Bevan of exceptional ability, exceptional reputation, and quite exceptional roguery. Bevan had succeeded in deceiving not only all the other directors of the company, but all his numerous partners of the firm of Ellis & Co., and he was able on behalf of Ellis & Co. to cause corroboration to be given to statements made by the company, independent corroboration by innocent persons, his own partners, although those persons had, in fact, derived their information from Bevan himself. Counsel for the liquidator suggested that the statements in the balance-sheet made a gradual and increasing divergence from the truth, and in so doing were inspired by someone in the background who was trying more and more to conceal the real state of things. I suppose he meant by Bevan, or possibly by Mansell. But I think that this circumstance is rather in favour of the auditors than against them. If these statements had been made on the initiative of the auditors themselves there might have been some ground for suspicion, but when what they do is to adopt the phraseology of a rogue and fail to detect the implications arising from that phraseology it seems to me that the circumstance that that is all they are doing is one very definitely in their favour.

The heads under which the auditors were sought to be rendered liable are summarised very clearly by ROMER, J., in his judgment. As regards the first two heads I do not propose to say anything. I only deal with the last head, namely that connected with the leaving of the securities in the custody of the brokers. In the first place, I think that the strict rules as to trustees do not necessarily apply to limited companies in all their rigour. Trustees are dealing with other persons' property. Limited companies are dealing with their own funds. It may well be that certain companies may find it advantageous to allow brokers or agents to hold or to have free access to securities which trustees are not entitled to do. That is a matter, it seems to me, for the internal regulation of a company, having regard to the character of its business. Speaking generally, I should have thought it was inadvisable to leave marketable securities with brokers or other persons not accustomed, like bankers or safe-deposit companies, to hold and keep securities as part of their ordinary business, and in any ordinary case I think it would be desirable that auditors should call attention to and require some justification for a practice of this kind. But the matter seems to me to be essentially one of degree, and one which is not regulated by the definite and strict rules which govern the conduct of trustees in such matters. It would not be right that auditors should deliberately adopt a standard of verification below the ordinary standard, because the persons with whom they are dealing are persons of specially high reputation. It would be dangerous to adopt any such lower standard on account of that circumstance. But I cannot find that the auditors here did deliberately adopt any lower standard of that kind. Mr. Lepine was, in my view, adopting the standard which he thought was the proper standard and one which was not definitely below any

standard to which he was accustomed in ordinary transactions. Here I wish to express my opinion that undue stress was laid by counsel for the liquidator on the effect of the evidence of Mr. Van de Linde and Mr. Cash. They seemed to treat the practice of those persons as if it had been embodied in a written or printed code. I think that is to treat the matter altogether too rigidly, and even taking the practice of Mr. Van de Linde and Mr. Cash as they stated it before the court, there was a considerable border line of undefined territory, in which the auditor had to be guided by his own personal view of what was sufficient in all the circumstances of the case. In my judgment, therefore, it is impossible to treat Mr. Lepine as having gone contrary to a well-defined or well-recognised practice such as could only have been justified in most exceptional circumstances.

I desire to add that I do not wish definitely to say that I agree with the view that has been taken by ROMER, J., that, apart from art. 150, the auditors would have been liable. We have not heard on that point any argument on behalf of the auditors, and I can quite see that there might be an argument of considerable force which might be addressed to us to prevent our holding that they were neglectful or were in default apart from the special provisions of that article. But having regard to the provisions of that article, and having come to the conclusion, as I have, that the very most that can be said against Mr. Lepine is that he committed an honest error of judgment, I am clearly of opinion that he is protected, even if he were otherwise liable, by the special and concluding words of art. 150.

Solicitors: *Linklaters & Paines*; *W. S. Pennefather* (*Stoneham & Sons*).

[*Reported by* G. P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

KELLY AND ANOTHER *v.* BARRETT

[COURT OF APPEAL (Sir Ernest Pollock, M.R., Warrington and Sargant, L.JJ.), May 13, 14, 15, 1924]

[Reported [1924] 2 Ch. 379; 94 L.J.Ch. 1; 132 L.T. 117; 40 T.L.R. 650; 68 Sol. Jo. 664]

Sale of Land—Restrictive covenant—Enforcement—Covenant attached to land of unadopted road—Road taken over by local authority—Freehold of surface no longer in covenantee.

By a building agreement, dated May 11, 1877, and four conveyances, dated May 11 and 14, 1880, land was sold by the predecessor of the plaintiff M.-W. to the plaintiff K. and his partner, subject to a covenant that: "No buildings other than messuages for private residences . . . shall be erected on the property or when erected shall be used for any purpose other than for private residences." Later in 1880 the plaintiff K. and his partner sold part of the land, with a house built thereon, to H. subject to the covenants contained in the conveyance of May 11, 1880. This plot of land faced a road which at that time had been dedicated to the public by M.-W.'s predecessor, but had not been taken over by the local authority. In 1882 the road was taken over by the local authority. Subsequently, M.-W.'s predecessor and K.'s partner died, and the rights conferred on the vendor by the agreement and conveyances of 1877 and 1880 became vested in M.-W. Shortly before the present action the defendant purchased the property conveyed to H. in 1880. It was admitted that she must be taken to have constructive notice of the restrictions in the agreement and conveyance of 1877 and 1880. She proceeded to use the house

as a nursing home, which, she admitted, was technically a breach of covenant, but there was nothing on the exterior of the house to show that it was being used otherwise than as a private residence and no nuisance or damage was caused to the plaintiffs. In an action by the plaintiffs to enforce the covenant,

Held: (i) on the facts, applying the test laid down by PARKER, J., in *Elliston* v. *Reacher* (1), [1908] 2 Ch. at p. 384, no building scheme had been formed with regard to the land the subject of the agreement of May 11, 1877; for the covenant to be enforceable against the defendant it must be attached to some land; the site and soil of the road on which the property abutted was land to which the benefit of the covenant might be attached, but when the road was taken over by the local authority its soil became vested in that authority to the depth to which it was necessary for the authority to possess it in order to maintain it and for its use for public purposes; thereafter the land below that depth was not land the occupation and enjoyment of which was liable to be affected by a breach of the covenant; and, therefore, the land now possessed by M.-W. as the representative of the original covenantee was no longer land to which the benefit of such a covenant could properly be attached, and the covenant was not enforceable.

The requirements of a building scheme discussed.

Injunction—Covenant—Enforcement—No privity of contract between plaintiff and defendant—No damage caused by breach.

Held (by TOMLIN, J., but doubted, without deciding the question, by the Court of Appeal): there being no privity of contract between M.-W. and the defendant, and the breach of covenant complained of, though admitted to be technically a breach, having caused no nuisance, annoyance, or damage, in any event it was not a proper case for an injunction.

Notes. Referred to: *Lawrence* v. *South Country Freeholds, Ltd.*, [1939] 2 All E.R. 503.

As to restrictive covenants, see 14 HALSBURY'S LAWS (3rd Edn.) 559 et seq. (building schemes at pp. 565–568), and ibid. (2nd Edn.), vol. 29, p. 441 et seq. For cases see 40 DIGEST (Repl.) 337 et seq. As to injunctions to enforce covenants, see 21 HALSBURY'S LAWS (3rd Edn.) 379 et seq.; and for cases see 28 DIGEST (Repl.) 818 et seq.

Cases referred to:

(1) *Elliston* v. *Reacher*, [1908] 2 Ch. 374; 77 L.J.Ch. 617; 99 L.T. 346; affirmed, [1908] 2 Ch. 665; 78 L.J.Ch. 87; 99 L.T. 701, C.A.; 40 Digest (Repl.) 337, *2749*.

(2) *Osborne* v. *Bradley*, [1903] 2 Ch. 446; 73 L.J.Ch. 49; 89 L.T. 11; 28 Digest (Repl.) 807, *561*.

(3) *Reid* v. *Bickerstaff*, [1909] 2 Ch. 305; 78 L.J.Ch. 753; 100 L.T. 952, C.A.; 40 Digest (Repl.) 341, *2770*.

(4) *Tunbridge Wells Corpn.* v. *Baird*, [1896] A.C. 434; 65 L.J.Q.B. 451; 74 L.T. 385; 60 J.P. 788; 12 T.L.R. 372, H.L.; 26 Digest 330, *618*.

(5) *Battersea Vestry* v. *County of London and Brush Provincial Electric Lighting Co., Ltd.*, [1899] 1 Ch. 474; sub nom. *St. Mary, Battersea, Vestry* v. *County of London and Brush Provincial Electric Lighting Co.*, 68 L.J.Ch. 238; 80 L.T. 31; 15 T.L.R. 175; 63 J.P.Jo. 84, C.A.; 26 Digest 328, *602*.

(6) *Doherty* v. *Allman* (1878), 3 App. Cas. 709; 39 L.T. 129; 26 W.R. 513, H.L.; 28 Digest (Repl.) 740, *14*.

(7) *Nottingham Patent Brick and Tile Co.* v. *Butler* (1886), 16 Q.B.D. 778; 55 L.J.Q.B. 280; 54 L.T. 444; 34 W.R. 405; 2 T.L.R. 391, C.A.; 40 Digest (Repl.) 343, *2781*.

(8) *Renals* v. *Cowlishaw* (1879), 11 Ch.D. 866; 48 L.J.Ch. 830; 41 L.T. 116; 28 W.R. 9, C.A.; 40 Digest (Repl.) 346, *2796*.

(9) *Spicer* v. *Martin* (1888), 14 App. Cas. 12; 58 L.J.Ch. 309; 60 L.T. 546; 53 J.P. 516; 37 W.R. 689, H.L.; 40 Digest (Repl.) 336, *2744*.

(10) *Rogers* v. *Hosegood*, [1900] 2 Ch. 388; 69 L.J.Ch. 652; 83 L.T. 186; 48 W.R. 659; 16 T.L.R. 489; 44 Sol. Jo. 607, C.A.; 40 Digest (Repl.) 340, *2769*.

(11) *South Eastern Rail. Co.* v. *Cooper*, [1924] 1 Ch. 211; 93 L.J.Ch. 292; 130 L.T. 273; 88 J.P. 37; 22 L.G.R. 109, C.A.; 19 Digest 108, *687*.

Also referred to in argument:

Re Hucklesby and Atkinson's Contract (1910), 102 L.T. 214; 54 Sol. Jo. 342; 40 Digest (Repl.) 269, *2249*.

London and South Western Rail. Co. v. *Gomm* (1882), 20 Ch.D. 562; 51 L.J.Ch. 530; 46 L.T. 449; 30 W.R. 620; 40 Digest (Repl.) 331, *2716*.

Lord Manners v. *Johnson* (1875), 1 Ch.D. 673; 45 L.J.Ch. 404; 40 J.P. 345; 24 W.R. 481; 40 Digest (Repl.) 351, *2829*.

Richards v. *Revitt* (1877), 7 Ch.D. 224; 47 L.J.Ch. 472; 37 L.T. 632; 26 W.R. 166; 40 Digest (Repl.) 361, *2890*.

Sharp v. *Harrison*, [1922] 1 Ch. 502; 91 L.J.Ch. 442; 28 Digest (Repl.) 826, *700*.

Spencer's Case (1583), 5 Co. Rep. 169; 77 E.R. 72; 31 Digest (Repl.) 153, *2907*.

Appeal from a decision of TOMLIN, J.

In and prior to the year 1877, Sir Spencer Maryon-Wilson was the owner of a large estate in Hampstead, and agreed to sell part thereof, being the land the subject-matter of the agreement next hereinafter mentioned, to two brothers, Herbert Kelly, and the plaintiff Edward Kelly, who were carrying on the business of builders in partnership. The agreement for sale was dated May 14, 1877, and was made between Sir Spencer Maryon-Wilson, as vendor, of the one part, and Herbert Kelly and Edward Kelly, as purchasers, of the other part. By cl. 1 the vendor agreed, subject to the conditions thereinafter contained, to sell and the purchasers to purchase at the price of £39,400 the several pieces or parcels of land respectively situate on either side of Fitzjohn's Avenue, Hampstead, which were delineated, and with their respective abuttals and boundaries shown on the plan drawn in the margin of the second side of the agreement and thereon coloured pink, and the inheritance thereof in fee simple in possession free from incumbrances. Clause 2 provided:

> "The purchasers having paid a deposit of £1,000 at the time of the signing of this agreement shall pay off the residue of their said purchase money by yearly instalments of not less than £5,000 each (except as to the last instalment which shall be the sum of £8,400), each of which shall be payable on Mar. 25 in each year and shall be paid by the purchasers at the office of Messieurs Bell, Steward & Co., of 49, Lincoln's Inn Fields (the vendor's solicitors) to the vendor or as he shall in writing direct, it being an express condition of this sale that the whole of the said purchase money of £39,400 shall be paid off by the purchasers before or at the latest on Mar. 25, 1884, and the first payment of such instalments shall be made on Mar. 25, 1878."

Clause 3 provided that the purchasers should pay interest on so much of the purchase money of £39,400 as should for the time being remain unpaid at or after the several rates thereinbefore respectively mentioned from the time possession of the hereditaments was given to the purchasers to Mar. 25, 1878, at certain rates mentioned in that clause. By cl. 13 it was provided:

> "As soon as the purchasers shall in writing have without any reservation or qualification whatsoever but absolutely and irrevocably accepted the title shown by the vendor to the whole of the property hereby agreed to be sold it shall be lawful for the purchasers to enter on all or any particular portions or portion of the property for the purpose of erecting and building and executing and doing thereon such dwelling-houses and other buildings works and things as hereinafter mentioned and generally for commencing and carrying on the building operations referred to or contemplated in or by these presents."

By cl. 14:

"The purchasers shall on or before June 24, 1878, lay out and expend a sum of at least £5,000 in building such houses as are hereinafter provided and within six months after they shall have entered on any portion of the land hereby agreed to be sold for the purpose of building any house or other permanent erection thereon shall erect and for ever thereafter maintain good and sufficient brick walls of the height of not less than 5 ft. 6 in. each as boundary walls"

as therein mentioned. Other provisions related to the erection of proper boundary fences. Clause 18 provided:

"All the dwelling-houses built on the land hereby agreed to be sold shall either face or have their front entrance facing to Fitzjohn's Avenue aforesaid and no buildings of any kind other than walls or fences not less than 5 ft. 6 in. in height (to be constructed subject to the approval aforesaid) or gateways porticos or bay windows shall be erected or placed on the east side of that avenue nearer the east footway thereof than the dotted building line shown on the plan."

Clause 19 provided:

"No dwelling-houses or portions of dwelling-houses shall be erected on the land hereby agreed to be sold of less value than £2,000 in the case of each detached house and of less value than £1,400 in the case of each semi-detached house . . ."

By cl. 20:

"No buildings other than messuages for private residences and the stabling as hereinafter referred to shall be erected on the property or when erected shall be used for any purpose other than for private residences."

Clause 24 provided:

"The purchasers shall at their option be entitled to have either one conveyance made to them by the vendor of the whole of the land hereby agreed to be purchased when the whole of the said purchase money of £39,400 and all the interest becoming payable thereon shall have been paid and this agreement shall in all respects have been completely performed by the purchasers or they shall (subject to the conditions hereinafter in this clause contained) be entitled to have conveyances of separate portions of the said lands made to them from time to time by the vendor on the terms of having paid or of then paying for such portions such a sum of money as after the rate of £2,750 per acre shall be properly payable as the purchase money therefor and all interest at the rates respectively aforesaid accruing payable on the whole or balance of such purchase money up to the time of the payment thereof, and of there then being in the opinion of the surveyor for the time being of the vendor erections and buildings of the cost value of £3,000 in the whole standing and being on other portions of the land not so conveyed such erections and buildings being houses properly roofed in and sufficiently drained. As regards the lands so included in any partial or separate conveyance all the stipulations of this agreement shall have been fully complied with."

Clause 25 provided:

"Every conveyance made to the purchasers shall be according to a model form marked 'A' and signed by the parties hereto as showing their approval thereof but not by way of conveyance or assurance."

The land the subject-matter of the agreement consisted of a piece of land on the east side of and fronting upon Fitzjohn's Avenue, between Akenside Road on the north and Belsize Lane on the south, and a piece of land on the opposite and west side of and fronting upon Fitzjohn's Avenue between Nutley Terrace on the north and College Crescent on the south. The land did not include any part of the site of Fitzjohn's Avenue, which at that time had apparently been dedicated by Sir Spencer to the public, but had not been taken over by the local authority. The

model form of conveyance "A" was headed "Model deed to meet case of works not completed," and it is expressed to be made between Sir Spencer Maryon Maryon-Wilson, of the first part, Herbert Kelly and Edward Kelly, of the second part, and —— [the sub-purchaser from the Kellys], of the third part. After recitals that Sir Spencer was seised and that Sir Spencer had agreed with the Kellys for the sale to them of several pieces of land, one of which was the piece of land hereinafter described, and that it was agreed that the Kellys should be entitled to have conveyances of separate portions on the terms provided by the agreement, and that the Kellys, acting under the authority of the agreement, entered upon the land and built and executed thereon a number of dwelling-houses and other buildings it continued: "And whereas the said Herbert Kelly and Edward Kelly have agreed with [the sub-purchaser] for the sale to him of the said piece of land" at a price which is named,

> "And whereas the sum of money which after the rate of £2,750 per acre is the sum properly payable to the said Sir Spencer Maryon-Wilson as the purchase money for the said piece of land . . . was the sum of —— pounds and the whole of that sum has been paid to him. . . . And Whereas all the conditions imposed by the said agreement for sale . . . between [Sir Spencer and the Kellys] have so far as regards the said piece of land . . . been performed."

The deed then witnessed that, in consideration of the appropriate sum paid to Sir Spencer, and the balance of the purchase price by the sub-purchaser paid to the Kellys, Sir Spencer, at the request of the Kellys, granted to the sub-purchaser, his heirs and assigns

> "all that piece of land situate on the —— side of the new public road called Fitzjohn's Avenue in the parish of St. John's, Hampstead, in the county of Middlesex, which is delineated and with its abuttals and boundaries shown on the plan drawn in the margin of these presents and thereon coloured ——. Reserving, however, to the said Sir Spencer Maryon-Wilson his heirs and assigns the full right to build [on certain adjoining land up to the boundary] and also the right in common with [the sub-purchaser] his heirs and assigns to drain into and use the said sewers and to use the roads pathways and kerbs of Fitzjohn's Avenue aforesaid as fully and freely as the said Sir Spencer Maryon-Wilson his heirs and assigns may desire to do, it being declared that no part of the site or soil of Fitzjohn's Avenue aforesaid is comprised in the grant of the piece of land and hereditaments hereinbefore expressed to be hereby made by the said Sir Spencer Maryon-Wilson."

After a number of other provisions, the sub-purchaser entered into a covenant with Sir Spencer in these terms:

> "And the said —— doth hereby for himself his heirs executors administrators and assigns covenant with the said Sir Spencer Maryon-Wilson his heirs and assigns owner and owners for the time being of the site and soil of Fitzjohn's Avenue aforesaid in manner following that is to say . . . that no buildings other than a messuage or messuages for private residence and stabling shall at any time hereafter be erected on the said piece of land . . . and that no messuage for the time being erected on the said piece of land shall be used for any purpose other than a private residence. Provided always and it is hereby agreed and declared that the said Sir Spencer Maryon-Wilson his heirs or assigns owners for the time being of the site and soil of Fitzjohn's Avenue aforesaid shall at any time or times hereafter have power to assent to any alterations of and also altogether to release any of the covenants hereinbefore contained at the request of the said —— his heirs or assigns owner or owners for the time being of the land with respect to which such alterations or release shall be requested."

Another model form of conveyance marked "B," to which there was no reference in the agreement as executed, was also prepared to meet the case of works com-

pleted. So far as it concerned the reservation of the site of the road to Sir Spencer and the imposition of restrictive covenants, it did not differ from form "A." A

The Kellys from time to time built houses and either sold them, the sub-purchaser taking a conveyance direct from Sir Spencer, or, before selling them, the Kellys took a conveyance from Sir Spencer and themselves conveyed to the sub-purchaser when they sold. In some few cases the Kellys sold pieces of the land, leaving the sub-purchaser to build. In the result, fifty-one houses were built; twenty-three of B the fifty-one sites being conveyed by Sir Spencer direct to sub-purchasers of the Kellys, and the remaining twenty-eight being conveyed to the Kellys, who sold some and retained others. The conveyances, whether to the sub-purchasers or to the Kellys, although they did not in all respects adhere to the model form, seemed, so far as could be judged from such of them as were produced, to have had the common characteristic that there was a declaration that no part of the site or soil C of the road was comprised in the grant, and that the grantee or grantees entered into covenants with Sir Spencer, his heirs and assigns, as owners for the time being of this site and soil of Fitzjohn's Avenue, in the form of the covenants contained in the sale agreements between Sir Spencer and the Kellys.

Prior to May, 1880, the Kellys had built upon part of the land on the east side of Fitzjohn's Avenue two semi-detached houses, formerly known as Nos. 14 and 13, D but now known as Nos. 40 and 42, Fitzjohn's Avenue. These were the houses the subject-matter of the present action. By a conveyance dated May 11, 1880, Sir Spencer conveyed No. 14, now No. 40, Fitzjohn's Avenue, to the Kellys. This conveyance contained the usual declaration as to the site and soil of the road, and the usual covenants entered into by the Kellys with Sir Spencer, his heirs and assigns, as owners of such site. The plan attached to the conveyance showed E nothing but the strip of land conveyed with the house thereon. In a similar form was a conveyance, dated May 14, 1880, whereby No. 13 (now No. 42), Fitzjohn's Avenue was also conveyed by Sir Spencer to the Kellys. The Kellys subsequently sold No. 40 to Allan M. Horner, and by a conveyance dated July 30, 1880, conveyed it to him subject to the covenants contained in the conveyance of May 11, 1880. The conveyance contained the following covenants by Horner: F

> "The said Allan Moline Horner doth hereby for himself his heirs executors and administrators covenant with the said Herbert Kelly and Edward Kelly their heirs and assigns that he the said Allan Moline Horner his heirs and assigns will henceforth observe perform and keep the covenants stipulations and conditions contained in said Indenture of May 11 last so far as the same remain to be performed." G

There followed a provision that A. M. Horner would keep indemnified the Kellys from all loss, costs, charges, damages, and expenses to be incurred or sustained on account of the non-performance or breach thereof. By a conveyance dated Nov. 1, 1881, the Kellys conveyed No. 42, Fitzjohn's Avenue to Richard Harris subject to the covenants contained in the conveyance of May 14, 1880, and Harris entered H into a covenant similar to that entered into by Horner. On Nov. 23, 1882, Fitzjohn's Avenue was taken over by the local authority under the appropriate public statute. Sir Spencer subsequently died, and the plaintiff, Sir Spencer Pocklington Maryon Maryon-Wilson, was his successor in title, and as such there was vested in him, subject to the interest of the local authority, the site of Fitzjohn's Avenue. Herbert Kelly died some years ago, and the plaintiff Edward Kelly, as the survivor I of the two brothers, was entitled to the whole Kelly interest. Some of the houses built by the Kellys were still vested in the plaintiff Edward Kelly. The defendant, Lady Florence Barrett, had, shortly before the present action, purchased and had conveyed to her Nos. 40 and 42, Fitzjohn's Avenue. It was admitted that she must be taken to have constructive notice of the restrictions in the conveyances of May 11 and 14, 1880, if they are enforceable against her. She was a medical practitioner, and purchased the houses, and was using them for purposes connected with her profession, namely, as a house where she could have some of her private

patients under her immediate care. There was nothing on the exterior of the houses to show that they were used otherwise than as an ordinary private residence. No nuisance of any kind was alleged; and, indeed, until the attention of the plaintiff Kelly was called, by an anonymous letter, to the fact, the nature of the user was not known or suspected. It was admitted that the user was technically a breach of the covenant not to use the premises for any purpose other than a private residence.

The plaintiffs framed their case in three ways. First, on behalf of the plaintiff Kelly it is said that the dealings by the Kellys with the land which they bought from Sir Spencer were such as to constitute a scheme under which all the purchasers from them intended to contract with them and with each other to abide by the various stipulations which were imposed in the sub-sales. In the course of the trial it became evident, and was admitted, that the evidence was not sufficient to support this case. It did not appear that the estate was ever laid out in plots as part of a definite scheme, or that the attention of any purchaser was ever called to the evidence of a condition of things which would justify the inference that mutual obligations were intended to be imposed: see *Elliston* v. *Reacher* (1). That view of the case cannot therefore be supported. Secondly, it was said that each of the sub-purchasers who took a conveyance directly from Sir Spencer had constructive notice of the agreement of May 14, 1877, and that notice of that agreement, taken with the form of the conveyance, was sufficient material to enable the court to infer the existence of a scheme whereby mutual covenants between such sub-purchasers and the Kellys were imposed. TOMLIN, J., assuming, without determining the point, that the sub-purchasers were affected with constructive notice as suggested, held that no such scheme as alleged be inferred. From start to finish there is nothing to show either (i) that the estate was ever intended to be laid out in defined plots, or (ii) that the Kellys were not free, at any time after they had sold one or more plots, to deal with the residue of the land in any way they pleased, provided they could get from Sir Spencer his consent to a variation of the original agreement. To give effect to that view of the case he (his Lordship) would have to hold that each sub-purchaser was willing to make himself liable, not merely to Sir Spencer, but—to use the words of FARWELL, J., in *Osborne* v. *Bradley* (2) ([1903] 2 Ch. at p. 453):

> "also to an unknown number of unknown persons in respect of an estate which, so far as it has been sold, is undefined,"

and that he had entered blindly into a bargain of which he could not possibly know the particulars. There has never been, so far as he knew, a case where, upon such indefinite material, a scheme had been held to exist: see *Reid* v. *Bickerstaff* (3). Thirdly, it was said that the plaintiff, Sir Spencer Pocklington Maryon Maryon-Wilson, was entitled to enforce the covenants contained in the conveyances of May 11 and 14, 1880, against the defendant who had constructive notice of them. TOMLIN, J., held that there was originally an effectual annexation to the site and soil of Fitzjohn's Avenue of the benefit of the restrictive covenants in the conveyances of May 11 and 14, 1880, but that the interest of the plaintiff, Sir Spencer Pocklington Maryon Maryon-Wilson, was not the interest of his predecessor, Sir Spencer Maryon-Wilson, since the taking over of Fitzjohn's Avenue by the local authority, whether it was under the Metropolis Management Act, 1855, or under the Public Health Act, 1875, vested in the local authority so much of the actual soil of the avenue as might be necessary for the purpose of preserving, maintaining and using it as a street: see *Tunbridge Wells Corpn.* v. *Baird* (4) and *Battersea Vestry* v. *County of London and Brush Provincial Electric Lighting Co., Ltd.* (5); so that Sir Spencer Maryon-Wilson's successor could not now show that the surface of the avenue was vested in him, or that he sued in respect of the estate or interest which belonged to his predecessor, or that the restrictions touched or concerned such land as he now had, and, therefore, Sir Spencer Pocklington Maryon Maryon-Wilson could not maintain the action. Secondly, it was admitted that no damage

could be proved to that plaintiff by what was being done, and, further, the breach complained of, although technically admitted to be a breach, was not of a kind which was proved or alleged to have caused any nuisance or annoyance, or, indeed, to be observable except by some investigation of what went on inside the houses. In such a case, where there is no privity of contract, the court had the right and was bound, whether or not proof of damage was essential, to exercise a judicial discretion with regard to granting an injunction (see *Doherty* v. *Allman* (6) and *Osborne* v. *Bradley* (2)). To grant an injunction in the present case would, in his Lordship's opinion, go beyond anything that had been done in any reported case and would be oppressive. It being clear that there was no damage, damages in lieu of an injunction ought not to be awarded. The action failed, and the plaintiffs appealed.

Greene, K.C., and *Baden Fuller* for the plaintiffs.
Grant, K.C., and *W. F. Swords* for the defendant.

SIR ERNEST POLLOCK, M.R.—This is an appeal from a judgment of Tomlin, J., who dismissed the action. The plaintiff, Mr. Edward Kelly, is the survivor of two brothers who were builders, and who made an agreement with the predecessor of the other plaintiff, Sir Spencer Maryon-Wilson, on May 14, 1877. The agreement was made in reference to some parcels of land which lie on the east and west side of Fitzjohn's Avenue and also a piece of land which lies on the west side of Fitzjohn's Avenue. His brother, who was joined with him as builder, and who was also a party to the agreement, died some time before the action, and Mr. Edward Kelly, the plaintiff, is in fact an executor of his late brother. The plaintiff, Sir Spencer Pocklington Maryon Maryon-Wilson, is the successor in title to his father, who was the other party to the agreement of May 14, 1877. The action is brought by the plaintiffs to establish as against the defendant a right to insist upon user by the defendant of the houses of which she is the owner in Fitzjohn's Avenue, namely, 40 and 42, solely as private residences, under the equitable doctrine that the covenant which was made in respect of the land originally in the agreement of May 14, 1877, is binding upon her, and can be enforced by the present plaintiffs. It is not suggested that there is any right at law. It is suggested that there is a right as against the defendant on the ground that the equity may be enforced against her as a purchaser with notice of the covenant which attached to the premises that she occupies and provided that those premises are to be occupied for the purposes of a private house only. Before Tomlin, J., an attempt was made to establish that there was a building scheme, and that the dealings by the Kellys with the land were such as to constitute a scheme under which all the purchasers from them intended to contract with them and with each other to abide by various stipulations which were imposed on the sub-sale. That claim failed for want of sufficient evidence to support it, and counsel for the plaintiffs in this court agrees that he can carry that claim no further.

The second claim, however, that was made is one upon which the learned judge also decided against the plaintiffs, and it is upon that second claim that the plaintiffs appeal to this court. I do not think it is necessary for me to set out all the facts or the devolution of the premises which are in the possession of the parties, because that has been both clearly and sufficiently done by Tomlin, J., but the point that we have got to consider is whether or not the plaintiffs are entitled to enforce as against the defendant their right in equity and to restrain her from using her premises otherwise than as a private residence on the ground that she had notice of the covenant I have mentioned, or, put, as the learned judge accurately put it, that the defendant had constructive notice of the agreement of May 14, 1877, and that notice of that agreement, taken with the form of the conveyance, was the material upon which the learned judge ought to have inferred the existence of a scheme whereby mutual covenants between sub-purchasers and the Kellys were imposed. It is clear that in order to enforce this doctrine as against the defendant on the ground that the defendant has notice, proof must be given that the de-

A fendant took the land with notice of the covenant, either actual or constructive. It is said here that there was a scheme, and that the defendant had notice of the scheme and is bound by it.

Counsel for the plaintiffs first of all set out to establish that he need not indicate in a case of this nature by the actual terms of the documents which the parties have entered into that there was such a scheme. He said that it would be sufficient B if it was found from the surrounding circumstances that the scheme had been entered into. He puts it, as it is put by JOYCE, J., in *Reid* v. *Bickerstaff* (3), that it is not necessary to find any express contract by the vendor or the several purchasers; it may be collected or inferred from the nature of the transaction. I think he is right in claiming that there may be a scheme which is inferred from the nature of the transaction. That is not more than carrying out the principle C enunciated by WILLS, J., in *Nottingham Patent Brick and Tile Co.* v. *Butler* (7). WILLS, J., says (15 Q.B.D. at p. 269):

> "It is in all cases a question of intention at the time when the partition of the land took place, to be gathered as every other question of fact, from any circumstances which can throw light upon what the intention was."

D Therefore, if there is evidence from which a scheme can be found to exist it does not fail because it is not to be found in express terms, if it can be collected from the nature of the transactions and the relevant facts. Counsel argues that in the present case the proper inference is that there was a scheme, and he puts his case in this way. He says there was the original agreement of 1877 entered into between the Kellys and Sir Spencer Maryon-Wilson, and he has pointed out to us E that there were to be two forms which were to be adopted when the land was to be conveyed in consequence of that agreement by Sir Spencer Maryon-Wilson to the Kellys according as the buildings intended to be placed upon the sites had been completed or not. However that may be, it is important to observe that the agreement of 1877 did contain a dispensing power on the part of Sir Spencer Maryon-Wilson from the agreements which the Kellys had entered into. The two houses F which are occupied by the defendant, Nos. 40 to 42, were passed through the Kellys to Horner and to Harris respectively and so came into the possession of the defendant. There is repeated in those deeds, which are the relevant deeds, no dispensing power which existed in 1877, and it is doubtful whether there is any reference to, or any notice of, the deed of 1877 which would make it essential that an inquiry should be made as to the actual terms.

G Quite apart from that, the question is: Was there a scheme? There are three or four cases which, I think, show exactly what must be found, if there a scheme is to be inferred. I need not refer back to the statement of law in *Renals* v. *Cowlishaw* (8), nor do I think it necessary to refer to *Spicer* v. *Martin* (9). *Spicer* v. *Martin* (9) accepts the statement of the law in *Renals* v. *Cowlishaw* (8), although it points out that the doctrines there laid down are not to be extended. Perhaps, H in passing, I may observe that in *Spicer* v. *Martin* (9) it is stated by LORD MACNAGHTEN that the houses which were in question in that case had actually been built as private houses and offered to the public as such, and their character was unmistakable. After those two cases the same point arose in *Rogers* v. *Hosegood* (10). COLLINS, L.J., stated the law in this way ([1900] 2 Ch. at p. 407):

I > "These authorities establish the proposition that, when the benefit has been once clearly annexed to one piece of land, it passes by assignment of that land, and may be said to run with it, in contemplation as well of equity as of law, without proof of special bargain or representation on the assignment. In such a case it runs, not because the conscience of either party is affected, but because the purchaser has bought something which inhered in or was annexed to the land bought."

In *Elliston* v. *Reacher* (1), PARKER, J., laid down the four conditions which had to be fulfilled, and I will read the first two of them. He said ([1908] 2 Ch. at p. 384):

"It must be proved [if a scheme is to be inferred] (1) that both the plaintiffs and defendants derive title under a common vendor; (2) that previously to selling the lands to which the plaintiffs and defendants are respectively entitled, the vendor laid out his estate, or a defined portion thereof (including the lands purchased by the plaintiffs and defendants respectively) for sale in lots subject to restrictions intended to be imposed on all the lots, and which, though varying in details as to particular lots, are consistent and consistent only with some general scheme of development."

In subsequent cases, and, in particular, I think in *Reid* v. *Bickerstaff* (3), there has been superadded to that a little more, and I think it is now said that there must be a defined area. COZENS-HARDY, L.J., puts it in this way, that the lots were intended to be defined and that the persons on whom the burden of this covenant was annexed were to have some sort of knowledge of the persons or range of persons to whom their responsibility existed. That, I think, appears definitely from *Reid* v. *Bickerstaff* (3) and without definitely saying that that seems to be so or not, I am content to take the law in *Elliston* v. *Reacher* (1), stated by PARKER, J., and to apply to the present facts the test which he has enunciated in the second condition which he laid down. I cannot find that the facts of the present case fulfil that condition which he indicates is to be a definite condition to be fulfilled. I do not see in the facts before us that there was ever a laying-out of the estate by Sir Spencer Maryon-Wilson, such as would fulfil this second test. It is true that in the agreement of 1877 there was a provision that certain houses, if built, should not be of a less money value, but there is no definite laying down of the number of houses to be built, and although certain boundary fences are to be of a uniform nature with some others, and there is a provision that the building shall not approach the frontage wall within a certain distance, and the like, a general system of laying-out appears to be absent. There does not appear to be sufficient detail or finality in the system which was to prevail throughout the scheme, and I cannot find, even taking at their highest the conditions which were laid down in the agreement of 1877, that they were consistent only with some general scheme of development.

I think this point becomes even clearer when one comes to see what happened after or in the course of the passage of these sites into the hands that at present hold them. It is quite clear that, in order to enforce the doctrine now advanced on behalf of the plaintiffs, proof must be given that the defendant took the land with notice of the covenant either actual or constructive, and that also there must be a mutuality between the persons who are to be bound and the persons who are entitled to enforce the contract. Looking back at what passed between Sir Spencer Maryon-Wilson and the Kellys, I cannot find that there was a mutuality which justified the inference that it was intended by Sir Spencer Maryon-Wilson that there should be a definite building scheme binding upon those who ultimately occupied these premises. It is at that point on that condition (2) that I think the plaintiffs' case really fails. Their counsel has argued that a general inference ought to be drawn on the ground that there would be an enhanced value in the subsequent conditions which are laid down by PARKER, J., but it seems to be that there is no system of reciprocal rights—no original laying out of a scheme—and that upon the whole, therefore, there is no just inference to be drawn that there was a scheme in existence by which the parties are bound. I have added a word or two to what TOMLIN, J., has said, but I am really content to say that I accept his judgment upon this second point as correct, and I do not desire to add more, except to say that I agree with the reasons which he has given, as well as for the reasons which I have given, that the plaintiffs' claims under this second head fails.

The third point which was taken is a wholly different one. It is said, quite apart from the question of any scheme, that Sir Spencer Pocklington Maryon Maryon-Wilson is entitled to enforce the covenants contained in the conveyances which are a part of the title of the defendant on the ground that a covenant was made directly

with his predecessor in title, namely, his father, and that he, as the assign of his father, is entitled to enforce that covenant. Now, he could only enforce them if he had got some interest to which the liability of the covenant could be attached, and the learned judge has found that, although in the first instance his father would have had sufficient interest to enable him to sue, the present plaintiff, Sir Spencer's successor, cannot show to-day that the surface of the avenue is vested in him or that he sues to-day in respect of the estate or interest which belonged to his predecessor. It is important to observe that what the present plaintiff has got is this. He has got an interest in the sub-soil of the streets, for streets they now are which are upon the soil which was a part of the estate of his father. Those streets have been taken over by the local authority, and for the purposes of a street the streets themselves are vested in the local authority. The plaintiff, Maryon-Wilson, therefore, although he has got a proprietorship in the sub-soil, has got no interest in the surface and no interest in the immediate sub-soil or such part of the sub-soil as it is necessary for the local authority to hold for the purpose of sewerage, lighting, and what not. The covenants that were taken from the Kellys were attached to Sir Spencer Maryon-Wilson in his right as the owner of these ways. I call them "ways" because at that time they had not been taken over by the local authority, but since that time the local authority have acquired their interest in them as streets, and all that is left is the interest which the present plaintiff, Maryon-Wilson, may have, if it is conceivable that they should cease to be streets, all the sewering and the light be swept away, and the fee be once again restored to the ownership of the surface of the land.

Counsel agrees that for the purpose of enforcing covenants against the defendant it is necessary that those covenants should be attached to some land, should have some connection with, and, indeed, I think, I may add, some connection, in the sense of an interest which unites the two pieces of land, but at the present moment all that the plaintiff, Maryon-Wilson, has got is an interest in the sub-soil. Counsel agrees that it would be impossible to attach the right to enforce the covenant to land, let us say, at Clapham, on the ground that it would be too remote and there would be no unity of interest whatever between the right and the land. I ask myself the question then: Is the interest which the plaintiff, Maryon-Wilson, at the present time has subject to the rights of the local authority anything like a sufficient interest which would enable him at the present time to enforce these restrictive covenants. It seems to me by parity of reasoning with the decision which says that land at Clapham would be too remote and unable to carry a right to sue in respect of the covenants in respect of this land at Hampstead, so too the interest which at present this plaintiff has in the sub-soil is of the same nature and is too remote and cannot carry with it the right which it is now sought to enforce, and that these restrictions which it is sought to enforce do not touch or concern the land such as he now has. I think, therefore, that Tomlin, J., is quite right in saying that the present Sir Spencer cannot maintain the action.

With regard to the last point, namely, whether the fact that no damage can be proved militates against Sir Spencer's right to enforce the covenant, I do not desire to say anything. I certainly do not desire to put my judgment on that ground, because I think that the cases which counsel for the defendant calls to our attention do indicate that the question of damage is not a cardinal point on which the remedy rests, and that, even if no actual monetary damage can be proved, yet, if there is a right to enforce the covenant, the covenant can be enforced even in cases where it would be difficult, or, perhaps, impossible, to estimate that there had been a monetary damage. I think it is sufficient to base my judgment upon the same ground as that on which the learned judge has based his judgment—that the restriction does not touch or concern such land as he now has, and therefore Sir Spencer's interest is not sufficient to enable him to enforce the covenants as against the present defendant. For these reasons the appeal should be dismissed with costs.

WARRINGTON, L.J.—The plaintiff, Mr. Edward Kelly, is the owner of certain plots of land with houses thereon, standing some on one side and some on the other side of Fitzjohn's Avenue. The defendant is the owner of two plots with semi-detached houses thereon also in Fitzjohn's Avenue. The plaintiff, Kelly, seeks to enforce against the defendant an obligation entered into by a predecessor in title of the defendant to use his houses as private houses only. The plaintiff, Sir Spencer Pocklington Maryon-Wilson, at present is the successor in interest of Sir Spencer Maryon-Wilson, who, prior to the events which have given rise to this action, was the owner of very considerable property at Hampstead, including the sites of the other plaintiff's and the defendant's residences, and in fact, of all the houses on both sides of Fitzjohn's Avenue.

The case made by the plaintiff, Kelly, against the defendant was founded upon the suggestion of what is well known in these courts, that there was a building scheme. What is the meaning of that? Stated shortly, it means that a piece of land divided into plots for sale has been so disposed of or dealt with that the purchaser of each of those plots and his successors in title are, as against the other purchasers, entitled in equity to a quasi-negative easement, the effect of which is to prevent those other purchasers from using those plots except in accordance with certain restrictions, and that in like manner his land is subject itself to a corresponding negative easement to the benefit of which the purchasers of all other plots are entitled. Stated quite shortly, I think it is essential that the land over the separate plots of which it is said that these reciprocal rights and liabilities extend should, when the scheme is created, be divided into the plots so that each owner may know what are the lands which in his favour are subject to the restrictions in question and who are the owners who can enforce such restrictions against him. I do not mean who are the owners by name, but who are the persons by reference to the lands they hold who can enforce those restrictions against him. That that is the position I think is sufficiently shown by the very well-known description of the essentials of a building scheme stated by PARKER, J., in *Elliston* v. *Reacher* (1) ([1908] 2 Ch. at p. 384). I will just read again the four essentials which he there mentions.

> "It must be proved (1) that both the plaintiffs and defendants derive title under a common vendor; (2) that previously to selling the lands to which the plaintiffs and defendants are respectively entitled the vendor laid out his estate or a defined portion thereof (including the lands purchased by the plaintiffs and defendants respectively) for sale in lots subject to restrictions intended to be imposed on all the lots, and which, though varying in detail as to particular lots, are consistent and consistent only with some general scheme of development; (3) that these restrictions were intended by the common vendor to be and were for the benefit of all the lots intended to be sold, whether or not they were also intended to be and were for the benefit of other land retained by the vendor; and (4) that both the plaintiffs and defendants, or their predecessors in title, purchased their lots from the common vendor upon the footing that the restrictions subject to which the purchases were made were to enure for the benefit of the other lots included in the general scheme, whether or not they were also to enure for the benefit of other lands retained by the vendors."

I will only add to that a passage from the judgment of FARWELL, J., in *Osborne* v. *Bradley* (2) ([1903] 2 Ch. at p. 453), which, to my mind, shows that the allocation in lots referred to by PARKER, J., is to be taken literally in the terms in which he has expressed it. FARWELL, J., says:

> "Nor would it be reasonable for me to draw the inference that a number of persons or any one person coming in and buying intend or intends to be bound to an unknown number of unknown persons in respect of an estate which, so far as it has been sold, is undefined, and to undertake liabilities to them and to accept a corresponding benefit from them. Neither the persons, nor the estate, nor the lots in respect of which these covenants are entered into or undertaken

A are in any way stated. If it was intended that the vendor should himself be bound, he would of course have entered into the covenant himself. The whole theory of these interdependent covenants appears to me to point to an arrangement made once for all, either on a sale by auction, by conditions of sale stating the covenants and that other persons will enter into similar covenants, and the plan exhibited at the sale, or by a scheme entered into already by B antecedent sales, the particulars of which are stated to the purchaser, and which are displayed upon a plan drawn upon the purchaser's deed."

It seems to me, therefore, essential, if one is going to create reciprocal rights that one must specify what are the parcels of land which are to enjoy those reciprocal rights.

Let us see what has happened in the present case. As I have said, Sir Spencer C Maryon-Wilson, in and prior to 1877, was the owner of a considerable area of land in Hampstead, and he had previously constructed a road which is now called—and which was called in 1877, although it had no houses upon it—Fitzjohn's Avenue. He had also made preparations for building on either side of Fitzjohn's Avenue by constructing a sewer under the road, and he had dedicated the road to the public, but it had not been taken over and it was not at that time a street within the D meaning either of the Public Health Act, 1875, or the Metropolis Management Act, 1855. On May 14, 1877, he had entered into an agreement with the two Kellys, the survivor of whom is the present plaintiff, Mr. Edward Kelly. The general effect of the agreement was that he agreed to sell to the Kellys for some £39,000, two strips of land on either side of Fitzjohn's Avenue. The land was shown on the plan simply in blocks as it was divided by the cross roads, but without any E division into lots as pieces of land bounded by roads on certain sides and by other land on other sides, but not in any way internally divided. The purchasers agreed to build houses on this land. The number was not specified; no provision was made as to the size, either minimum, maximum or otherwise, of the plots into which it was to be divided; no stipulation was made, beyond the amount of money that was to be spent on the houses, as to what was to be the nature of the houses. F The only restriction, besides the amount of money to be spent, was that the front elevation—and where the house adjoined on a side road, the side elevation also—should be approved by the vendor's surveyor. Except in those particulars there was nothing in the deed to define the nature of the supposed scheme which is now relied upon, but it is true that Sir Spencer Maryon-Wilson took from the Kellys a stipulation in the agreement that the houses to be built should be used as private G residences only. As I have pointed out, the number of those houses, so far as this agreement is concerned, might have been fifty, one hundred, twenty, or a dozen—whatever number the Kellys might choose to select. It was left entirely to them to carry out the details of what no doubt with them was a building speculation. The Kellys had power under the agreement to take conveyances under certain terms of portions of the land. The form in which the conveyances should be taken H was fixed at the date of the agreement by reference to a draft which had been prepared and which is referred to in the document, and that was in an alternative form. In one of the two forms the agreement of 1877 was referred to. In the other of the two forms all reference to it was excluded. I think fifty-two houses have been built upon the plots of land comprised in that agreement; certainly I fifty-two houses have been sold. Twenty-eight were conveyed to the Kellys, and twenty-four were by the Kellys' directions conveyed to sub-purchasers. Whether there is much difference between the two so far as the law is concerned I doubt. The defendants' two houses are included in the twenty-eight, the conveyances of which were made to the Kellys themselves. The first of those conveyances is dated May 11, 1880. It is sufficient to refer to that one because the other is in exactly the same form. The first thing to notice is that it is a conveyance of a single plot of land. There is no reference in the conveyance to any other land. For anything that appears on the face of the conveyance it was the only plot of

land which the Kellys had in the neighbourhood. The recital is that Sir Spencer Maryon-Wilson was seised of the land, that he agreed to sell the land granted to the Kellys, and that the Kellys had agreed to enter into the covenants in the deed contained. Then there is simply a conveyance by Sir Spencer Maryon-Wilson to the Kellys of that plot of land, and there is a covenant in the deed by the two Kellys with Sir Spencer Maryon-Wilson, his heirs and assigns, "owners for the time being of the site and soil of Fitzjohn's Avenue aforesaid in manner following." Among other things, they covenant that

> "no messuage for the time being erected on the said piece of land shall be used for any purpose other than that of a private residence, and that no stabling now erected or which shall be for the time being on the said piece of land shall be used as a public livery or jobhorse stables or otherwise than for private use."

That is simply a conveyance of one plot without reference to any other land. Mr. Farmiloe is stated to be the owner of the land to the south of it, and Messrs. Kelly are stated to be the owners of a strip immediately to the north. Those are the two pieces bounding that piece of land, and nothing is said as to the ownership of the surrounding land. The conveyance of the other plot is exactly the same, except that the owner of the land lying to the north is "C. A. Barton, Esq.," and the owner of the land lying to the south is "Messrs. H. E. Kelly." Those two plots were sold by Messrs. Kelly, the one to a gentleman named Horner and the other to a gentleman named Harris, and they have recently been purchased by the defendant.

In my opinion, there is no evidence here from which it is possible to infer an intention to create these reciprocal rights, for the reason to which I have already alluded, that Sir Spencer Maryon-Wilson, the common vendor from which both plaintiff and defendant derive their title, did not sell the property in lots and create a scheme which was to apply to the purchasers of all the lots within the statement of the essentials of such a scheme as described by FARWELL, J. The utmost that can be said about it is that the agreement between Sir Spencer Maryon-Wilson and the Kellys contemplated the building of a number of houses which were to be private houses, and that they were to be kept as private houses, and that it was enough to make a sufficient building scheme if the details were left to be settled by Messrs. Kelly, the purchasers. In my opinion, that would be an extension of the principles upon which the court has already acted in these cases, which LORD MACNAGHTEN has told us in *Spicer* v. *Martin* (9) are not to be extended. The principle gives rise, even as it stands, to a somewhat anomalous position that a man who has made no bargain with a particular person is liable to be sued by that person and to have enforced against him an obligation into which he has not entered, either in fact or with the person who is seeking to enforce it against him, but an obligation by which he is bound by the application of the equitable principles to which I have already referred. LORD MACNAGHTEN has expressly said that that is a principle the application of which is not to be extended, and I think that to accede to the plaintiffs' view of the present case would be to extend such a principle to a very large extent indeed. So much for the main question in the action.

The next question is this. The present Sir Spencer Maryon-Wilson has been added as plaintiff in the action, and it is contended that he, at all events, as the representative of the original covenantee, is entitled to enforce his covenant against the defendant. It is admitted that he could not sue the defendant at common law and that all he can do is on equitable principles to enforce this obligation as one entered into for the benefit of certain lands retained by the present Sir Spencer Maryon-Wilson's predecessor in title, of which land he is now the possessor. The covenant in the deed of conveyance, and in all the deeds of conveyance, is made with "Sir Spencer Maryon Maryon-Wilson his heirs and assigns owners for the time being of the site and soil of Fitzjohn's Avenue." Two questions have been raised. It is asked whether at that date the site and soil of Fitzjohn's Avenue was property to which it was possible, for the purposes of such cases as we are dealing

with, to annex the benefit of such an obligation. Secondly, it is said that, even if it were, the land to which the present Sir Spencer Maryon-Wilson is entitled is not that to which the benefit of the covenant was attached. With regard to the first point TOMLIN, J., held that the site and soil of the road was land to which the benefit might in law be attached, and I take it that the question which has to be determined in all such cases is whether the land to which the benefit purports to be attached may be reasonably regarded as capable of being affected by the performance or the breach of the obligation in question, as the case may be? I am not prepared to differ from TOMLIN, J., on this point. I think it may be that a reasonable person could come to the conclusion that Sir Spencer Maryon-Wilson, as the owner, as he then was, of that strip of land which is called the site and soil of Fitzjohn's Avenue, might be affected by the performance or non-performance of the obligation, but that land had been laid out as a road. Building on either side of it was contemplated, and, accordingly, at any time it might become a street liable to be taken over by the local authority and to vest in that local authority. That is what happened. On Nov. 23, 1882, the road was formally taken over by the local authority, and thereupon the street vested in that local authority. We know what is meant by the vesting of the street. It means that the soil of the road which constitutes the street is vested in the local authority to the extent to which it is necessary that the authority should possess it in order to control the use of the street. In my opinion so soon as that event took place—an event which must have been contemplated at the time when the arrangement was made—the street, so far as it remained vested in Sir Spencer Maryon-Wilson, was not land of such a nature that the obligation could properly be attached to it, and, therefore, it seems to me that the present Sir Spencer Maryon-Wilson is not entitled to enforce that obligation, inasmuch as the land of which he is now possessed, after the exercise of their powers by the local authority, is not land to which the benefit of such a covenant could properly be attached. On that ground, which I think is substantially the same as that taken by TOMLIN, J., I think that the claim of the second plaintiff also fails.

With regard to the last passage in TOMLIN, J.'s judgment as to the discretion of the court to give damages in lieu of an injunction, it is unnecessary to say more than that I am not satisfied, having regard to the authorities to which we have been referred by counsel for the plaintiffs that the remarks made in that part of his judgment by TOMLIN, J., are justified. They were not essential to his judgment, and, so far, they are immaterial. I think the appeal fails.

SARGANT, L.J.—I am of the same opinion. The first and principal claim here is to enforce an alleged building scheme said to have been constituted by an agreement of May 14, 1877. On the face of it the agreement in question is one of a very familiar type under which portions of building estates are developed. It provides for the purchase of a considerable area of land and the expenditure on it by the builder of money in building houses in sections. It prescribes the value of the houses to be built, and prohibits the erection of any but private houses. Then cl. 4 contains a provision which is essential for the practical carrying out of a building agreement, namely, that the builder can have conveyed to him portions of the property at an apportioned part of the purchase money, the object, of course, being to separate and individualise the rights in respect of these separate portions, and to enable them to be mortgaged and conveyed by the builders to third parties subject only to the performance of an apportioned part of the liabilities under the agreement, and discharged from the general liabilities of the agreement with reference to the rest of the property. There is attached to this agreement alternative forms of conveyance, and each alternative form of conveyance is carefully framed so as to avoid putting on the title the building agreement itself. It recites merely that there has been an agreement for sale, either subject to certain conditions which have not been performed down to the present time and the performance of which is continued in the conveyance, or that there has been an agreement for sale

simpliciter, but there is no reference by date or parties to the particular agreement. I think as I said in *South-Eastern Rail. Co.* v. *Cooper* (11) ([1924] 1 Ch. at p. 235), that that is carefully done in accordance with the practice of conveyancers to avoid putting on the title any reference to the antecedent agreement at all. Then it is to be noted in either alternative form of conveyance the covenants—which include the obligation now said to have been violated—are covenants with Sir Spencer Maryon-Wilson and with him alone, and, of course, only in respect of the particular land conveyed. Where is there any indication of there being a building scheme at all as distinguished from an ordinary building agreement under which rights are to arise and to continue not merely between the purchasers and Sir Spencer Maryon-Wilson, but as between the purchasers themselves by way of mutual obligation? I cannot, myself, see any evidence of such an intention in this agreement. I do not think the agreement went, or was intended to go, beyond the provisions of a quite ordinary building agreement. Every provision of the agreement was one appropriate to the working out of a building agreement, and there is no provision, as far as I can see, which contemplates, either directly or indirectly, the formation of a building scheme enforceable between the several purchasers of houses built on the estate. I think there are indications to the contrary, and that the very careful form of conveyance under which the original agreement is carefully kept off the title, so that the only apparent obligation will, in the future, be an obligation to Sir Spencer Maryon-Wilson alone under the covenants, is a very strong indication, indeed, that it was not intended that there should be any building scheme.

I may add that the configuration of the land alone seems to me to show how singularly unadapted it was for the formation of a building scheme. It was only part of a considerable length of road called Fitzjohn's Avenue and it was not land as to part of it on both sides of that avenue. As to part it was land on both sides of the avenue; as to the other part, it was land on one side only. Reference having been made to *Spicer* v. *Martin* (9), I think I ought to say this. I have procured the case that was lodged in the House of Lords, with, of course, prints of all the documents in that case, and I do not think *Spicer* v. *Martin* (9) can be fully appreciated without having before one the plan of the land with regard to which that decision was made. It is a piece of land so bounded and so carefully described —it is a kind of self-contained piece of land in a ringed fence—it is all lotted out and carefully numbered 1 to 7, and the conveyance of each separate piece of land of each separate house has on it, not, as is usual, the delineation of the site of that particular house alone, but it has on the plan a delineation of the whole of the seven houses. I think that there are, quite apart from what appears in the printed report of the case, a great many indications to be derived from an observation of the plan; and the documents themselves in *Spicer* v. *Martin* (9) show how very strong the physical indications, both of the property itself and of the plans on the documents, were in favour of there having been, not merely a building agreement, but a building scheme. It seems to me that if in this case we come to any other conclusion than that which I have stated and held—that this was not a building agreement, but a building scheme—we should be introducing very great confusion into all or most of those ordinary building agreements where the purchaser can take his conveyances in portions and where similar covenants are to be entered into by all purchasers with the freeholder. In such cases, the ordinary result of the working out of the agreement is that at the end of the agreement the intermediate builder has been eliminated, and in the result there are a number of purchasers, each of whom is subject to the same obligations towards the original freeholder, but who are not subject, and have never been intended to be subject, to any additional mutual obligations, inter se, such as are ordinarily directly aimed at in a building scheme and seem to me in this agreement to be as directly avoided. That is all I have to say on the first and main point here.

With regard to the second point, counsel for the plaintiffs very frankly admitted that land to which the benefit of the covenant restricting the user of other land can be attached must be land the occupation or enjoyment of which is liable to be

affected by the prohibited user. After the road had been taken over by the local authority, and thereupon the surface of the road had become vested in the local authority, can it be said that the freehold of the land below that surface was land the occupation or enjoyment of which was liable to be affected by the prohibited user? There, again, counsel, very frankly, admitted that if at the date when the obligation was created the road had already been taken over by the local authority so that the freeholder was not entitled to the surface, but was only entitled to the subjacent soil, the covenant could not properly have been entered into because the freeholder would not have had an interest in anything which would have been affected by the prohibited user. It seems to me to follow from that that, if the state of the freeholder has been reduced to that which would not originally have supported the annexation of the benefit of the covenant, he has not left in him that which will now support the enforcement of the covenant. Counsel said that it was extremely hard that an Act of Parliament should take away rights which were never meant to be affected, but if the true view is that the right to enforce the covenant is annexed to land, the land is the principal and the right to enforce the covenant is the accessory, and if the principal becomes reduced so that it would not originally have supported the accessory, it seems to me that the result is that it can no longer support the accessory. In my judgment, therefore, the judgment of TOMLIN, J., was right and the appeal must be dismissed.

Solicitors: *Linklaters & Paines*; *Scott, Bell & Co.*

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

THE BRITISH TRADE

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sir Henry Duke, P.), January 21, 28, 1924]

[Reported [1924] P. 104; 93 L.J.P. 33; 130 L.T. 827; 40 T.L.R. 292; 16 Asp.M.L.C. 296]

Shipping—Seaman—Damages for wrongful dismissal—Maritime lien—Admiralty Court Act, 1861 (24 & 25 *Vict.*, *c.* 10), *s.* 10—*Merchant Shipping Act*, 1894 (57 & 58 *Vict.*, *c.* 60), *s.* 167 (*i*).

A claim by a master or seaman for damages for breach of a special contract for service on board ship, i.e., a contract containing stipulations other than the intended voyage and the rate of wages, is not supported by a maritime lien, because such a claim would not have been within the ancient jurisdiction of the Admiralty Court. The jurisdiction over such a claim arises solely under s. 10 of the Admiralty Court Act, 1861, which confers no maritime lien where none existed prior to the statute.

Notes. Section 10 of the Admiralty Court Act, 1861, has been replaced by s. 1 (1) (o) of the Administration of Justice Act, 1956 (36 HALSBURY'S STATUTES (2nd Edn.) 4), which extends the jurisdiction mentioned in s. 10 by removing the qualification that the wages claimed must have been earned on board the ship, but does not affect the point decided in this case.

As to maritime liens, see 30 HALSBURY'S LAWS (2nd Edn.) 947–953; and for cases see 41 DIGEST 927–939.

Cases referred to:

(1) *The Exeter* (1799), 2 Ch. Rob. 261; 165 E.R. 809; 41 Digest 246, *865*.
(2) *The Beaver* (1800), 3 Ch. Rob. 92; 165 E.R. 397; 41 Digest 225, *630*.
(3) *The Elizabeth* (1819), 2 Dods. 403; 165 E.R. 1527; 41 Digest 252, *939*.

(4) *The Eliza* (1823), 1 Hag. Adm. 182; 166 E.R. 65; 41 Digest 232, *709*.
(5) *The Camilla* (1858), Sw. 312; 31 L.T.O.S. 282; 6 W.R. 840; 166 E.R. 1152; 41 Digest 234, *742*.
(6) *The Great Eastern* (1867), L.R. 1 A. & E. 384; 36 L.J.Adm. 15; 17 L.T. 228; 2 Mar.L.C. 553; 1 Digest 134, *415*.
(7) *The Blessing* (1878), 3 P.D. 35; 38 L.T. 259; 26 W.R. 404; 3 Asp.M.L.C. 561; 1 Digest 247, *1750*.
(8) *The Ferret* (1883), 8 App. Cas. 329; 52 L.J.P.C. 51; 48 L.T. 915; 31 W.R. 869; 5 Asp.M.L.C. 94, P.C.; 1 Digest 252, *1796*.
(9) *Re Great Eastern Steamship Co., Williams' Claim* (1885), 53 L.T. 594; 5 Asp.M.L.C. 511; 41 Digest 936, *8257*.
(10) *Johnstone* v. *Milling* (1886), 16 Q.B.D. 460; 55 L.J.Q.B. 162; 54 L.T. 629; 50 J.P. 694; 34 W.R. 238; 2 T.L.R. 249, C.A.; 12 Digest (Repl.) 377, *2961*.
(11) *Hamilton* v. *Baker*, *The Sara* (1889), 14 App. Cas. 209; 58 L.J.P. 57; 61 L.T. 26; 38 W.R. 129; 5 T.L.R. 507; 6 Asp.M.L.C. 413, H.L.; 41 Digest 937, *8279*.
(12) *Morgan* v. *Castlegate Steamship Co.*, *The Castlegate*, [1893] A.C. 38; 62 L.J.P.C. 17; 68 L.T. 99; 41 W.R. 349; 9 T.L.R. 139; 7 Asp.M.L.C. 284; 1 R. 97, H.L.; 41 Digest 937, *8285*.
(13) *The Minerva* (1825), 1 Hag. Adm. 347; 166 E.R. 123; 41 Digest 218, *574*.

Also referred to in argument:

The Mary Ann (1865), L.R. 1 A. & E. 8; 35 L.J.Adm. 6; 13 L.T. 384; 12 Jur.N.S. 31; 14 W.R. 136; 2 Mar.L.C. 294; 41 Digest 934, *8235*.
The Justitia (1887), 12 P.D. 145; 56 L.J.P. 111; 57 L.T. 816; 6 Asp.M.L.C. 198; 41 Digest 254, *951*.
The Neptune (1824), 1 Hag. Adm. 227; 166 E.R. 81; 41 Digest 225, *633*.

Motion for judgment in default of appearance.

The plaintiffs, James Ellis Dye and Gerald Stephen Johnson, were respectively the master and the chief engineer of the steamship *British Trade*, and were engaged as such under agreements dated April 18, 1922, and April 6, 1922, entered into between them and the defendants, the owners of the *British Trade*, by which they undertook to serve on board the vessel in their respective capacities on the terms set out in the agreements. The *British Trade* was owned by a company called the British World Trade Expeditions, Ltd., and it was originally intended that she should be employed as a floating exhibition of British manufactures in various parts of the world. It was a condition of the agreements with the plaintiffs that the master should invest £2,000 and the chief engineer £1,000 in the company. The master began to serve under the agreement on May 1, 1922, and the engineer on April 3. By their statement of claim they alleged that on or about July 28, 1923, when the *British Trade* was at Hull, they received notice that their wages would cease from July 31, 1923. The periods of time intervening between that date and the dates on which the plaintiffs were engaged had been occupied in preparations, during the course of which the vessel had proceeded from Tilbury to Southend and thence to Hull. Each of the plaintiffs had at that time incurred certain liabilities and made necessary disbursements in their respective capacities. They claimed £757 16s. 11d., made up as follows: Claim of the Master (James Ellis Dye)—Wages, fifteen months from May 1, 1922, to July 31, 1923, at £58 per month, £870; expenses and disbursements, £149 15s. 3d.; making a total sum of £1,019 15s. 3d.; less £584 18s. 1d. received from the owners; leaving a balance due of £434 17s. 2d. Claim of the engineer (Gerald Stephen Johnson)—Wages, sixteen months from April 3, 1922, to July 31, 1923, at £47 10s. per month, £760; expenses and disbursements, £101 3s. 1.; making a total sum of £861 3s. 1d.; less £538 3s. 4d. received from the owners; leaving a balance due of £322 19s. 9d. In addition, both plaintiffs claimed damages for breach of their agreements on July 31, 1923. The receiver for the debenture-holder of the British World Trading Expedition, Ltd., and Rowland Rand, a registered mortgagee, intervened and put

in a defence in which they pleaded, among other matters, that the plaintiffs' claims were not enforceable by an action in rem, and that the court had no jurisdiction in rem over such claims or any part of them. A firm named Livingstone and Cooper also appeared and claimed a possessory lien in respect of repairs.

By s. 10 of the Admiralty Court Act, 1861:

"The High Court of Admiralty shall have jurisdiction over any claim by a seaman of any ship for wages earned by him on board the ship whether the same be due under a special contract or otherwise, and also over any claim by the master of any ship for wages earned by him on board the ship, and for disbursements made by him on account of the ship."

By s. 167 (1) of the Merchant Shipping Act, 1894:

"The master of a ship shall so far as the case permits have the same rights, liens and remedies for the recovery of his wages as a seaman has under this Act or by law or custom."

Stone Hurst for the plaintiffs.

Alfred Bucknill for the interveners, the receiver for the debenture-holder and Rand.

W. H. Owen for Livingstone and Cooper.

Cur. adv. vult.

Jan. 28. **SIR HENRY DUKE, P.,** read the following judgment.—The plaintiffs are James Ellis Dye, formerly master, and Gerald Stephen Johnson, formerly chief engineer, of the steamship *British Trade*. They sue for wages, disbursements and expenses, and for damages for wrongful dismissal, and assert a maritime lien in respect of all their claims. This action is defended by a receiver for the debenture-holder and a mortgagee, who have intervened. The ship is the subject of an application for sale. The liquidated claims of the plaintiffs amount to £757 16s. 11d., and the amount represented by debentures and mortgages is said to be £70,000. The interveners admitted at the hearing the right of the plaintiffs to be paid the amount of their claims for wages, disbursements, and expenses out of the proceeds of the ship. What is in issue between the parties is whether the plaintiffs have, or either of them has, a maritime lien in respect of their several claims for damages. The matters to be mentioned by me will be mentioned only in respect of their bearing, or possible bearing, upon this question.

The vessel in which the plaintiffs were employed was the property of a company originally called the British World Travel Trades and Cinematograph Expeditions, Ltd., and subsequently the British World Trade Expeditions, Ltd. The company engaged each plaintiff by an agreement under seal, which dealt with various matters. The project in view appears to have been the conveyance about the world by sea of exhibitors and their wares, with a view to a floating exhibition of British manufactures. Each plaintiff, as a condition of his engagement, invested money in the company—the master £2,000, and the chief engineer £1,000. After many months spent in preparation, in course of which the vessel was towed from Tilbury to Southend and proceeded under steam to Hull, the vessel was transferred to the new company, and notice was given to the plaintiffs that the old company disclaimed further liability under their respective contracts. The plaintiff Dye had previously given three months' notice to determine his contract, of which one month remained unexpired. The plaintiff Johnson had given no notice. The argument advanced on behalf of the interveners in opposition to the claim of the plaintiffs to have a wages lien for anything more than wages earned was founded on the proposition that in order to give such a lien the wages must have been, in the words of the Admiralty Court Act, 1861, s. 10, "earned on board the ship," and counsel properly insisted that the existence in the Admiralty Court and in this Division of jurisdiction to deal with all the claims of the plaintiffs under their agreements of service does not necessarily involve a right to a lien. The opinion of Sir Gainsford Bruce against the existence of this lien as expressed in the well-known work, Williams and Bruce, Admiralty Practice (3rd Edn.), p. 202,

was relied upon, and in opposition to the claim I was also reminded of a judicial opinion of LORD GORELL that whether such a lien exists is a difficult question.

The difficulty is to be solved by authority, and not by opinion. Such as it is, it seems to me to arise not so much from want of authority in decided cases as from the difficulty there is in making sure, with regard to many of the cases, whether the existence or non-existence of a lien was material or was adjudicated upon in the several judgments which have to be considered. Inasmuch as before 1861 the Court of Admiralty exercised, in its ancient jurisdiction, remedial powers in personal suits and suits in rem, as well as in suits for the enforcement of maritime liens, and after 1861 had an enlarged jurisdiction over suits of various kinds without extension to the claimants in those suits of rights of lien, the period, subject-matter, and result must be scrutinised when the several decisions in question come to be examined. It must be borne in mind, too, that until 1861 the seaman's lien for wages, enforceable in the Admiralty jurisdiction, was a lien for the wages recoverable in that jurisdiction under what LORD STOWELL called a mariner's contract; that a special contract might be proceeded upon at law, but not in Admiralty; and that the master of a ship had not the seaman's privileges with regard to wages. The plaintiff Johnson would have had it in respect simply of hiring and service, but the plaintiff Dye would not. The matters to be considered in detail as to both plaintiffs are, therefore, whether a seaman has a maritime lien in respect of damages for wrongful dismissal from his service under a simple contract; whether the contract relied upon by each is such that service thereunder gives a lien to a seaman; and whether they are in substance claiming wages or damages. Further, as to the plaintiff Dye, there is the question whether by virtue of the Admiralty Court Act, 1861, s. 10, and the Merchant Shipping Act, 1894, he has a maritime lien under his contract.

The argument on the part of the interveners that a seaman's lien upon the ship for wages exists only in respect of wages earned by the seaman on board the ship in the strict literal sense of these words must be examined in the light of decisions in the Court of Admiralty which extend over a long period, and under which the seaman's lien has been held to include subsistence money, viaticum, and, as it seems, whatever he could be fairly said to have earned by his services. In *The Exeter* (1), in 1799, the ship had been sold in a wages action, and LORD STOWELL decreed in favour of a seaman discharged at Colombo on a voyage from Bombay to London the payment out of the proceeds of the ship of wages subsequent to his dismissal. In *The Beaver* (2), where a marine had been put ashore on the African coast on a voyage from Liverpool to Africa and back, the same learned judge determined that the wages recoverable were those due for the whole voyage. Again, in *The Elizabeth* (3), LORD STOWELL spoke of the right of the seaman wrongfully discharged to claim wages until the return of the vessel to the original port as one recognised in most countries, and when an enterprise had been determined by frustration in the Baltic he decreed that wages were payable to the time of the seaman's arrival in England. The same rule was applied by the same judge in different circumstances in *The Eliza* (4), and where the seaman was given half wages from leaving the ship until his arrival in England. DR. LUSHINGTON, in 1856, in *The Camilla* (5), decreed payment of wages at the contract rate from the date of discharge to the time within the contract period when the plaintiff obtained other employment. On the same footing, DR. LUSHINGTON also decided, in *The Great Eastern* (6), that a lien existed for damages after wrongful dismissal. *The Blessing* (7) does not raise the question of lien, but lays down that the statutory jurisdiction of the county courts in respect of seamen's wages extends to a claim for damages in lieu of wages. The decision of the Privy Council in *The Ferret* (8) goes to a like question. Lastly, in *Re Great Eastern Steamship Co.* (9), CHITTY, J., in 1885, determined in favour of the crew a claim of maritime lien in respect of seamen's wages accrued after a wrongful determination of the hiring. The conflict was between the wages claimants and mortgagees, and wages were held payable to the time of the chief clerk's certificate in the cause.

Having regard to the state of the authorities, I cannot say that the wages for which a seaman has a lien under a seaman's contract of service are limited in the way the interveners contend. There are, however, two other questions to be considered. Are the plaintiffs respectively, in point of substance, claiming under their respective contracts wages which remain unpaid, or are they claiming damages for breach of contract? Are their respective contracts such as could have been sued upon in the Admiralty jurisdiction, or special contracts? The distinction between a claim for wages and a claim for damages under a seaman's contract which has been broken depends upon purely legal considerations. The best answer, I think, is that, if there has been merely a breach of the contract by the employer, the contract subsists and can be made the subject of a simple claim for wages, but, on the other hand, if the employer has repudiated the contract and the seaman has accepted the repudiation the contract is at an end, and any claim to be made by him in respect of its stipulations is a claim for damages: see *Johnstone* v. *Milling* (10). It is not clear in the present case that the repudiation of the contracts in question by the owners was accepted by the plaintiffs before the issue of the writ. On this footing a claim for wages might have subsisted until that date. The plaintiff, the chief engineer, has all a seaman's remedies if he is claiming under a seaman's contract. He may also recover judgment here under a special contract, by virtue of various statutes. Whether the plaintiff, the master, has the alleged lien depends upon the combined effect of the provision in the Admiralty Court Act, 1861, s. 10, which gave the court jurisdiction over any claim by the master of any ship for wages earned by him on board the ship, and s. 167 of the Merchant Shipping Act, 1894, whereby a master is given the same rights, lien, and remedies for wages as a seaman under that Act, or by law or custom. By virtue of the decisions in *The Sara* (11) and *The Castlegate* (12), I must take it that the Admiralty Court Act, 1861, s. 10, did not create any maritime lien which had not existed before that Act, but merely conferred upon the Court of Admiralty jurisdiction in cases where, before then, it had not jurisdiction. As to the chief engineer, then, it is necessary to inquire whether his claim arises under a special contract, so that it became cognisable in Admiralty by the Act of 1861, or was a claim such as that court always had within its jurisdiction. As to the master, the like question arises under the two sections.

The distinction between a seaman's contract which was cognisable before 1861 in the Court of Admiralty and a special contract such as was within the Admiralty jurisdiction by the Act of 1861 was clearly defined when important rights were constantly dependent upon it. Lord Tenterden described the contract which was enforceable in the Court of Admiralty as "a hiring on the usual terms made by word and writing only and not by deed": Abbott on Shipping (11th Edn.), p. 511. Lord Stowell discusses it at some length in *The Minerva* (13) under the name of "the mariner's contract," and speaks of it as an ancient instrument in which two stipulations only were necessary—on the part of the owner, the description of the intended voyage; on the part of the seaman, the rate of wages he was content to accept for his services on that voyage. Whether the contracts here put in suit to ground the claims for damages made by the plaintiffs are such as were cognisable in the Court of Admiralty appears upon examination of them. Each of the agreements was a contract under seal. The employment taken by the master is employment, not for a voyage, but for a year certain, and thereafter for a period determinable by notice, and with terms and incidents which arise from his association with the company as a shareholder. The chief engineer's agreement again entitled him to be employed until the termination of the first voyage, and thereafter until determination of the contract by three months' notice in writing, or constructive total loss of the vessel. Both of them are, in my opinion, special contracts, such as were not within the ancient jurisdiction of the Court of Admiralty. In view of the admission of the interveners that the plaintiffs have the lien they assert for the wages they in fact earned, I have no concern with any question whether the existence of special contracts would have prevented the

Court of Admiralty from entertaining, in the case of the chief engineer as a seaman, a claim to a lien for wages upon proof of service performed. No such question is raised in this case with regard to either of the plaintiffs. So far, however, as their claim extends to damages they can only be asserted upon proof of the contracts. They, therefore, could not have been entertained by the Court of Admiralty without the statutory authority of the Act of 1861, and they consequently do not carry with them any right to a maritime lien. In the circumstances of the case it is not necessary to consider reported decisions in which, where a mariner's contract and a special agreement were embodied in one writing, the court, upon finding the same to be severable, decreed in favour of the claim which was within its jurisdiction.

In the result there must be paid out of the fund in court £434 17s. 2d. to the plaintiff James Ellis Dye, and £322 19s. 9d. to the plaintiff Gerald Stephen Johnson, in pursuance of the admission of the interveners to that effect. The claim of the plaintiffs for a declaration that they have a maritime lien for any amount claimed by them under para. 6 of the statement of claim, is disallowed.

Solicitors: *Flegg & Son*; *Botterell & Roche*; *Dawson & Loncaster*, Hull.

[*Reported by* Geoffrey Hutchinson, Esq., *Barrister-at-Law.*]

PRAGER *v.* BLATSPIEL, STAMP AND HEACOCK, LTD.

[King's Bench Division (McCardie, J.), January 14, 15, 23, 1924]

[Reported [1924] 1 K.B. 566; 93 L.J.K.B. 410; 130 L.T. 672; 40 T.L.R. 287; 68 Sol. Jo. 460]

Agent—Agency of necessity—Extent of application of doctrine—Matters which agent must prove—"Necessity"—Only commercially reasonable course to take.

The doctrine of agency by necessity is not confined to cases of the master of a ship, a carrier by land, or the acceptor of a bill of exchange for the honour of the drawer. It can exist, e.g., in a case of the sale of goods purchased by an agent on behalf of a principal where unforeseen emergencies arise, provided (i) that at the material time the agent cannot communicate with his principal, (ii) that the agent can prove that the sale was necessary in the sense that it was the only reasonable business course to take, and (iii) that the agent satisfies the court that in doing what he did he was acting bona fide in the interests of the parties concerned.

Circumstances in which **held** that a sale of the principal's goods by the agent was not necessary and that the agents acted dishonestly.

Notes. Considered: *Jebara* v. *Ottoman Bank*, [1927] 2 K.B. 254. Referred to: *Re Banque des Marchands de Moscou (Koupetschesky)*, *Royal Exchange Assurance* v. *The Liquidator*, *Wilenkin* v. *The Liquidator*, [1952] 1 All E.R. 1269.

As to agency of necessity, see 1 Halsbury's Laws (3rd Edn.) 157, 158 (in particular note (l) on p. 158); and for cases see Digest, Supps. Tit. Agency, case No. 215 et seq.

Cases referred to:

(1) *Hawtayne* v. *Bourne* (1841), 7 M. & W. 595; 10 L.J.Ex. 224; 5 Jur. 118; 151 E.R. 905; 1 Digest 319, *390*.

(2) *Gwilliam* v. *Twist*, [1895] 2 Q.B. 84; 64 L.J.Q.B. 474; 72 L.T. 579; 59 J.P. 484; 43 W.R. 566; 11 T.L.R. 415; 14 R. 461, C.A.; 1 Digest 390, *941*.

(3) *Nicholson* v. *Chapman* (1793), 2 Hy. Bl. 254; 126 E.R. 536; 41 Digest 851, *7141.*

(4) *Great Northern Rail. Co.* v. *Swaffield* (1874), L.R. 9 Exch. 132; 43 L.J.Ex. 89; 30 L.T. 562; 8 Digest (Repl.) 38, *219.*

(5) *London and North Western Railway* v. *Duerden* (1916), 85 L.J.K.B. 885; 114 L.T. 590; 32 T.L.R. 315, C.A.; 8 Digest (Repl.) 235, *1495.*

(6) *Sims & Co.* v. *Midland Rail. Co.*, [1913] 1 K.B. 103; 82 L.J.K.B. 67; 107 L.T. 700; 29 T.L.R. 81; 18 Com. Cas. 44, D.C.; 8 Digest (Repl.) 27, *162.*

(7) *Springer* v. *Great Western Rail. Co.*, [1921] 1 K.B. 257; 89 L.J.K.B. 1010; 124 L.T. 79; 15 Asp.M.L.C. 89, C.A.; 8 Digest (Repl.) 37, *212.*

(8) *De Bussche* v. *Alt* (1878), 8 Ch.D. 286; 47 L.J.Ch. 381; 38 L.T. 370; 3 Asp.M.L.C. 584, C.A.; 1 Digest 387, *906.*

(9) *R.* v. *Electricity Comrs., Ex parte London Electricity Joint Committee Co. (1920), Ltd.*, [1924] 1 K.B. 171; 93 L.J.K.B. 390; 130 L.T. 164; 88 J.P. 13; 39 T.L.R. 715; 68 Sol. Jo. 188; 21 L.G.R. 719, C.A.; 20 Digest 197, *1.*

(10) *Harris* v. *Fiat Motors, Ltd.* (1907), 23 T.L.R. 504, C.A.; 1 Digest 390, *942.*

(11) *Beard* v. *London General Omnibus Co.*, [1900] 2 Q.B. 530; 69 L.J.Q.B. 895; 83 L.T. 362; 48 W.R. 658; 16 T.L.R. 499, C.A.; 34 Digest 142, *1113.*

(12) *Bank of New South Wales* v. *Owston* (1879), 4 App. Cas. 270; 48 L.J.P.C. 25; 40 L.T. 500; 43 J.P. 476; 14 Cox, C.C. 267, P.C.; 1 Digest 330, *464.*

(13) *Tetley* v. *British Trade Corpn.* (1922), 10 Lloyd, L.R. 678.

(14) *Cannan* v. *Meaburn* (1823), 1 Bing. 243; 8 Moore, C.P. 127; 1 L.J.O.S.C.P. 84; 130 E.R. 98; 41 Digest 511, *3402.*

(15) *Australasian Steam Navigation Co.* v. *Morse* (1872), L.R. 4 P.C. 222; 8 Moo.P.C.C.N.S. 482; 27 L.T. 357; 20 W.R. 728; 1 Asp.M.L.C. 407; 17 E.R. 393, P.C.; 41 Digest 511, *3404.*

(16) *Acatos* v. *Burns* (1878), 3 Ex.D. 282; 47 L.J.Q.B. 566; 26 W.R. 624, C.A.; 41 Digest 453, *2841.*

(17) *Atlantic Mutual Insurance Co.* v. *Huth* (1880), 16 Ch.D. 474; 44 L.T. 67; 29 W.R. 387; 4 Asp.M.L.C. 369, C.A.; 41 Digest 512, *3418.*

(18) *Ewbank* v. *Nutting* (1849), 7 C.B. 797; 13 L.T.O.S. 94; 137 E.R. 316; 41 Digest 515, *3450.*

(19) *Tronson* v. *Dent* (1853), 8 Moo.P.C.C. 419; 14 E.R. 159, P.C.; 41 Digest 515, *3447.*

(20) *James Phelps & Co.* v. *Hill*, [1891] 1 Q.B. 605; 60 L.J.Q.B. 382; 64 L.T. 610; 7 T.L.R. 319; 7 Asp.M.L.C. 42, C.A.; 41 Digest 485, *3169.*

Action tried by McCardie, J.

The plaintiff claimed damages from the defendants for the wrongful conversion of furs which the defendants had bought on the instructions of the plaintiff. The plaintiff was a dealer in furs carrying on business in Bucharest, and the defendants were fur merchants in London. In 1915 and 1916 the plaintiff instructed the defendants to buy certain furs and skins for him, to have them dressed, and to dispatch them to him at Bucharest at the earliest possible date. The skins, to the value of £1,900, were bought and paid for by the defendants and delivered by the sellers to the defendants. Owing to the defeat and occupation of Romania by the Germans at the end of 1916 the defendants were unable to forward the goods to the plaintiff, and in 1917 and 1918 they sold the furs and skins. At the conclusion of the war the plaintiff wrote asking the defendants to forward him the furs and skins, and in a letter dated April 30, 1919, the defendants informed him that the goods had been sold. The plaintiff repudiated the act of the defendants and brought this action. The defendants contended that they were the plaintiff's agents of necessity to sell the skins. The plaintiff pleaded that the circumstances did not constitute a necessity to sell, that the defendants had not acted bona fide, and, therefore, that the doctrine of agency by necessity did not apply.

Greaves-Lord, K.C., and *W. R. Howard* for the plaintiff.
Patrick Hastings, K.C., and *W. Van Breda* for the defendants.

Cur. adv. vult. A

Jan. 23. **McCARDIE, J.,** read the following judgment.—This case raises several points of law and fact. The broad circumstances are these. The plaintiff deals in furs, and lives in Bucharest, being furrier to the Romanian Court. The defendants are fur merchants in London, and act as agents in the buying and dressing of skins. For some years before the outbreak of the first world war they had been B agents for the plaintiff, and they continued so to act after the outbreak of hostilities in August, 1914. In 1915 and 1916 the defendants purchased for the plaintiff a large number of skins, including skunk skins, leopard cat skins, and marten, opossum, ermine, and silver fox skins. The total cost of the goods was nearly £1,900. In substance the plaintiff had paid the defendants the whole of that amount, and in 1916 all that the plaintiff owed the defendants was about £380 for C dressing a number of skins purchased. The defendants were bound to dispatch the goods, when required to do so, to the plaintiff in Romania as he might direct. War conditions gradually rendered transport difficult, and postal and telegraphic communication equally difficult. In 1915 the defendants endeavoured to forward some of the skins to Romania, as asked for by the plaintiff. The skins were returned by the postal authorities after many wanderings. At the end of 1916 D the German forces entered and dominated Romania. Thenceforward Romania became, for practical purposes, an enemy country. As from December, 1916, it is agreed that it was impossible to send any goods to the plaintiff and also impossible to communicate with him in any way. In the autumn of 1917 the defendants began to sell the plaintiff's goods. They were sold in different lots onwards to September, 1918, and all were sold save a few of the silver fox skins. In E November, 1918, the armistice was declared, and thereafter facilities for communication between London and Romania arose. On Jan. 21, 1919, the plaintiff wrote to the defendants: "I hope that all our merchandise is in good condition, and I request you to be so good as to take the necessary measures for the shipment of the same." On Feb. 12, 1919, the defendants acknowledged the letter and said: "We thought it best to realise your goods as they were getting stale and F there was no knowing how long these troublous times might last." The plaintiff replied expressing his astonishment, and added: "I bought the merchandise under the then existing difficulties and unfavourable conditions in order to be supplied with goods upon the return of normal conditions." He repudiated the action of the defendants, and demanded back his goods and, after further correspondence, brought this action for conversion and for other relief. It is admitted that the G defendants had no contractual right to sell the goods. They justified their acts on the ground only that they were agents of necessity.

The first question of law is this. Can the facts as I have outlined them afford a possible legal basis on which to rest an agency of necessity? The defendants say "Yes"; the plaintiff says "No." The doctrine of agency of necessity doubtless took its rise from marine adventure. Hence the numerous decisions set out in H CARVER'S CARRIAGE BY SEA (6th Edn.), s. 294, and following sections. The substance of the matter as stated in that book is that in cases of necessity the master of a ship has power, and it is his duty, to sell the goods in order to save their value or some part of it: see s. 297. In *Hawtayne* v. *Bourne* (1) (7 M. & W. at p. 599), PARKE, B., expressed a view that agency of necessity could not arise save in the case of a master of a ship and of the acceptor of a bill of exchange for the I honour of the drawer. He added (ibid. at p. 600): "The authority of the master of the ship rests upon the peculiar character of his office." In *Gwilliam* v. *Twist* (2), LORD ESHER, M.R., said ([1895] 2 Q.B. at p. 87):

> "I am very much inclined to agree with the view taken by EYRE, C.J., in the case of *Nicholas* v. *Chapman* (3) and by PARKE, B., in the case of *Hawtayne* v. *Bourne* (1) to the effect that this doctrine of authority by reason of necessity is confined to certain well-known exceptional cases, such as those of

A the master of a ship or the acceptor of a bill of exchange for the honour of the drawer."

If the dicta I have cited be correct, then the defendants in the case now before me cannot justify their acts of sale. In my humble opinion, however, those dicta are not the law to-day. In *Great Northern Rail. Co.* v. *Swaffield* (4), more than twenty years before the dictum of Lord Esher, M.R., the Court of Exchequer (Kelly, C.B., Pigott, Pollock, and Amphlett, BB.) had applied the doctrine of agency of necessity to a land carrier. They applied to him the principle of the shipping cases. I think, too, that *London and North Western Railway* v. *Duerden* (5) is in substance an application of the same principle. In *Sims & Co.* v. *Midland Rail. Co.* (6)—the sale of butter case—the Divisional Court (Ridley and Scrutton, JJ.) again recognised that the principle of the shipping cases might apply to land carriers: see also Macnamara on Carriers by Land (2nd Edn.), art. 189 (n). In *Springer* v. *Great Western Rail. Co.* (7) the Court of Appeal approved the principle stated in *Sims' Case* (6).

The decisions I have already cited show that the dictum of Lord Esher in *Gwilliam* v. *Twist* (2) is not the law of to-day. Agency of necessity is not confined to shipmaster cases and to bills of exchange. I may next point out that in the well-known judgment of the Court of Appeal in *De Bussche* v. *Alt* (8) the court stated that unforeseen emergencies may arise which impose on an agent the necessity of employing a substitute and the authority to do so which he would not otherwise possess. That case related to the sale of a ship in the east, and it shows an appreciation by the Court of Appeal in 1878 of a principle which, in its application, could not be confined to carriers or acceptors of bills of exchange. The object of the common law is to solve difficulties and adjust relations in social and commercial life. It must meet, so far as it can, sets of fact abnormal as well as usual. It must grow with the development of the nation. It must face and deal with changing or novel circumstances. Unless it can do that it fails in its function and declines in its dignity and value. An expanding society demands an expanding common law. A dozen decisions could be cited to illustrate the remarks I have just made. I mention only the words of Bankes, L.J., in *R.* v. *Electricity Comrs.* (9) where he said ([1924] 1 K.B. at p. 192):

> "It has, however, always been the boast of our common law that it will, whenever possible, and when necessary, apply existing principles to new sets of circumstances."

I respectfully agree, and I venture to add that it would be well if those words were more often remembered and applied. In my view, there is nothing in the existing decisions which confines the agency of necessity to carriers whether by land or sea, or to the acceptors of bills of exchange. The basic principle, I think, is a broad and useful one. It lies at the root of the various classes of cases of which the carrier decisions are merely an illustration. When carefully examined, such cases as *Gwilliam* v. *Twist* (2) and *Harris* v. *Fiat Motors, Ltd.* (10) show, by implication, a recognition of a wide rule as to agency of necessity: see also Bowstead on Agency (6th Edn.), art. 8, p. 15, and the illustration thereto, *Beard* v. *London General Omnibus Co.* (11) and *Bank of New South Wales* v. *Owston* (12). The view I am now expressing is strikingly supported by the lucid treatise of Story on Agency (9th Edn.), ss. 69, 85, 141, 193 and 237, and the notes. The gist of the observations of the learned author appears in s. 141, where he says:

> "Although the powers of agents are, ordinarily, limited to particular acts; yet . . . extraordinary emergencies may arise, in which a person, who is an agent, may, from the very necessities of the case, be justified in assuming extraordinary powers, and . . . his acts, fairly done, under such circumstances, will be binding upon his principal."

See also Chitty's Commercial Law (1824), vol. III, p. 218.

I see nothing which as a matter of strict law prevents the defendants here from

seeking to rely on the doctrine of agency of necessity. In *Tetley* v. *British Trade Corpn.* (13) BAILHACHE, J., applied the doctrine of agency of necessity to the case of an agent who, while in Russian Georgia, found himself, through violent events, unable to deal with goods in accordance with his instructions and equally unable to communicate with his principals. A like ruling has been given, on substantially similar facts, in other cases (unreported) in the King's Bench Division. Upon the first point I rule in the defendants' favour.

I must refer briefly to several other features of the doctrine of agency of necessity in a case where, as here, the agent has, without orders, sold the goods of his principal. In the first place, it is, of course, clear that agency of necessity does not arise if the agent can communicate with his principal. This is established by all the decisions: see CARVER ON CARRIAGE BY SEA (6th Edn.), arts. 295, 299; SCRUTTON ON CHARTERPARTIES (11th Edn.), art. 98; and *Springer* v. *Great Western Rail. Co.* (7). The basis of this requirement is, I take it, that, if the principal's decision can be obtained, the agent should seek it ere acting. In the present case it is admitted that the agents could not communicate with the principal. In the next place it is essential for the agent to prove that the sale was necessary. What does this mean? In *Cannan* v. *Meaburn* (14) PARK, J., said (1 Bing. at p. 247): "The master cannot sell except in a case of inevitable necessity." In *Australasian Steam Navigation Co.* v. *Morse* (15), however, SIR MONTAGUE SMITH said (L.R. 4 P.C. at p. 230):

> "The word 'necessity,' when applied to mercantile affairs, where the judgment must, in the nature of things, be exercised, cannot, of course, mean an irresistible compelling power—what is meant by it in such cases is the force of circumstances which determine the course a man ought to take."

Later on he refers to "commercial necessity." In *Acatos* v. *Burns* (16) BRETT, L.J., uses the words (3 Ex.D. at p. 290): "unless there is an urgent necessity for the sale." In *Atlantic Mutual Insurance Co.* v. *Huth* (17) COTTON, L.J., says (16 Ch.D. at p. 481):

> "It lies on those who claim title to cargo, as purchasers from the captain, to prove that this necessity clearly existed; further . . . it is not sufficient to prove that the master thought he was doing the best for all concerned, or even that the course adopted was, so far as can be ascertained, the best for all concerned."

In *Sims & Co.* v. *Midland Rail. Co.* (6) SCRUTTON, J., said ([1913] 1 K.B. at p. 112) that the question was whether "necessity justified the sale." In *Springer's Case* (7), already quoted, SCRUTTON, L.J., said ([1921] 1 K.B. at p. 267) that the defendants must show "that a sale was in the circumstances the only reasonable business course to take." With this may be compared art. 97 of SCRUTTON ON CHARTERPARTIES (11th Edn.). In substance I may say that the agent must prove an actual and definite commercial necessity for the sale. In the third place, I think that an alleged agent of necessity must satisfy the court that he was acting bona fide in the interests of the parties concerned. In *Ewbank* v. *Nutting* (18) COLTMAN, J., said during the argument (7 C.B. at p. 804):

> "Does not the authority of the master extend to acts such as he, in the exercise of an honest judgment, thinks the best for the interest of the owner of both ship and goods?":

see, too, pp. 808 and 810 of the same case.

In *Tronson* v. *Dent* (19) the Privy Council plainly indicated that bona fides was essential in addition to actual necessity: see also the judgment of LINDLEY, L.J., in *James Phelps & Co.* v. *Hill* (20); CARVER'S CARRIAGE BY SEA (6th Edn.), arts. 298, 299; and SCRUTTON ON CHARTERPARTIES (11th Edn.), art. 97. Bona fides, in my opinion, is an essential condition for the exercise of the power of sale.

I have now stated the principles of law, which, in my view, apply to this case, and can state quite briefly my conclusions of fact after carefully weighing the

whole of the evidence, the correspondence, and arguments. I hold, in the first place, that there was no necessity to sell the goods. They had been purchased by the plaintiff in time of war and not of peace. He bought them in order that he might be ready with a stock of goods when peace arrived. He had refused, by letters to the defendants, several profitable offers for some of them prior to the cessation of correspondence between the defendants and himself. The goods were not perishable like fruit or food. If furs are undressed they may deteriorate somewhat rapidly in the course of a year or two, but these furs were dressed and not undressed. Dressed furs deteriorate very slowly. They lose somewhat in colour and suppleness year by year. The measure of deterioration depends on whether they are properly stored. If put into cold storage the deterioration is very little. Even if kept in an ordinary fur warehouse the deterioration is but slight, that is, if care be used. The great bulk of the furs here were of the best quality. I see no adequate reason for the sale by the defendants, for I am satisfied that there was nothing to prevent the defendants from putting them into cold storage and certainly nothing to prevent them from keeping them with proper care in their own warehouse. The expense of cold or other storage would have been but slight compared with the value of the furs. The plaintiff had given nearly £1,900 for them, and they steadily rose in value. The contra account of the defendants was less than £400. The margin, therefore, was of the most ample description. The defendants could and ought to have stored the goods till communication with Romania was restored. I have said that the value of the furs was rising. Broadly speaking it may be said that from 1917 on to 1919 there was a steady and sometimes a rapid rise in the value of furs. This arose from the shortage of supply. The slight deterioration of the furs was far outweighed by the general and striking increase in market prices. I can see no point of time at which the defendants could honestly and fairly say: "In the interests of the plaintiff it is imperative that we sell his goods." That the furs were deteriorating but slightly is, I think, plain, and particularly when I observe the prices at which the defendants sold them. The defendants could not have formed the view at any time given that there was a necessity for sale, for they sold the goods by about seventeen different sales, ranging from October, 1917, to Sept. 20, 1918. If the defendants honestly believed in the necessity of sale they could at any time have sold the whole. In view of the military position in September, 1918, the sales in that month are significant. I hold that there was no commercial necessity for the sale. In the second place I decide, without hesitation, that the defendants did not act bona fide. I need not repeat the observations I have already made as to the absence of necessity for the sale. But I must add a few further words. I hold that the defendants were not, in fact, agents of necessity, that the sales of the plaintiff's goods were not justified, and that the defendants acted dishonestly. In the result, I give judgment for the plaintiff for £1,822 with costs.

Judgment for plaintiff.

Solicitors: *Arthur Rutherford*; *Lawrance, Webster, Messer & Nicholls.*

[*Reported by* T. W. Morgan, Esq., *Barrister-at-Law.*]

A

S. SCHNEIDERS & SONS, LTD. *v.* ABRAHAMS

[Court of Appeal (Bankes, Scrutton and Atkin, L.JJ.), October, 15, 1924]

[Reported [1925] 1 K.B. 301; 94 L.J.K.B. 408; 132 L.T. 721; 41 T.L.R. 24]

B

Rent Restriction—Possession—"Using premises for illegal purposes"—User only incidental circumstance of offence—Length of user—Deposit of stolen goods—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 5 (1), *as substituted by Rent and Mortgage Interest Restrictions Act*, 1923 (13 & 14 *Geo.* 5, *c.* 32), *s.* 4.

C By s. 5 (1) (b) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (as substituted by s. 4 of the Rent and Mortgage Interest Restrictions Act, 1923) [now Sched. I (b) to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933] : "No order or judgment for the recovery of possession of any dwelling-house to which this Act applies . . . shall be made or given unless . . . (b) the tenant . . . has been convicted of using the premises or allowing the premises to be used for an immoral or illegal D purpose. . . ." A tenant of a dwelling-house to which the Rent Restriction Acts applied was convicted by a court of summary jurisdiction of receiving at the demised premises property of the landlords, well knowing it to have been stolen. On a claim by the landlords for possession under s. 5 (1) (b) (as substituted),

E **Held:** (i) to bring the case within s. 5 (1) (b) it was sufficient that the user of the premises should be, not an essential element, but an incidental circumstance, of the offence, e.g., where, as in the present case, the premises had no more than an incidental connection with the commission of the crime, provided that the landlords could prove, as they must be taken to have proved here, that the tenant had taken advantage of his tenancy of the premises and the opportunity it afforded for committing the offence; (ii) while the commis- F sion of a casual assault or of a crime with which the premises had nothing to do beyond being merely the scene of its commission would not constitute "using" within s. 5 (1) (b), user as a deposit for stolen goods was such "using"; and, therefore, the case fell within s. 5 (1) (b), and the landlords were entitled to possession.

G **Notes.** Applied : *Hodson* v. *Jones* (1951), 95 Sol. Jo. 236.

As to possession on the ground of nuisance or commission of a criminal offence by the tenant, see 23 Halsbury's Laws (3rd Edn.) 819–820. For cases see 31 Digest (Repl.) 700, 701; and for the Rent Restriction Acts, 1920, 1923, and 1933, see 13 Halsbury's Statutes (2nd Edn.) 981, 1033, 1044.

Cases referred to :

H (1) *Waller* v. *Thomas*, [1921] 1 K.B. 541; 90 L.J.K.B. 656; 125 L.T. 21; 37 T.L.R. 325; 19 L.G.R. 109, D.C.; 31 Digest 657, *7591*.

(2) *Birmingham Young Men's Christian Association* v. *Gee* (1924), July 30, unreported.

Appeal from an order of Talbot, J.

I The plaintiffs, the landlords, claimed possession of a messuage, No. 127, New Road, Whitechapel, which was let to the defendant, a working tailor, on a weekly tenancy at a rent of £3 a week, which was subsequently by mutual agreement increased to £4 a week. The tenancy was duly determined by notice to quit. The tenant refused to give up possession of the premises and relied on the provisions of the Rent Restrictions Acts. The landlords said that he was not entitled to the provisions of the Acts as he had been convicted of using the premises for an illegal purpose within s. 5 (1) (b) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, as substituted by s. 4 of the Rent and Mortgage Interest

Restrictions Act, 1923 [see now Sched. I (b) to Rent and Mortgage Interest Restrictions (Amendment) Act, 1933]. He had, on Sept. 21, 1923, been convicted by a court of summary jurisdiction of receiving, on Sept. 17 at the said premises, a roll of Italian cloth valued at £5, well knowing the same to have been stolen or unlawfully obtained, the property of the landlords, and was sentenced to five weeks' imprisonment. It was contended for the tenant that a single isolated act of receiving did not constitute using the premises for an illegal purpose; that for the subsection to apply it was necessary that the offence should be such that the use of the premises was a necessary ingredient in the illegality for which the tenant was convicted; and that there was no conviction known to the law such as a conviction "for using premises for an illegal purpose." TALBOT, J., held that the landlords were not entitled to possession, as, although the tenant had been convicted in respect of an illegal act done on the premises, the user had not been continuous. The landlords appealed.

Pritt for the appellants.
Sir Reginald Coventry, K.C., and *J. H. Watts* for the respondent.

BANKES, L.J.—This case raises a short but important point upon the meaning of certain words in s. 4 of the Rent Restrictions Act, 1923, which leave the intention of the legislature in considerable doubt. The landlords brought an action to recover possession of premises of which the respondent was tenant. The premises were within the scope of the Rent Restrictions Acts. The tenant relied on the provisions of those Acts in answer to the claim for possession. In reply to this the landlords contended that the case fell within s. 4 (b) of the Act of 1923 and relied on the fact that the tenant had been convicted of receiving property stolen from them—which he had received on the demised premises—as disentitling the tenant to the protection of the Act. The effect of s. 4 (b) is that no judgment for the recovery of possession of any dwelling-house to which the Act applies shall be given unless, among other conditions,

> "the tenant . . . has been convicted of using the premises or allowing the premises to be used for an immoral or illegal purpose."

The question is whether, on the true construction of those words, the tenant has in the circumstances of this case been convicted of using the premises for an illegal purpose. First, a doubt arises whether the legislature is using those words in reference to an offence, the gist of which is the user of premises; whether the user of the premises is an essential element in the constitution of the offence, so that the user must be charged in the indictment and the offence must be described therein as the offence of using the premises for some purpose, being an illegal purpose; or whether it is enough that the user should be, not an essential element, but merely an incidental circumstance of the offence. Secondly, assuming that the latter is the intention of the Act, is it enough to disentitle the tenant to protection that he should have once used the premises for an illegal purpose, or is a continuous or frequent user necessary? The conviction in the present case was for receiving on Sept. 17, 1923, at 127, New Road, Whitechapel, one roll of Italian cloth, well knowing the same to have been stolen or unlawfully obtained, the property of the landlords. To constitute the offence of receiving goods knowing them to have been stolen it is not necessary that the receiving should be on any premises, but incidentally the receiving in this case took place on these premises. Is this such an offence as is contemplated in s. 4 (b) of the Rent Restrictions Act, 1923?

In looking for the intention of the Act, it is material to consider what class of offences would be included, if the words were given a strict technical construction, which would limit their application to those offences in which the user of premises is an essential element. The number of those offences is comparatively small. There are offences for "keeping" premises for this or that immoral purpose, which would not come within a technical construction of "using" premises, yet keeping

the demised premises as a brothel would surely be within the contemplation of s. 4 (b). Again, if the tenant had fitted up the demised premises as a coiner's den, and had been caught and convicted of falsely making or counterfeiting coin, contrary to s. 2 of the Coinage Offences Act, 1861, he would not be within a strict construction of s. 4 (b), because the user of premises is no part of that offence. Inasmuch as a strictly technical construction of s. 4 of the Act of 1923 would exclude so many offences which would seem naturally to fall within the purview of the section, and because such a construction would deprive the words "or immoral" of all force or effect, I, therefore, reject the argument that the section includes only offences in which user of the premises is an essential element. But I think it is necessary to show that the tenant has taken advantage of his tenancy of the premises and of the opportunity it afforded for committing the offence. In this view, the tenant who uses the demised premises as a coiner's den, or as a deposit for stolen goods, and is convicted of counterfeiting coin or receiving goods, would be "convicted of using the premises for an illegal purpose" within the meaning of s. 4.

That disposes of the more difficult question. The second point was that, when the statute refers to "using the premises," it intends something more than a single act of user, and means a continuous, frequent or repeated use. I cannot assent to that suggestion. It may be that the mere fact of a crime being committed on the premises would not constitute a user of the premises by the tenant for an illegal purpose—for example, if the tenant was convicted of an assault upon someone who happened to be on the premises in the occupation of the tenant—and, if that were the only evidence, I doubt whether the tenant could be said to have been convicted of "using the premises for an illegal purpose" within the meaning of s. 4. But, if the tenant uses the premises as a coiner's den, or as a deposit for stolen goods, a single instance of such user seems to me to be quite enough to satisfy the language of the statute. Reference was made to *Waller* v. *Thomas* (1) in the Divisional Court as supporting the opinion of TALBOT, J. In my view, there is a clear distinction between the facts of that case and those of the present. The offence there was the offence of selling intoxicating liquor on licensed premises within prohibited hours; it was said that this constituted using the premises for an illegal purpose. The court held that, the premises being licensed premises, the user was a lawful user, and that it was only by a slip in the user that the offence was committed. LUSH, J., makes it clear that this was his view. He said ([1921] 1 K.B. at p. 550):

> "There was only one case of sale within prohibited hours, and I do not think that an isolated breach would be sufficient to justify the learned judge in holding that the house was used for an illegal purpose. Those words refer to putting a house to an improper use to carry out an unlawful purpose."

McCARDIE, J., said (ibid. at p. 552):

> "As to Mr. Wootten's suggestion that the defendant came within s. 5 (1) (b) [of the Act of 1920] by allowing the premises to be used for an 'illegal purpose,' I agree with LUSH, J., that the object of [s. 5 (1) (b)] is to deal with cases in which the improper user of the premises is in furtherance of an unlawful purpose, and not with an isolated instance of illegality in carrying out a lawful purpose."

The effect of the particular offence committed in that case is now specially dealt with in s. 4 (i) of the Act of 1920 (as substituted), but the distinction between that case and the present is not thereby weakened. We are told that in another case—*Birmingham Young Men's Christian Association* v. *Gee* (2)—the Divisional Court has taken the view which I have expressed. For the reasons I have given I think this appeal should be allowed.

SCRUTTON, L.J.—The vague language of s. 4 makes it very difficult to discover what it is intended to apply to. It is inapplicable to many conditions

A and circumstances which would seem primâ facie to be within the purview of the enactment. The difficulty of interpretation is due to absence of technical drafting.

In this case the landlords desire to eject their weekly tenant, because the tenant has been convicted of receiving on the demised premises goods which were stolen from the landlords, and, if ever there was a good reason for evicting a tenant, this is one. As enabling them to do so they point to s. 4 of the Rent Restrictions B Act, 1923, which prevents them from recovering possession unless the tenant "has been convicted of using the premises . . . for an immoral or illegal purpose." What is the meaning of those words, "convicted of using the premises"? Is the crime which exposes the tenant to the risk of ejectment the crime that he has used the premises? Does the crime, to come within s. 4, involve the user of premises for some immoral or illegal purpose, or is it enough if the tenant has been convicted C of an illegal act which in fact takes place on the premises, although the conviction is not recorded as a conviction for using the premises for that or any other purpose? The words "using the premises . . . for an immoral . . . purpose" are very curious, because a defendant cannot be convicted of using premises for an immoral purpose which is not also illegal. If the section means that the conviction must be for using the premises, the difficulty is that there are very few crimes that can be D properly so described and brought within its operation. If the tenant used the premises as a disorderly house, that would not come within the section strictly construed, because the offence under s. 2 of the Disorderly Houses Act, 1751, is not for using, but for keeping, a disorderly house. Did the legislature use the words strictly so as to exclude a conviction for keeping a disorderly house? Or did it use the words in a looser sense? The words would appear to include an E offence under s. 4 of the Gaming Houses Act, 1854, which does include the user of premises; also an offence under s. 79 of the Licensing (Consolidation) Act, for among the offences under that section is that of using premises in contravention of the Betting Act, 1853; and the words would include some offences under the Betting Act, 1853, itself, for those offences include that of using a house or permitting it to be used for the purpose of betting. They would not cover the F offence of counterfeiting coin nor the case of a woman who took premises for the purpose of enticing foolish persons thereto and extorting money from them by the threats of a bully; nor would they include the occupation of the house by notorious receivers of stolen property. Were the words meant to have their strict meaning, or were they meant to cover all cases where a tenant is convicted of a crime and had used the premises to facilitate the commission of it? This interpretation G would exclude cases where a crime had been committed, but the premises have no more than an incidental connection with the commission of the crime.

It is difficult to choose between these two interpretations. On the one hand, a judge is tempted to adhere to the strict meaning of words used in a statute, and to leave Parliament to correct the interpretation if it is not what was intended. On the other hand, regard must be paid to the object to be attained by means of H the words used; and I cannot imagine the intention of Parliament to have been that a tenant may use the demised premises for the purpose of committing a crime, that he should be apprehended on the premises and convicted of committing the crime, and yet that the landlord should be compelled to keep him as his tenant. The crime of receiving goods knowing them to have been stolen is a good instance of the difficulty raised by s. 4. There is no crime, and consequently there can be I no conviction, of using premises for receiving stolen goods, and yet premises may be used for the purpose of receiving stolen goods. The rest of the wording of s. 4 suggests that such a user is within the contemplation of the section. Giving the case the best consideration I can, I come to the conclusion that the conviction need not be for using the premises for one or another immoral or illegal purpose, and that it is enough if there is a conviction of a crime which has been committed on the premises and for the purpose of committing which the premises have been used, but that it is not enough that the tenant has been convicted of a crime with which the premises have nothing to do beyond merely being the scene of its

commission. For these reasons I am of opinion that the landlords are entitled to recover, and that this appeal should be allowed. A

ATKIN, L.J.—We are asked in this case by the tenant to give the words of the statute their precise meaning, and, if there was a plain meaning to be attached to the words, I should give them that meaning. The words to be considered are "unless the tenant . . . has been convicted of using the premises or allowing the premises to be used for an immoral or illegal purpose." I ask myself: What is the meaning of those words? If they mean that the conviction must be in the terms used in the Act—that is, for "using the premises" for the purpose—the question arises: Is there an offence of using premises for an immoral purpose?—for there is the alternative, immoral or illegal. I know of no offence which could be charged as "using" named premises "for an immoral purpose." The offence would have to be charged as "using the premises for some specified purpose, being an immoral purpose or an illegal purpose, as the case may be. Then it is found that there are very few offences to which the charge would apply. The words would apply to using the premises for betting and gaming purposes, but not to using them as a brothel, because the offence under s. 13 of the Criminal Law Amendment Act, 1885, is that of keeping a brothel, and not of using premises as a brothel. The whole Act must be considered to ascertain the object of the legislature. It specifies certain conditions under which a landlord may recover possession of the demised premises, and, when those conditions are considered, it seems an extraordinary conclusion that they should not include a case where the tenant takes the premises, fits them up as a coiner's den, uses them for that purpose, is apprehended on the premises, and is then charged with the offence of counterfeiting coin and convicted. This leads to the conclusion that the words of s. 4 must be used in a less technical sense. In my opinion, they cover a case where the tenant has been convicted of a criminal offence, and in the course of the trial it has been proved that he used the premises for an immoral or illegal purpose. B C D E

"Using" the premises in this section does not necessarily involve a continuous or repeated user. If the tenant formed the deliberate purpose of robbing a man, allured him into the premises and so used them for the purpose, it would be sufficient for the section, if they were once so used. On the other hand, if the premises are once used for an immoral or illegal purpose it does not necessarily follow that they have been used for such a purpose within the section—for example, a casual assault may be committed in the course of an innocent user. Moreover, in my view, the premises may be used for an immoral purpose within the meaning of the section without being used for an illegal purpose. Suppose a prostitute visits the premises and while there commits a theft or an assault for which she is prosecuted and ultimately convicted, and in the course of the proceedings it is proved that she used the premises for the purpose of prostitution, it might well be said that she had been convicted of using the premises for an immoral purpose within the meaning of the section. I agree that the appeal should be allowed. F G H

Appeal allowed.

Solicitors: *Bartlett & Gluckstein*; *H. T. Nicholson.*

[*Reported by* W. C. Sandford, Esq., *Barrister-at-Law.*]

WILLIAMS *v.* PERRY

[KING'S BENCH DIVISION (Swift and Acton, JJ.), March 31, 1924]

[Reported [1924] 1 K.B. 936; 93 L.J.K.B. 521; 131 L.T. 471; 40 T.L.R. 539; 68 Sol. Jo. 617; 22 L.G.R. 471]

Rent Restriction—Application of Rent Acts—Dwelling-house let at standard rent—Letting to new tenant at higher rent for business purposes only—New tenant going to reside on premises—Premises not brought again within Acts—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 12 (2), *proviso* (*ii*), *s.* 12 (6).

By s. 12 (2), proviso (ii), of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920: "The application of this Act to any house or part of a house shall not be excluded by reason only that part of the premises is used as a shop or office or for business, trade, or professional purposes. . . ." By sub-s. (6) of s. 12 of the Act: "Where this Act has become applicable to any dwelling-house . . . it shall continue to apply thereto whether or not the dwelling-house continues to be one to which this Act applies."

From August, 1914, until March, 1919, premises consisting of a shop and living accommodation were let at the standard rent, 12s. 6d. a week, to a tenant who carried on business in the shop and resided above it. In March, 1919, this tenant left the premises, and the landlord let the premises to the defendant at a rent in excess of the standard rent, i.e., £4 a month, to carry on a business in the shop and use the other rooms as storerooms and workrooms, and not as a dwelling-house. No substantial structural alteration of the premises was made. The tenant entered the premises, and some time later he occupied the upper part of them for residential purposes. He then contended that the premises came within the Rent Restriction Acts, by virtue of s. 12 (2), proviso (ii), of the Act of 1920, and that the landlord was not entitled to receive more than the standard rent of 12s. 6d. In an action by the landlord for the rent at the higher figure,

Held: it was not true to say that, unless the identity of premises was physically and structurally altered, the premises, if once within the Rent Acts, remained within them even though they became used only for business purposes; a dwelling-house could be converted into business premises by agreement of the parties as to the user of the premises just as much as by structural alteration; the premises in question ceased to be within the protection of the Acts in March, 1919, and it was not open to the defendant to say that they had been brought again within that protection by residing in part of the premises in breach of his agreement with the landlord; and, therefore, the landlord was entitled to recover the higher rent.

Notes. Applied: *Phillips* v. *Hallahan*, [1925] 1 K.B. 756. Considered: *Leslie & Co., Ltd.* v. *Cummings*, [1926] All E.R.Rep. 408. Referred to: *Barrett* v. *Hardy Bros. (Alnwick), Ltd.*, [1925] All E.R.Rep. 139; *Hyman* v. *Steward*, [1925] All E.R.Rep. 526.

As to the application of the Rent Acts generally, see 23 HALSBURY'S LAWS (3rd Edn.) 720 et seq.; and for cases see 31 DIGEST (Repl.) 640–657. For Increase of Rent, &c. (Restrictions) Act, 1920, see 13 HALSBURY'S STATUTES (2nd Edn.) 981.

Case referred to:

(1) *Phillips* v. *Barnett*, [1922] 1 K.B. 222; 91 L.J.K.B. 198; 126 L.T. 173; 38 T.L.R. 39; 66 Sol. Jo. 124; 20 L.G.R. 1, C.A.; 31 Digest (Repl.) 674, *7695*.

Also referred to in argument:

King v. *York* (1919), 88 L.J.K.B. 839; 35 T.L.R. 256, D.C.; 31 Digest (Repl.) 634, *7427*.

Woodifield v. *Bond* (*No. 1*) (1921), 127 L.T. 204; 66 Sol. Jo. (W.R.) 14; 31 Digest (Repl.) 640, *7476*.

Appeal from Bow County Court.

The landlord of premises brought an action in the county court to recover from the defendant, the present tenant, rent alleged to be due in respect of the premises. The tenant contended that the landlord was claiming more than he was entitled to, having regard to the provisions of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. From August, 1914, until March, 1919, the premises, which were let at a weekly rent of 12s. 6d., consisted of a shop, at the back of which there was a kitchen, and above the shop and kitchen there were three living-rooms used by the tenant and his family. The tenant carried on a business in the shop and, therefore, the premises came within the Rent Acts as being within s. 12 (2), proviso (ii), of the Act of 1920, premises of which part was "used as a shop or office or for business, trade, or professional purposes." In March, 1919, the then tenant vacated the premises and the defendant approached the landlord with a request to let to him the premises as business premises. On the defendant's representation that he wanted to carry on an upholstery business in the shop, and to use the upper rooms as storerooms and workrooms, the landlord let the premises to the defendant as a shop, warehouse, and storerooms, and not as a dwelling-house, at a rent of 10s. a week, subsequently increased to £4 a month. No substantial structural alteration of the premises was made. The defendant entered the premises, and for a time carried on the business of an upholsterer in accordance with the arrangement, but he afterwards occupied the upper part of the premises as a dwelling-house. In August, 1923, the tenant refused to pay the agreed rent and contended that he was only liable to pay the standard rent, namely, 12s. 6d. a week, and, against a claim by the landlord for £21 alleged arrears of rent, he counter-claimed for £26 from the landlord, being a sum which he alleged he had overpaid as rent to the landlord. It was contended on behalf of the tenant that the premises were admittedly a dwelling-house for the period from August, 1914, to March, 1919, and were still a dwelling-house within the meaning of the Rent Restriction Acts, and that, therefore, the tenant could not be compelled to pay a rent in excess of the standard rent, since, once the premises were within the protection of the Rent Restriction Acts, they always remained within the protection of those Acts. The county court judge accepted that argument and decided in favour of the tenant, and the landlord appealed.

Frank J. Powell for the landlord.

A. H. Woolf for the defendant, the present tenant.

SWIFT, J.—This is an appeal from a judgment of the judge of the Bow County Court, who gave judgment for the tenant in an action brought against him by his landlord for the rent of certain premises at East Ham. The tenant contended that the landlord was claiming more than the rent which he was entitled to, having regard to the provisions of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. He went further, and said that he was entitled to recover from the landlord certain payments which he had made in the name of rent, which, under the provisions of the Act, were not recoverable by the landlord.

There can be no doubt that from August, 1914, to March, 1919, the premises came within s. 12 (2), proviso (ii), of the Act of 1920, and, therefore, the fact that the tenant was carrying on in his dwelling-house a business did not take the premises out of the protection of the Act. In March, 1919, that tenant went out, and the defendant approached the landlord with a request to let to him the premises for use as business premises. He stated specifically that he wanted the upper rooms as storerooms and workrooms, and that he did not want them as a dwelling-house, as he had a house of his own elsewhere. On that statement, the landlord let the premises to the defendant, not as a dwelling-house, but as a shop, warehouse and storerooms. The defendant entered the premises and carried on the business of an upholsterer, but after he had been there for a few weeks he introduced someone to live in the upper part of the premises, and at a later stage he took his own wife and son to live there. This was a clear breach of the

A arrangement, which was made at the time of the letting, that no one should live there, and I do not think that it was open to the defendant to represent at any time that the character of a dwelling-house was given to these premises because someone slept there after he became tenant. If such an occupation of the premises as might constitute them a dwelling-house did take place, it was by the defendant's wrongful act in breach of his bargain with the landlord, and I think he should be B estopped from saying that he has by his wrongful act given the premises any particular characteristic. From the time the defendant went into them, the premises could not be said to be a dwelling-house by reason of anything which the defendant did in connection with them. I do not think that a man who improperly and in breach of his agreement occupies a room as a sleeping room which has been let to him as a workshop is entitled to say that he has converted that workshop C into a dwelling-house.

But the point of the case does not turn so much upon that. Counsel for the defendant has argued that these premises, having been admittedly from August, 1914, to March, 1919, a dwelling-house within the meaning of the various Rent Restriction Acts, are now a dwelling-house within the Acts of 1920 and 1923, and the tenant cannot be made to pay a greater rent than the standard rent. I under- D stand counsel to say, on the authority of *Phillips* v. *Barnett* (1), that, if one destroys or alters the identity of the premises, one destroys the protection given to them by the Act and one does not get any fresh protection for any other building which one may erect on the site, but that so long as one does not alter the identity of the premises physically and structurally, the premises if once within the Act are always within it. That argument was accepted by the county court judge, E who held that in law the agreement between the landlord and the defendant that the premises should be let as business premises did not take the premises out of the protection of the Act. I am unable to accede to that argument. It is quite clear that premises may be partly a dwelling-house and partly business premises, and that they may at one time be a dwelling-house and at another time business premises. Anyone who takes a walk in Lincoln's Inn will see houses which at F one time were dwelling-houses, but now, with little or no structural alteration, have become the business premises of counsel and solicitors. No one lives in them. No one would call them dwelling-houses. I see no reason why premises, at one time a dwelling-house and within the Act, should not at another time be business premises and outside the Act.

While these premises were partly business premises and partly a dwelling-house G they came clearly within the Acts. It seems to me from the very words of the second proviso to which I have alluded that, if the whole of the premises are used as a shop, office, &c., it necessarily follows that the Act does not apply. Section 13 of the Act of 1920 was passed to protect such premises, which would not otherwise be protected, as from July, 1920, and, so long as s. 13 remained in force, the defendant would be protected in his occupancy, but, under s. 13 (3), the section H ceased to exist in June, 1921, and there was no protection for business premises. Before business premises were protected the defendant made a bargain, by which he went into the premises, not as a dwelling-house, but as business premises. Does the Act still apply to them? Counsel for the defendant says that s. 12 (6) shows conclusively that the premises are still a dwelling-house in spite of the agreement. But that subsection does not say that where the Act has been I applicable to a dwelling-house it shall continue to apply to a factory into which it has been converted. I see no reason why a dwelling-house should not be converted into business premises, just as much by the agreement of the parties as to the user of the premises as by structural alteration. I think that the county court judge was wrong in law, and that this appeal must be allowed.

ACTON, J.—I agree. *Appeal allowed.*

Solicitors: *Rexworth, Barnard & Bonser*; *E. Edwards & Son.*

[*Reported by* T. W. MORGAN, ESQ., *Barrister-at-Law.*]

A

JOY *v.* EPPNER

[KING'S BENCH DIVISION (Shearman and Salter, JJ.), November 24, 1924]

[Reported [1925] 1 K.B. 362; 94 L.J.K.B. 157; 132 L.T. 343; 41 T.L.R. 136; 69 Sol. Jo. 841; 23 L.G.R. 52]

B

Rent Restriction—Apportionment—House not within Rent Acts on Aug. 3, 1914—Apportionment based on hypothetical letting and imaginary standard rent on that date—Increase of Rent and Mortgage Interest Restrictions Act, 1920 (10 & 11 *Geo. 5, c. 17), ss.* 12 (1) (*a*), 12 (3), 12 (7).

In 1905 a house was let at a rent less than two-thirds of its rateable value. In 1921 the landlord purchased and occupied it. In 1923 he divided it into C two parts and let the top half as a self-contained flat at £2 a week. The tenant of this flat took out an apportionment summons. The county court judge made an apportionment by assuming a hypothetical letting in 1914 and fixing an imaginary standard rent. The landlord appealed.

Held: the lettings and rents contemplated by the Rent Restriction Acts must be actual and not imaginary, and an apportionment could not be made by D constructing a hypothetical letting and basing an imaginary standard rent upon it; as the letting of 1905 was at a rent less than two-thirds of the rateable value, the county court judge was bound to disregard it, and the only letting he could look at was that of 1923; the standard rent of the respondent's dwelling-house, therefore, was £2, the rent reserved by the letting in 1923, and no apportionment should have been made.

E

Notes. Explained: *Barrett* v. *Hardy Bros. (Alnwick), Ltd.*, [1925] All E.R.Rep. 139. Approved: *Lloyd* v. *Cook*, *Goudge* v. *Broughton*, *Simson* v. *Mialt*, *Bartram* v. *Brown*, *Barker* v. *Hutson*, [1928] All E.R.Rep. 201.

As to "rent" within the meaning of the Rent Acts, see 23 HALSBURY'S LAWS (3rd Edn.) 773, 774; and for cases see 31 DIGEST (Repl.) 667 et seq. For Rent Restriction Act, 1920, see 13 HALSBURY'S STATUTES (2nd Edn.) 981; and for Rent F Act, 1957, see ibid., vol. 37, p. 550.

Case referred to:

(1) *Sutton* v. *Begley*, [1923] 2 K.B. 694; 92 L.J.K.B. 1086; 129 L.T. 773; 68 Sol. Jo. 82; 21 L.G.R. 679, C.A.; 31 Digest (Repl.) 686, *7786.*

G

Appeal from Wandsworth County Court.

On Aug. 3, 1914, a dwelling-house was held under a thirty-nine years building lease from Mar. 25, 1905, at a rent rising from one peppercorn to £8 10s. per annum, such rent being less than two-thirds of its rateable value. In 1921 the present landlord purchased and occupied the house. In 1923 he divided it into two parts by structural alterations, which did not, according to the finding of H the county court judge, amount to a reconstruction. He continued to occupy the lower portion himself, but let the upper portion as a self-contained flat to the tenant at a rent of £2 per week. In January, 1924, the tenant took out a summons asking for an apportionment of the standard rent. The county court judge held that the house had been let as a whole on Aug. 3, 1914, but as the rent at that time was less than two-thirds of the rateable value and, accordingly, the premises I did not come within the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, and acquire a standard rent, he proceeded to arrive at a hypothetical rent by assuming an imaginary letting and constructing a rent on the basis of the interest on the purchase price which the landlord had paid, plus additional sums for rates and other outgoings. This sum he apportioned as the standard rent. The landlord appealed.

Merriman, K.C., and *Watts* for the landlord.

Gilbert Stone for the tenant.

SHEARMAN, J.—This is an appeal from a judgment of a learned county court judge on a summons issued before him for an apportionment under the Rent Restrictions Acts. The landlord let the upper portion of his house to the tenant at £2 per week. Having gone into possession, the tenant took out a summons for apportionment, with the object of getting the rent which he had agreed to pay reduced under the provisions of the Acts. The county court judge entered into a species of inquiry as to what would have been the rent in the year 1914 which a hypothetical tenant would have paid for the premises. He made a hypothetical rent for the landlord, divided it into halves, and fixed the standard rent of the new premises as the half of the hypothetical rent. An appeal is brought to this court, alleging that there was no jurisdiction under the Act for the county court judge to make any such apportionment at all, and, in my judgment, that is correct.

From the year 1905 the house had been let on a building lease at a peppercorn rent, increasing ultimately to £8 10s., a ground rent. The lessee of the house lived in it, and in 1921 the landlord bought the house for £1,030, as a single house, and lived in it himself. In January, 1923, he made some structural alterations, divided the house into what undisputably are two self-contained flats, and let the upper one at £2 a week. The tenant, having gone in, desired to have the rent reduced by obtaining an apportionment. The argument on behalf of the tenant was that he was entitled to look into the value of this house, and, as it was not disputed practically that the premises let were just about one-half, it is said he was entitled to pay just half the rent which a tenant would have paid in 1914. The argument of the landlord is that, though there are on the decisions the widest powers of fixing by apportionment what the Irish used to call a "fair" rent, this is a case which is not touched by the Act, and there can be no apportionment. I forbear to go into the history of apportionment. The law as to it has been finally settled by *Sutton* v. *Begley* (1). Views differed before that as to the exact circumstances in which an apportionment could be made, but that case settled the law as to the circumstances in which an apportionment may be made, and we are bound by it. In that case a house had been let at a rent which was outside the restrictions of the Act and had been divided, and it was held that, notwithstanding the fact that the original property was outside the Act, yet, if it was sublet in portions, one could look at what was in fact the total rack-rent at the time when the Act came into force, apportion what was the proper rent, having regard to the rack-rent of the whole, and fix an apportionment, a fair rent of the premises. It was argued on behalf of the respondent in this case, that when there was no actual rack-rent one can fix it by having a general inquiry as to value.

In my judgment, the contention of the landlord in the present case is correct. I do not propose to refer to any other cases. The whole matter depends upon s. 12 of the Act of 1920—s. 12 (1) (a), s. 12 (3), and s. 12 (7). Section 12 (1) (a) [repealed by Rent Act, 1957, s. 1 (1) of which lays down a new basis for rents in cases of protected tenancies] provides:

> "The expression 'standard rent' means the rent at which the dwelling-house was let on Aug. 3, 1914, or, where the dwelling-house was not let on that date, the rent at which it was last let before that date, or, in the case of a dwelling-house which was first let after the said Aug. 3, the rent at which it was first let; Provided that, in the case of any dwelling-house let at a progressive rent payable under a tenancy agreement or lease, the maximum rent payable under such agreement or lease shall be the standard rent; and, where at the date by reference to which the standard rent is calculated, the rent was less than the rateable value, the rateable value at such date shall be the standard rent."

By s. 12 (7):

> "Where the rent payable in respect of any tenancy of any dwelling-house is less than two-thirds of the rateable value thereof, this Act shall not apply to that rent or tenancy. . . ."

Those words are very strong, and where there was a rent or a letting such as is

described in the present case, the subsection goes on to provide that "this Act shall apply . . . as if no such tenancy existed or ever had existed." [These last words were repealed by the Rent Act, 1957.] It is noticeable that the word "tenancy" is used there. Section 12 (3), which is the provision under which this application for apportionment of rent was made, runs as follows:

> "Where, for the purpose of determining the [standard rent or] rateable value of any dwelling-house to which this Act applies, it is necessary to apportion the [rent at the date in relation to which the standard rent is to be fixed, or the] rateable value of the property in which that dwelling-house is comprised, the county court may, on application by either party, make such apportionment as seems just, and the decision of the court as to the amount to be apportioned to the dwelling-house shall be final and conclusive." [The words in square brackets were repealed by the Rent Act, 1957.]

It is suggested that that gives the county court judge an absolute right to look into all the circumstances and fix a fair rent. I am unable so to read the section. It seems clear to me that one has to determine the standard rent on this application, that is, the standard rent of the upper portion of the premises. For the section to apply at all it must be necessary to apportion the rent in relation to which the standard rent is to be fixed, that is, to apportion the rent on what SALTER, J., has, I think, properly described as the "comprising property." There is jurisdiction to deal with this only when one finds the rent of a complete comprising property. When one looks at s. 12 (7) in the circumstances of this case, there never was a rent at all or a letting of the comprising property so as to come under any of the provisions of the Act. The result is that it was not necessary to apportion; the county court judge could not do it; there was no previous letting at all of the comprising property which he was entitled to consider. It seems to follow, as regards this upper portion of the premises, that the first letting of it was a letting at £2 a week, which, in my judgment, is the standard rent of the property. That being the first rent, there is no necessity to apportion at all. On these grounds, it seems to me, the objection which was taken that there was no right to apportion was properly taken, the county court judge had no right to apportion, and this appeal must be allowed.

SALTER, J.—I am of the same opinion. I think this is a novel and difficult point. I am sure that the decision of the learned judge is wrong, but I am not as clear as I should like to be as to what the proper standard rent of the tenant's dwelling-house is. The tenant comes to the county court judge to have the standard rent of his dwelling-house fixed, and invites the judge to fix it by means of apportionment of the rent of the property in which his dwelling-house is placed. His dwelling-house is the upper part, and in this case the comprising property is the whole house. He is entitled to have the standard rent of his dwelling-house fixed, and he is entitled to have it fixed by apportionment, if he can show that apportionment is necessary. Reference must, therefore, be made first to s. 12 (1) (a), which is the general rule for ascertaining standard rents, and that subsection provides, in effect, that one has to look first at the actual rent of the dwelling-house—that is, of course, the tenant's dwelling-house, the upper part—on Aug. 3, 1914. If the dwelling-house was let on that date, the rent at which it was then let is the standard rent. No further inquiry is possible. If at that date it was not let separately, but as part of the whole, its standard rent must be ascertained by apportionment of the whole. If, and only if, the dwelling-house was not let on that date, one has to look and see next what the rent was at which it was last let before that date, and if one fails again to find there any letting before that date, then, in the case of a dwelling-house which was first let after Aug. 3, 1914, one has to look and see the rent at which it was first let. The rent to look at is the rent on Aug. 3, 1914; if not, the rent next before; and if not that, the rent next after. Here there was the suggestion that there had been such substantial structural alterations that it was necessary for the judge to say that this particular

part was first let when it was let separately on Jan. 15, 1923. The learned judge declined so to hold, and I think the evidence warranted him in so finding. Therefore I return to s. 12 (1) (a). He had to ask himself: Was this upper part let as a part of a whole on Aug. 3, 1914? The answer to that question is: Yes. There was in force at that date a lease of the property in which the dwelling-house was comprised at a small ground rent of about £8 a year. Therefore, the upper part was then let, and presumably the standard rent must be ascertained by reference to the actual rent of the comprising property at that date. That brings us to s. 12 (7), and it is argued that, in consequence of the provision of that subsection, it was the duty of the learned judge to ignore the lease of the whole at a ground rent for ninety-nine years from 1905. The words of the subsection are very strong:

> "Where the rent payable in respect of any tenancy of any dwelling-house is less than two-thirds of the rateable value thereof, this Act shall not apply to that rent or tenancy . . . and this Act shall apply in respect of such dwelling-house as if no such tenancy existed or ever had existed."

The question is whether that subsection applies to apportionment; whether it applies not only to dwelling-houses which are the subject of tenancy within the Act, but applies also to these cases where the comprising property under s. 12 (3) happens to be a dwelling-house. The comprising property, of course, need not be a dwelling house; it need not be a structure at all. I am inclined to think it might be an interest in chattels. The argument is that it so happens that the comprising property is a dwelling-house, and then sub-s. (7) applies. I entertain grave doubts whether it was intended that s. 12 (7) should be applied to a comprising property under sub-s. (3), but the words of the section are so plain and so emphatic that I feel constrained to read the subsection in its full natural meaning, and, inasmuch as the comprising property is a dwelling-house, I think sub-s. (7) must be applied. The strange result is, that whereas here the standard rent of this upper part is £2 a week, if the comprising property had happened not to be a dwelling-house, the standard rent would have been about £4 a year. Assuming, therefore, that sub-s. (7) does apply, the learned judge had to ask himself whether this upper part was let as part of the whole before Aug. 3, 1914, and he had no evidence of any such letting. Lastly, he had to ask himself whether this upper part had been let as part of a whole at any time after Aug. 3, 1914. Again he found no evidence of any letting. The result is that there is before him no evidence at all of any letting before, and the only letting after is the separate letting of this property on Jan. 15, 1923. The standard rent, therefore, is the actual rent. The learned judge appears to have thought that, as he was bound to disregard the letting at a rack-rent shown by this lease, he must construct an imaginary rack-rent as at Aug. 3, 1914, and he did so, and based the standard rent upon such imaginary rack-rent. But this Act deals with real lettings and real rents and with real rates fixed by authority, not with imaginary rents or lettings. Whatever the correct decision of this case may be, I am quite sure that is the fact, and I agree with my Lord, therefore, that this appeal should be allowed.

Appeal allowed.

Solicitors: *H. T. Nicholson*; *Tatton, Gaskell & Co.*

[*Reported by* T. R. FITZWALTER BUTLER, ESQ., *Barrister-at-Law.*]

A

WARD AND OTHERS *v.* VAN DE LOEFF AND OTHERS BURNYEAT *v.* VAN DE LOEFF AND OTHERS

[HOUSE OF LORDS (Viscount Haldane, L.C., Viscount Cave, Lord Dunedin, Lord Phillimore and Lord Blanesburgh), January 22, 24, March 21, 1924]

B

[Reported [1924] A.C. 653; 93 L.J.Ch. 397; 131 L.T. 292; 40 T.L.R. 493; 68 Sol. Jo. 517]

Perpetuities—Will—Application of rule—Gift to children of brother or sister born after testator's death.

Will—Revocation—Revocation by codicil—Substituted gift invalid—Need to prove testator's intention to revoke even though codicil should fail—Class gift—Ascertainment of class—Time—Date of distribution.

C

By his will, dated May 13, 1915, the testator gave the income of his residuary estate to his wife during her life and after her decease, if there should be no children of his marriage with her, for such of the children of his brothers and sisters as she should appoint, and in default of such appointment, then in equal shares to all the children of his brothers and sisters. By a codicil dated April 23, 1916, the testator declared that the life interest given to his wife by his will should be terminable on her re-marriage unless such re-marriage should be with a natural-born British subject, revoked the power of appointment thereby given to her, and declared that after her death his trustees should stand possessed of the residuary trust funds in trust for all or any of the children or child of his brothers and sisters who should be living at the death of his wife or born at any time afterwards before any one of such children for the time being in existence attained a vested interest, and who, being a son or sons, attained the age of twenty-one years, or, being a daughter or daughters attained that age or married, if more than one, in equal shares. The testator died on May 7, 1916, without issue, his estate consisting of personalty only. The testator's parents were both of the age of sixty-six years when he made his codicil, and both survived the testator. The testator had two brothers and two sisters living at his death, and they had together eight children. At the date of the codicil the youngest brother or sister of the testator was thirty-two years old. On Feb. 4, 1921, the testator's widow married a Dutch subject. On June 28, 1921, the testator's father died. A child of one of the brothers and sisters of the testator was born after the re-marriage of the widow.

D

E

F

G

Held: (i) in considering whether a testamentary gift was void for remoteness the proper course was first to construe the gift without regard to the rule against perpetuities and then to consider whether the gift, as so construed, offended against the rule, and, further, in determining whether the rule was infringed, possible, and not probable or actual, events were to be taken into account; in the present case the testator spoke in the codicil of his brothers and sisters generally, and, on construction of the document, there was no exclusion of other possible brothers and sisters of the whole or half blood who might, in contemplation of law, be born thereafter; accordingly, the class which it was sought to benefit was not one all the members of which were, as a necessary result of the words used, to be ascertained within the period which the law prescribed; and, therefore, the gift in the codicil in favour of children of brothers and sisters was wholly void.

H

I

Per VISCOUNT CAVE: Extrinsic evidence . . . designed to show that the testator must have intended only brothers and sisters who were alive at the time of the codicil . . . that at that time the testator's mother was beyond the age of child-bearing was not admissible.

Observations by LORD BLANESBURGH regarding the stringency of the rule against perpetuities.

(ii) the only revocation of a term in the will expressed in the codicil was

confined to the power of appointment given to the wife and did not extend to the gift to the nephews and nieces; that gift was wholly void, and, in the absence of words in the codicil from which an intention could be attributed to the testator of wholly revoking the trust in the will even though the modification intended by the codicil should fail to take effect, was not effective impliedly to revoke the gift in the will.

(iii) the date at which the class of children was to be ascertained was that of distribution, i.e., the re-marriage of the testator's widow, and children born after that date were excluded.

Notes. Applied: *Re Davies, Thomas* v. *Thomas-Davies*, [1928] Ch. 24; *Re Robinson, Lamb* v. *Robinson*, [1930] All E.R.Rep. 658. Distinguished: *Re Wohlgemuth's Public Trustee v. Wohlgemuth*, [1948] All E.R. 882. Considered: *Re Murray, Murray* v. *Murray*, [1956] 2 All E.R. 353. Referred to: *Re Hawksley's Settlement, Black* v. *Tidy*, [1934] All E.R.Rep 94.

As to the application of the rule against perpetuities, see 25 Halsbury's Laws (2nd Edn.) 123 et seq., and as to the revocation of a will by a codicil, see ibid., vol. 34, pp. 78 et seq. For cases see 37 Digest 92 et seq., and 44 Digest 320 et seq.

Cases referred to:

(1) *Pearks* v. *Moseley, Re Moseley's Trusts* (1880), 5 App. Cas. 714; 50 L.J.Ch. 57; 43 L.T. 449; 29 W.R. 1, H.L.; 37 Digest 68, *98*.

(2) *Dorin* v. *Dorin* (1875), L.R. 7 H.L. 568; 45 L.J.Ch. 652; 33 L.T. 281; 39 J.P. 790; 23 W.R. 570, H.L.; 44 Digest 809, *6616*.

(3) *Higgins* v. *Dawson*, [1902] A.C. 1; 71 L.J.Ch. 132; 85 L.T. 763; 50 W.R. 337, H.L.; 44 Digest 549, *3672*.

(4) *Jee* v. *Audley* (1787), 1 Cox, Eq. Cas. 324; 29 E.R. 1186; 37 Digest 57, *15*.

(5) *Lord Dungannon* v. *Smith* (1846), 12 Cl. & Fin. 546; 10 Jur. 721; 8 E.R. 1523, H.L.; 37 Digest 55, *9*.

(6) *Re Dawson, Johnston* v. *Hill* (1888), 39 Ch.D. 155; 57 L.J.Ch. 1061; 59 L.T. 725; 37 W.R. 51; 37 Digest 93, *295*.

(7) *Onions* v. *Tyrer* (1716), 1 P.Wms. 343; 2 Vern. 741; 24 E.R. 418; sub nom. *Onyons* v. *Tryers*, Prec. Ch. 459; Gilb. Ch. 130, L.C.; 44 Digest 354, *1852*.

(8) *Alexander* v. *Kirkpatrick* (1874), L.R. 2 Sc. & Div. 397, H.L.; 44 Digest 336, *1661*.

(9) *Duguid* v. *Fraser* (1886), 31 Ch.D. 449; 55 L.J.Ch. 285; 54 L.T. 70; 34 W.R. 267; 44 Digest 528, *3449*.

(10) *Morley* v. *Rennoldson, Morley* v. *Linkson* (1843), 2 Hare, 570; 12 L.J.Ch. 372; 1 L.T.O.S. 12; 7 Jur. 938; 67 E.R. 235; 44 Digest 338, *1675*.

(11) *Hill* v. *Crook* (1873), L.R. 6 H.L. 265; 42 L.J.Ch. 702; 22 W.R. 137, H.L.; 44 Digest 223, *476*.

(12) *Roxburghe* v. *Wauchope* (1820), 1 Ross, L.C. 659; 2 Bli. 619, H.L.

(13) *Radcliffe* v. *Roper* (1712), 10 Mod. Rep. 89; 88 E.R. 639; sub nom. *Roper* v. *Radcliffe*, 9 Mod. Rep. 181; on appeal sub nom. *Rooper* v. *Radcliffe* (1714), 5 Bro. Parl. Cas. 360; sub nom. *Roper* v. *Radcliffe*, 9 Mod. Rep. 167; 10 Mod. Rep. 230, H.L.; 44 Digest 335, *1653*.

(14) *Baker* v. *Storey* (1874), 31 L.T. 631; 23 W.R. 147; 44 Digest 335, *1655*.

(15) *Ex parte Earl of Ilchester* (1803), 7 Ves. 348; 32 E.R. 142; 44 Digest 361, *1947*.

(16) *Venkatanarayana Pillai* v. *Subbammal* (1915), L.R. 43 Ind. App. 20; 32 T.L.R. 118, P.C.; 44 Digest 335, *1656*.

(17) *Tupper* v. *Tupper* (1855), 1 K. & J. 665; 26 L.T.O.S. 47; 1 Jur.N.S. 917; 3 W.R. 616; 69 E.R. 627; 44 Digest 363, *1964*.

(18) *Quinn* v. *Butler* (1868), L.R. 6 Eq. 225; 44 Digest 363, *1966*.

(19) *Dixon* v. *Treasury Solicitor*, [1905] P. 42; 74 L.J.P. 33; 92 L.T. 427; 21 T.L.R. 145; 44 Digest 363, *1963*.

(20) *Re Sayer's Trusts* (1868), L.R. 6 Eq. 319; 36 L.J.Ch. 350; 18 L.T. 787; 86 L.J.Ch. 350; 18 L.T. 787; 37 Digest 98, *94*.

(21) *Re Fleetwood, Sidgreaves* v. *Brewer* (1880), 15 Ch.D. 594; 49 L.J.Ch. 512; 29 W.R. 45; 44 Digest 364, *1967*. A

(22) *French's Case* (1587), 1 Roll. Abr. 614; 44 Digest 335, *1652*.

(23) *Re Bernard's Settlement, Bernard* v. *Jones*, [1916] 1 Ch. 552; 85 L.J.Ch. 414; 114 L.T. 654; 60 Sol. Jo. 458; 44 Digest 528, *3448*.

Also referred to in argument: B

Re Eve, Edwards v. *Burns*, [1909] 1 Ch. 796; 78 L.J.Ch. 388; 100 L.T. 874; 44 Digest 812, *6646*.

Re Jeans, Upton v. *Jeans* (1895), 72 L.T. 835; 13 R. 627; 44 Digest 845, *6982*.

Re Pearce, Alliance Assurance Co., Ltd. v. *Francis*, [1914] 1 Ch. 254; 83 L.J.Ch. 266; 110 L.T. 168; 58 Sol. Jo. 197, C.A.; 44 Digest 810, *6627*.

River Wear Comrs. v. *Adamson* (1877), 2 App. Cas. 743; 47 L.J.Q.B. 193; 37 L.T. 543; 42 J.P. 244; 26 W.R. 217; 3 Asp.M.L.C. 521, H.L.; 44 Digest 615, *4417*. C

Appeal from an order of the Court of Appeal (LORD STERNDALE, M.R., and WARRINGTON, L.J.; ATKIN, L.J., dissenting) reported sub nom. *Re Burnyeats' Will Trusts, Burnyeat* v. *Ward*, [1923] 2 Ch. 52, reversing in part a decision of P. O. LAWRENCE, J., reported 128 L.T. 752, on the construction of a codicil to the will of William John Dalzell Burnyeat, dated May 13, 1915, the codicil being dated April 23, 1916. The testator died on May 7, 1916. The facts appear from their Lordships' opinions. D

Jenkins, K.C., and *J. E. Harman* for the nephews and nieces of the testator existing before the re-marriage of the testator's widow.

Greene, K.C., and *Lavington* for a nephew born after the re-marriage of the widow. E

Owen Thompson, K.C., L. F. Potts, and *C. Shebbeare* for the trustees.

Their Lordships took time for consideration.

Mar. 21. The following opinions were read.

LORD HALDANE, L.C.—In these cases the questions which arise for decision were raised, by an originating summons in April, 1922, by John Burnyeat and John Graham, the then trustees of the will and codicil of one William John Dalzell Burnyeat. The will was made on May 13, 1915, and the codicil on April 23, 1916, and the testator died on May 7, 1916. He left surviving him no children, but a father, William Burnyeat, and mother, Sarah Frances Burnyeat. The father was born in 1849, and the mother in the same year. The father died in 1921, having by a will and a codicil left such property as he might inherit as next-of-kin from his son to trustees, who are among the respondents before the House. The testator, William J. D. Burnyeat, whose estate consisted exclusively of personalty, left two brothers and two sisters surviving him. These were alive at his death, and were all upwards of thirty years of age. Each of these brothers and sisters had children living at the testator's death. All of these were then infants. There was one other child of a brother, Philip Ponsonby Burnyeat, who was born after the testator's death and after the re-marriage of his widow, and he is also an infant. The widow of the testator married a Dutch subject after his death, in 1921, and she is now Hildegard Van der Loeff, a party to these appeals. By his will the testator William J. D. Burnyeat left his residuary estate to trustees for conversion and investment and on trust for his wife for life, and after her decease for his children who, being sons, should attain twenty-one, or being daughters attain that age or marry, in equal shares, with conditional institution of their children in the case of death before vesting. In the event of there being no such child, which happened, he gave his wife power to appoint the trust fund among the children of his brothers and sisters, and in default of such appointment the trust fund was to go in equal shares among all the children of his brothers and sisters. About the validity of these trusts no question arises. But it is otherwise with the codicil made by the testator. It was in these terms: F G H I

A "I declare that the life interest given to my said wife by my said will be terminable on her re-marriage unless such re-marriage shall be with a natural-born British subject. I revoke the power of appointment among the children of my brothers and sisters given to my said wife by my said will. And I declare that after her death my trustees shall stand possessed of the residuary trust funds in trust for all or any the children or child of my brothers and B sisters who shall be living at the death of my wife or born at any time afterwards before any one of such children for the time being in existence attains a vested interest and who being a son or sons attain the age of twenty-one or being a daughter or daughters attain that age or marry if more than one, in equal shares."

C On the construction of the will and codicil, two questions arise. The first is whether the limitation in favour of children, contained in the concluding words of the codicil, is valid, having regard to the rule against perpetuities. The second is whether, if invalid, this new limitation and the wording of the codicil have been at all events efficacious as expressing a revocation of his bequest to children contained in the will. If the limitation to children in the codicil be invalid, and that in the will has not been revoked, then a further question arises, whether the gift D in the will operated in favour of any children of the brothers and sisters who were not born until after the testator's death. Philip Ponsonby Burnyeat, who is one of the parties to these appeals, was a son of the testator's brother, Myles Fleming Burnyeat, but was not born until after the testator's death and the re-marriage of his widow. It is argued against his claim that the life interest of the widow was E effectively determined by the provision in the codicil, and that the class of children to take was finally ascertained at that date as the time of distribution. If this be so, Philip Ponsonby Burnyeat is excluded. P. O. Lawrence, J., was the judge before whom this summons came in the first instance. He decided that the gift in the codicil in favour of the children of the testator's brothers and sisters was so framed as to be void for perpetuity. He held further that the codicil F operated to revoke the residuary gift in the will only so far as the substituted provision in the codicil was valid, and that the gift in the will in favour of the children, therefore, took effect, but merely in favour of such of the children as were born before the re-marriage of the testator's widow. Philip Ponsonby Burnyeat was thus excluded. A majority of the Court of Appeal (Lord Sterndale, M.R., and Warrington, L.J.) agreed with him in holding that the gift in the codicil in favour of the children of brothers and sisters was void for perpetuity, but G held that the codicil revoked the gift in their favour contained in the will, and that there was an intestacy as regarded the residuary estate of the testator as from the re-marriage of his widow. Atkin, L.J., dissented, holding that the testator must be taken, as matter of construction, to have been referring in his codicil only to the brothers and sisters of the whole blood in existence when he died, just as if he had designated them individually. The provision in the codicil was, therefore, H valid, and that in the will had been revoked.

The principle to be applied in construing instruments for the purpose of ascertaining whether the direction which they contain infringes the rule against perpetuity is a well-settled one. It was repeated with emphasis in this House in *Pearks* v. *Moseley* (1) where it was laid down that, in construing the words, the J effect of the rule must in the first instance be left out of sight, and then, having in this way defined the intention expressed, the court had to test its validity by applying the rule to the meaning thus ascertained. It is only, therefore, if, as matter of construction, the words in the codicil, taken in the natural sense in which the testator used them, do not violate the rule, that they can be regarded as giving a valid direction. Looking at the language of the testator here, I am wholly unable to read it as not postponing the ascertainment of possible members of the class beyond the period of a life in being and twenty-one years afterwards. No doubt, if we were warranted in interpreting the testator as having referred

only to the children of those of his brothers and sisters who were alive at his death, we might read his language in a way which would satisfy the law. But for so restricting the natural meaning of his words, there is no justification in the language used in the context. He speaks of his brothers and sisters generally, and there is no expression which excludes the children of other possible brothers and sisters of the whole or half blood who might, in contemplation of law, be born. He has nowhere indicated an intention that his words are not to be construed in this, their natural meaning. I think, therefore, that the class to be benefited was not one all the members of which were, as a necessary result of the words used, to be ascertained within the period which the law prescribes, and that the gift in the codicil in favour of children of brothers and sisters is wholly void.

The next question is whether the codicil, although inoperative to this extent, was yet operative to revoke the gift to children of brothers and sisters contained in the will. After consideration, I have come to the conclusion that it was not so operative. There is, indeed, a revocation expressed in the codicil, but it is confined to the power of appointment given to the wife. It does not extend to what follows. That is, in terms, an attempt at a substantive and independent gift, and, as it is wholly void, I think, differing on this point from the Court of Appeal, that the provision in the will stands undisturbed. There is nothing else in the codicil which purports to affect it. It can make no difference that the class of children is a new and different class, if the constitution of the new class is wholly inoperative in law. If it fails, then unless an independent and valid intention to revoke has been independently of it expressed, no revocation can take place. There is no such independent expression of intention here. The only other point is at what period the class of children of brothers and sisters who took under the will is to be ascertained. I think that, according to a well-known rule, the period is that of distribution; in other words, taking the valid alteration in the codicil into account, the re-marriage of the widow with a foreign subject. Philip Ponsonby Burnyeat is thus excluded. The result is that the judgment of LAWRENCE, J., should be restored. As the difficulty has been entirely caused by the testator himself, I think that the costs here and below should be taxed as between solicitor and client and paid out of the residuary estate.

VISCOUNT CAVE.—These appeals raise two questions relating to the construction and effect of the will and codicil of the late William John Dalzell Burnyeat, namely: (i) Was the gift of the testator's residuary estate contained in the codicil in favour of the children of his brothers and sisters therein described void as infringing the rule against perpetuities? and (ii) if so, did the gift in the will of the same residuary estate in favour of the children of his brothers and sisters take effect? It is not disputed that, in the latter event, the gift was accelerated and took effect on the re-marriage of the testator's widow.

In dealing with the first question, it is necessary to bear in mind two principles which have been established beyond dispute. The first is that, in considering whether a testamentary gift is void for remoteness, the proper course is first to construe the gift without regard to the rule against perpetuities, and then, to consider whether the gift, as so construed, offends against the rule. The second is that, in determining whether the rule is infringed, possible, and not probable or actual, events are to be taken into account. The trust declared by the codicil is in the following terms:

> ". . . in trust for all or any the children or child of my brothers and sisters who shall be living at the death of my wife or born at any time afterwards before any one of such children for the time being in existence obtains a vested interest and who being a son or sons attain the age of twenty-one years or being a daughter or daughters attain that age or marry if more than one in equal shares."

There can be no doubt that, if in this gift the expression "my brothers and sisters" is construed in the ordinary sense as including any brother or sister of the testator

who may be born after the testator's death, the gift must, on the principles above stated, be held to be void for remoteness, for such a brother or sister would not be a life in being at the testator's death, and accordingly the class of nephews and nieces to take under the gift might conceivably not be ascertained within the limits of a life in being and twenty-one years afterwards.

But it is argued on behalf of the appellants that, having regard to the circumstances existing at the date of the codicil and known to the testator, the brothers and sisters referred to are not the whole class of brothers and sisters born or to be born, but only those born before the date of the codicil. At that date the father and mother of the testator were both over sixty-six years of age, and of the testator's brothers and sisters then born, of whom there were four, the youngest was aged about thirty-two; and in these circumstances it is urged that the testator must have known that no brother or sister could be born to him in the future, and, therefore, must have intended to refer to his brothers and sisters already born, and to no others I think this argument inadmissible, and for more reasons than one. In the first place, it does not appear to me that evidence of extrinsic facts can be used for the purpose for which the appellants desire to use it. No doubt a court, called upon to construe a will, is entitled to know the facts which the testator knew, and to use that knowledge for the purpose of resolving doubts as to the identity of persons or things mentioned in the will or of assigning a meaning to expressions which otherwise would have no "adequate or intelligible sense": per LORD HATHERLEY in *Dorin* v. *Dorin* (2) (L.R. 7 H.L. at p. 575). But it is quite another thing to say that when a testator has used an unambiguous expression such as "my brothers and sisters," extrinsic evidence can be adduced to show that he must have intended the expression to refer to brothers and sisters already born. That would be to use the facts, not as evidence of identity, but as evidence of intention; and such a use of them would be contrary to settled principles of construction. In *Higgins* v. *Dawson* (3) LORD DAVEY quotes with approval ([1902] A.C. at p. 10) the reasoning of RIGBY, L.J., in the Court of Appeal, who said ([1900] 2 Ch. at pp. 763, 764):

> "The first point which I think it convenient to notice is the fundamental distinction between evidence simply explanatory of the words (of the will) themselves, and evidence sought to be applied to prove intention itself as an independent fact,"

and added that a will

> "is only ambiguous, when, after full consideration, it is determined judicially that no interpretation can be given to it."

That is to say, as LORD DAVEY explained ([1902] A.C. at p. 10):

> "without some explanation of the expressions used in it which are descriptive of the subjects of the bequests or of the persons to whom the bequests are made."

It has been urged in this case that the evidence is referred to, not for the purpose of showing intention, but for the purpose of identifying the persons intended. I find myself unable to accept that contention. The phrase describes a class general in its extent and clear in its description, and the evidence sought to be admitted is to show that the gift was intended to be limited to four persons and was not, in truth, a class gift at all. This is to show that the testator intended something different from the ordinary meaning of the words which he used.

But even if some extrinsic evidence were admissible for the purpose desired, I think it clear that, according to the established rules of our courts, the particular evidence relied upon—namely, the fact that the testator's mother was past the age of child-bearing—is inadmissible for that purpose. The rule was laid down at least as long ago as in *Jee* v. *Audley* (4), where LORD KENYON, M.R., said (1 Cox, Eq. Cas. at p. 325):

"I am desired to do in this case something which I do not feel myself at liberty to do, namely, to suppose it is impossible for persons in so advanced an age as John and Elizabeth Jee to have children; but, if this can be done in one case it may in another, and it is a very dangerous experiment and introductive of the greatest inconvenience to give a latitude to such sort of conjecture."

This ruling has been followed ever since; and, if I may borrow an expression used by LORD KENYON in the same case, I should say that the ruling has grown reverend by age, and is not now to be broken in upon (1 Cox, Eq. Cas. at p. 325). The rule was treated as settled by this House in *Lord Dungannon* v. *Smith* (5), where LORD BROUGHAM, using somewhat extravagant language, described the judgment in *Jee* v. *Audley* (4) as "one of the corner stones of the law." (12 Cl. & Fin. at p. 631); and was again applied in *Re Dawson, Johnston* v. *Hill* (6), where CHITTY, J., in a careful judgment, explained the rule, and reinforced it by a reference to COKE UPON LITTLETON, vol. I, s. 53, 40b, where COKE said that, in considering the right to dower, the possibility of issue would be assumed "albeit the wife be a hundred years old." The case last cited completely covers the present case, and it would not be possible to decide this point in favour of the appellants without overruling the judgment of CHITTY, J. I think that it is far too late either to question the principle or to endeavour to whittle it away; and it is fatal to the appellants' argument. In coming to this conclusion, I have set aside the consideration that the testator's father might possibly have survived his wife and married again, and might have had issue by such re-marriage. As at present advised, I am disposed to think that such a child, being a brother or sister of the half-blood, would come within the expression "my brothers and sisters" in the testator's will, and, accordingly, that the children of any such child would take under the terms of the codicil. But this point was not much argued, and I prefer to rest my decision upon the wider ground already stated.

I conclude, therefore, that the gift in the codicil is void; and it remains to consider whether the gift in the will fails also. In my opinion, it does not. The codicil, while it expressly revokes the power of appointment given to the testator's wife by the will, contains no words of revocation affecting the gift in default of appointment. No doubt, if the gift in the codicil had taken effect, it would have superseded, and to that extent would have impliedly revoked, the gift in the will; but the implication of revocation is found only in the terms of the substituted trust, and if that trust falls to the ground, the implied revocation falls with it. The substituted gift, like the original, is in favour of nephews and nieces of the testator, although the particular class of nephews and nieces who are to take is modified; and I cannot, on the words of this codicil, attribute to the testator an intention of wholly revoking the trust in the will, even though the modification intended by the codicil should fail to take effect. The authority for this view is not to be found in *Onions* v. *Tyrer* (7), and cases of that class, where even express words of revocation failed to take effect, but rather in cases like *Alexander* v. *Kirkpatrick* (8), *Duguid* v. *Fraser* (9) and *Morley* v. *Rennoldson* (10), where there were no words of revocation; and the principle could hardly be more clearly stated than in the words of LORD HATHERLEY in *Alexander* v. *Kirkpatrick* (8), where he said (L.R. 2 Sc. & Div. at p. 404):

"The court feels itself in this position, according to the case cited by Mr. Pearson (*Onions* v. *Tyrer* (7)), that it can discover an intention to revoke only in the altered disposition which is attempted to be made by the second instrument; and if that disposition fails, then also the court must fail to perceive an indication of an intention to revoke the first, the court not being able to find that there is in truth any inconsistent disposition at all in consequence of that which was intended to be such having wholly failed to take effect."

For the above reasons I am of opinion that the judgment of the Court of Appeal should be set aside, except as to costs, and the judgment of LAWRENCE, J., restored.

In the special circumstances of the case, I agree that the costs of all parties of these appeals as between solicitor and client should be ordered to be paid out of the testator's estate.

LORD DUNEDIN.—The main question in this case seems to me to be determined by what was said in this House by LORD CAIRNS in *Hill* v. *Crook* (11) and *Dorin* v. *Dorin* (2). In the former of these cases he laid down that when one wishes to vary the meaning of a word denoting a class of relations from what the primâ facie meaning of that word is—he actually said it of the words "legitimate children," but the application is obviously wider—there are two classes of cases only where the primary signification can be departed from. The one is where it is impossible, in the circumstances, that any person indicated by the primâ facie meaning can take under the bequest. That is not the case here, because probably in law, although scarcely in fact, the idea of other brothers and sisters of the testator coming into existence could not be excluded, but in any case the half-brother or sister was a real possibility. The second class of cases is where one finds something in the will itself, that is to say, in the expressions used in the will, to exclude the primâ facie interpretation. That also seems to me to be absent. The testator has used the words "brother and sister" without explanation or glossary, and I am afraid that he must take the consequences. On the first point, therefore, I agree with your Lordships.

The second question is whether there was a revocation of the settlement of the residue by the will in respect of the execution of the codicil. I confess that I do not understand what the late Master of the Rolls meant when he said that no case had been cited to him where, there being a gift in the codicil inconsistent with that in the will, and that inconsistent gift having failed, it had been held that the gift in the will still existed. In the face of *Alexander* v. *Kirkpatrick* (8), not to mention others, it is impossible, I think, to justify this observation. WARRINGTON, L.J., goes on to say that the result is in accordance with justice, because he says that if the testator had known that his codicil would not receive effect, who can tell but that he would have made a different modification equally destructive of the arrangements in the will. With great deference, this seems to me to beg the question, for it assumes that the first action of the testator was to revoke what had been done in the will. The mere fact of writing a codicil does not revoke the prior will. The codicil may contain words of revocation, and, if so, they will receive effect. But if there are no such words, the revocation can only be found if it is necessarily implied, and it will be implied, if what is done brings into being a position inconsistent with what was arranged under the will. If, therefore, nothing is done which creates such a position, then there is no implied revocation, and ex hypothesi there is no direct revocation. It was, however, urged on behalf of the respondents that *Kirkpatrick's Case* (8) depended on the fact that the inefficiency of the new settlement was due to the non-efficiency of the words of conveyance, and that a different result would follow where the inefficiency depends on some inability on the part of the taker, or some incompetence in the interest created. I do not think that this is a sound distinction. It would be curious if it were so. The question obviously depends on the intention of the testator, as gathered from the words which he has used, and it is difficult to understand how that intention can be varied accordingly as the inefficiency of the new arrangement depends on whether he has not legally carried out his intention by the words which he has used, or whether the law has made impossible the thing which he was trying to do. But, as a matter of fact, there were many cases quoted before their Lordships who decided *Kirkpatrick's Case* (8) which give instances of the inefficiency being of the latter sort.

By the law of Scotland a disposition of heritable property, if made to the prejudice of the heir within forty days of death, and if the disponer had not been to kirk or market, could be set aside by the heir. But if there was an anterior disposition made before forty days from death equally to the prejudice of the heir,

although made in favour of other persons than the person favoured by the death-bed disposition, then it was held that the heir's title failed, for it was useless for him to get rid of one disposition merely to set up another equally prejudicial to him. It, therefore, became of great moment for the heir to find, if he could, a revocation of the anterior disposition in the death-bed disposition. It was first found, in a case which reached the House of Lords, that where there was an express revocation in the death-bed deed, that was quite good, although the disposition in the death-bed deed could not receive effect if challenged by the heir. But when it was afterwards sought to extend this doctrine to a revocation to be implied only from the inconsistency of the two dispositions, it was held that this attempt could not be sanctioned. *Roxburghe* v. *Wauchope* (12) came also to the House of Lords, and LORD ELDON'S judgment is so much to the point, and is expressed with a brevity not always to be found in that very learned Lord Chancellor's pronouncements, that I venture to quote it at length (2 Bli. at p. 654):

> "As to the question of implied revocation; if we are to act on the maxim of stare decisis the judgment cannot be disturbed. The deed in liege poustie reserves a power of revocation; by making another disposition under the authority of the power, it must be supposed that the disponer intended to do something effectual; and it cannot be implied that by the exercise of the power he meant to revoke it."

It is true that the law of death-bed is peculiar to the law of Scotland, but the principle underlying its application to this question is not peculiarly Scottish. It should be observed that the death-bed disposition was not, as in *Kirkpatrick's Case* (8), ineffectual to convey; it was a perfectly good deed, but liable to be reduced by the heir-at-law.

While I do not think that the law has ever varied in Scotland, there were conflicting decisions in England. There is a very short note of such a point in the old case of *Roper* v. *Radcliffe* (13). There a codicil had been executed which was subject to an attack under the disabling law applicable to Papists. The decision of the court was that the codicil was good, but they gave their opinion that, in any view, the codicil would act as a revocation in respect of the inconsistency of the gift. Appeal was taken to the House of Lords and the latter point was not appealed against. On this appeal the judgment was reversed on the merits, and then the first point stood without a decision of the Lords upon it. SIR GEORGE JESSEL, M.R., decided in the same way in *Baker* v. *Storey* (14). But the authority the other way is more cogent. In 1802, in *Ex parte Earl of Ilchester* (15), it was held that a testamentary appointment of a guardian was not revoked by a subsequent testamentary appointment inconsistent with it, but not executed according to the statute. *Onions* v. *Tyrer* (7) went further—further, I think, than is justified—for there in the second devise, which was void for want of subscription of witnesses in the presence of the testator, there was an expressed revocation, and yet it was held not to operate as such. But the case of *Alexander* v. *Kirkpatrick* (8), although a Scottish case, dealt with the whole subject, and it is worth while to see how the noble Lords expressed themselves. LORD CAIRNS used the words "valid or effectual." It is clear that "valid" covers the case then in point, but "effectual" goes beyond it and touches all cases where practical inefficiency is the result. LORD CHELMSFORD puts the matter very clearly (L.R. 2 Sc. & Div. at p. 403):

> "Where a subsequent deed, assuming the power exists to revoke or alter the former one, contains dispositions wholly different from the prior one without expressed words of revocation, as the two dispositions cannot stand together, the latter deed must prevail. This on the ground, not of revocation, but of inconsistent provisions. Viewed in this light, the question appears to me to be very clear. The parties meant to vary and depart from the dispositions in the former deed by substituting other and different ones, but they failed to execute their intention in the only way in which it could be really and

A effectually done. Then the proposed substituted provisions never taking effect, nothing exists to interfere with the former deed."

Lord Hatherley, although he explains the matter as belonging to the law of Scotland, goes on to say (L.R. 2 Sc. & Div. at p. 404):

"The court feels itself in this position, according to the case cited by Mr. B Pearson, that it can discover an intention to revoke only in the altered disposition which is intended to be made by the second instrument; and if that disposition fails, then also the court must fail to perceive an indication of an intention to revoke the first, the court not being able to find that there is in truth any inconsistent disposition at all in consequence of that which was intended to be such having wholly failed to take effect."

C The cases cited by Mr. Pearson were *Onions v. Tyrer* (7) and *Ex parte Earl of Ilchester* (15), and that this case is to be taken as a general rule, not confined to the class of cases where the failure is due to inefficacy of words of conveyance, but extends to those where there is inability in the disponee to take, is shown by a recent case in the Privy Council—*Venkatanarayana Pillai* v. *Subbammal* (16) (L.R. 43 Ind. App. at p. 25)—where Lord Wrenbury again used the words "valid or D effectual."

I may summarise what I consider to be the law thus. If when a subject has been disposed of in a will, and the same subject is again disposed of, either in a subsequent will or in a codicil, then if you can find, apart from the description of the subject, words expressly or impliedly effecting revocation, that revocation will stand, whatever the fate of the subsequent disposition; but if the only revocation E is that which is to be gathered from the inconsistency of the subsequent disposition with the earlier one, then if the second disposition fails from any reason to be efficacious, there will be no revocation. I, therefore, think that the judgment of Lawrence, J., was right and should be restored.

LORD PHILLIMORE.—Upon the first question, which is common to both sets F of appellants, I am in agreement with your Lordships in affirming the conclusion arrived at by Lawrence, J., and the majority of the Court of Appeal. I have read over again the dissentient judgment of Atkin, L.J., and I am not convinced by it.

Three points are, I think, taken upon behalf of the appellants. First, they say that when the testator spoke of the children of his brothers and sisters, he must be taken to have meant, and meant only, the children of the two brothers and of G the two sisters who were then in being, and whom he knew. I find no warrant for so limiting the words, which are general in their nature. Secondly, it is said that, having regard to the age of his parents, both of whom were living, he could not be taken to expect, and, indeed, there could not be any further brothers or sisters. I doubt whether this is an admissible consideration. I am inclined to think that, in dealing with the limitations of property by an instrument, the law H considers persons in the abstract and not the concrete flesh and blood. However that may be, there was in this case no physical impossibility in there being further brothers and sisters of the half-blood, and the words of the testator, according to the accepted rules of construction, are wide enough to include such brothers and sisters. Thirdly, stress was laid upon provisions in the codicil restricting the children of brothers and sisters who were to take to such as should be born before I any of those in existence attained twenty-one or married, and it was said that, to introduce any such child even of the half-blood, it would be necessary to have a holocaust of the seven now living children. As to this, the best that can be said is that which was said by Atkin, L.J. ([1923] 2 Ch. at p. 72):

"That seems to me to be a matter which no business person could possibly have contemplated in view of these circumstances."

In applying the rule against perpetuities to the limitations in any instrument of conveyance, it is well established that if, in any possible event, the period during which property would be tied up exceeds the period allowed by law, the disposition

becomes invalid. The rule against perpetuities is, as I apprehend, judge-made law; and the courts have adopted a somewhat peculiar attitude in this matter. They have treated attempts to tie up property as actions only excusable in so far as they do not transgress the legal limits, and any transgression as something to which a penalty is to be applied. Inasmuch, therefore, as it would be possible, even if highly improbable, that the property might be under the disposition of the codicil tied up for an undue length of time, these dispositions become wholly invalid.

I now approach the point on which the decision of LAWRENCE, J., was favourable to the seven appellants on the first appeal, but was reversed by the unanimous judgment of the Court of Appeal. This point is an interesting one, and of some delicacy and difficulty. These appellants say that, although the dispositions in the codicil would, if they could stand, supersede the provisions in the will, yet inasmuch as they cannot stand, the provisions in the will are not superseded, and these appellants can take the benefit of them. That there is a doctrine of dependent relative revocation is not to be doubted. I say that it is not to be doubted, but after reading again the judgment of the Court of Appeal, it appears to be a doctrine to which their Lordships have only rendered lip-service. On this question a number of cases have been cited to your Lordships. I will begin with *Onions* v. *Tyrer* (7), because it is a simple case. At that time, according to the law regulating devises of land by will, a nicety was required in the attestation of a will devising land which was not required for a will merely revoking a devise. In consequence, where a testator had made a good first will devising land, and a second will in terms revoking that devise and substituting another, differing, it is true, rather in machinery than in substance, and this second will was sufficiently executed for revoking purposes, but not sufficiently for devising purposes, the court held that the revocation was conditional only, made in order to let in the new arrangement, and that, as the new arrangement could not stand, the revocation might be considered as conditional only and disregarded, and so the first will could stand. The decision in *Alexander* v. *Kirkpatrick* (8), turning upon a point of Scottish conveyancing, maintains the same principle. *Ex parte Earl of Ilchester* (15) seems to be to the same effect.

Roper v. *Radcliffe* (13) has been supposed to lay down some limitation of this doctrine. It is suggested that this case shows that dependent relative revocation only applies where the second instrument fails from defect of form, and not where it fails from defect in the capacity of the person who is to be benefited by the second instrument. I shall have, in a moment, to discuss this supposed principle; but I will first devote some consideration to *Roper* v. *Radcliffe* (13). I have pursued the case through such reports as are available. I have also looked into the LORDS' JOURNALS. By an Act then in force (11 & 12 Will. 3, c. 4) Papists were disabled, generally speaking, from taking land by will. The testator, one Roper, having conveyed his lands to the uses of his will, by his will devised them to four persons, whom he named as his executors, upon trust to sell and to hold the proceeds for themselves and their heirs. Two of these executors were Roman Catholics, and two were Protestants. By codicil he altered the devise, and devised the lands to the Roman Catholic executors only. They filed a bill claiming the property, to which the heir-at-law and the two Protestant executors were made defendants. All the defendants set up the statute, the heir claiming as upon an intestacy, and the two Protestant executors treating the codicil as ineffective and claiming under the will, contending that the devise to the four must be deemed to be a devise to the two, the disabled executors being treated as if they were non-existent. In addition to making this case in their answer, they set it up also in a cross bill. The Lord Chancellor, who was specially assisted by several judges, decided in favour of the Roman Catholic executors, principally on the ground that the land was to be sold, and the proceeds of land were not like land and could well be bequeathed, as personal estate could be bequeathed, to Roman Catholics. Naturally, if this view was correct, the codicil was good, and there was no question

of dependent relative revocation, and, therefore, the case of the Protestant executors failed. It was no doubt observed that in any case it would not have succeeded, as the codicil had absolutely revoked the devise contained in the will. But this observation must have been an obiter dictum. An appeal was taken on behalf of the heir to the House of Lords, and after the judges had given their opinions—six in favour of the heir and five against him—the judgment of the Lord Chancellor is reported to have been reversed by a large majority. It is interesting to notice that, according to the Lords' Journals, the sitting of the day was wholly given to judicial business, and the presence of a large number of Lords, spiritual and temporal, is recorded. The report in 10 Modern, at p. 233, says that, at the Bar of the House, counsel for the heir and counsel for the Roman Catholic executors agreed that no good case could be made on behalf of the two Protestant executors who took under the will, as the codicil had revoked the devise in the will; but these executors were not parties to the appeal, and brought no separate appeal of their own, and the decision against them rests upon the decree of the Lord Chancellor. The statement of the terms of the will and the codicil is so meagre that it seems to me difficult to draw any certain inference from this case. There may well have been words showing an absolute and unconditional intention to revoke the original devise. Moreover, the devise in both instruments was almost certainly a devise to trustees, and not to beneficiaries, and there must have been some secret trust, probably for some purpose which in the then state of the law was forbidden to Roman Catholics, and this being so, if the decision in favour of the two Roman Catholic executors could not stand, it was not likely that the alternative devise would be allowed to take effect. I have dealt with this case at some length, because it seems to me on the whole that which weighs most heavily against the seven appellants.

In *Tupper* v. *Tupper* (17) and *Quinn* v. *Butler* (18) the codicil contained express words revoking the bequest of the will, and in each case the court came to the conclusion, upon the construction of the whole document, that, whether the codicil could stand or not, the testator intended to annul the previous disposition which he had made in his will. This is a view which, as I apprehend, it is always open to a court of construction to take. I cannot, however, assent to the second rule stated by Mr. Jarman in his work on Wills. He states his rule in the following words (vol. 1, 6th Edn., pp. 169, 170):

> "if the second devise fail, not from the infirmity of the instrument, but from the incapacity of the devisee, the prior devise is revoked."

Great as is the authority of the writer, I would rather subscribe to the criticism of Mr. Theobald in his work on Wills. He says (7th Edn., pp. 746, 747):

> "But this is a mere distinction of fact and not of principle. It may even be doubted whether it reconciles the cases in fact."

In truth, the cases where, to use the euphemistic language of Lord Romilly, M.R., in *Quinn* v. *Butler* (18), "there has been a defective execution of the second instrument" are a fortiori cases. An instrument defectively executed is no instrument. It is but a written memorandum of intentions not carried into effect; and even if it be an instrument valid for some purposes of destruction, as in *Onions* v. *Tyrer* (7) or *Alexander* v. *Kirkpatrick* (8), the constructive part takes no higher position than that of a memorandum. In such cases the court has made a wide stride in order to effectuate what it believed to be the intention of the testator, when it has inferred from an invalid document that a valid revocation was intended merely to express a preference, and was not meant for an absolute supersession. Possibly the extreme was reached when, in certain cases in the Court of Probate, a will, destroyed animo revocandi, has nevertheless been admitted by a copy to probate, on oral evidence that it was only destroyed by the testator in order to make room for a later will which, somehow or other, he never found time to make: see *Dixon* v. *Treasury Solicitor* (19), and cases there cited. It is a much less stretch for the court of construction to take two valid instruments and piece them

together, and, on finding that there is an invalid bequest in the second instrument, to look at all the terms of both documents and determine whether the revocation, explicit or implied, in the second instrument, was intended to take away the bequest in any event from the legatee under the will or merely to give effect to a preference of the legatee under the codicil over the legatee under the will. When, as in *Onions* v. *Tyrer* (7), or not quite so closely in the present case, the substituted bequest is the benefiting of the same individuals by another machinery, this may be a strong reason for the conclusion that the revocation was dependent and conditional. I am at one with your Lordships in holding that this appeal should be allowed.

LORD BLANESBURGH.—I, too, have arrived at the same conclusions as the rest of your Lordships. I am of opinion that the ultimate gift of residue contained in this testator's codicil is void as transgressing the rule against perpetuities, and I think that it is also inoperative to revoke those residuary dispositions of his will which rank subsequent to the interest thereby given to his widow. We have in this case an extreme, but by no means uncommon illustration of the stringency—I might even describe it as the penal character—of this rule. At no time was there here any practical possibility that a perpetuity could eventuate as a result of the complete fulfilment of the terms of the gift in question; while, by the time any contest as to the validity of the gift arose, it had become, by reason of the death of the testator's father, inconceivable that any infraction of the rule could be involved in the gift. If we consider matters as they stood at the testator's death, which is, of course, the really relevant date, it was necessary, before anything obnoxious to the rule could take place in connection with this residuary gift, that the following remarkable conjunction of events should supervene. The testator's father and mother were then each upwards of sixty-six years of age; to them, after a family of five, no child had been born for more than thirty years. It was, nevertheless, necessary that they should have another child. Alternatively, it was necessary that their marriage should be dissolved otherwise than by the death of the father, and that he should marry again, and have a child by that second marriage. That child, in turn, had to have a child born after the death of the testator's widow—one born in her lifetime would not have been excluded by the rule—and even a child so born would have brought about an infraction of the rule only if it had also eventuated that no one of the already substantial and apparently increasing families of the testator's four living brothers and sisters had survived his widow, having married or attained twenty-one. So much, as matters stood at the testator's death, had to happen before any nephew or niece excluded by the rule could appear. By the date of the summons on which the orders under appeal were made, this new event had to take place before the rule could be infringed. The testator's mother had survived her husband; she, then a widow lady of upwards of seventy-two years of age, had to marry again and have issue. It is, I think, only fair to the draftsman of this codicil, which was manifestly prepared under severe pressure of time, to indicate the apparent remoteness of any provision contained in it from the danger of a perpetuity. It is quite certain, I make bold to say, that no idea of such a possibility entered anybody's mind. In its application to the present case, the rule has been really a snare, useless, so far as its legitimate purpose is concerned, but operative in the view of the Court of Appeal, and operative also in the view of this House (but for a fortunate accident for which the rule is entitled to no credit), to produce an intestacy under which certainly one person would greatly benefit, whose interests it was the permissible and express purpose of the testator by his codicil to circumscribe and reduce. In my own experience nearly all modern manifestations of the rule are of this character, and have this result. The rule has so schooled testators into compliance with, perhaps even into approval of, its requirements, that attempts to push their privileges beyond its strict limits are now rarely made. So far as the courts are concerned, the existence of the rule in these days is usually made manifest only in cases where, nothing of the kind

having been desired or suspected, and where by nothing short of a miracle could a perpetuity at any time have supervened, even that possibility has, by the time of the contest, ceased to be existent. Nevertheless, in these cases the rule is fatal even to gifts so innocuous, and I cannot doubt that such a result is both mischievous and unfortunate in many directions, in this notably that it brings a sound principle into entirely gratuitous discredit. Nevertheless, I most fully agree that the rule is not, even for such a reason as that, to be whittled away by the courts. It is too well authenticated in all its recognised incidents to be any longer under the control of any court. It is the legislature alone, which, maintaining the salutary purpose of the rule in its proper application, can, if it pleases, remove from it those incidents or excrescences which, without assisting to achieve its legitimate object, have done much mischief in other directions.

In the present case, and notwithstanding the conditions which I have referred, I am, like the rest of your lordships, satisfied that, on the construction of the words here used by the testator, it is impossible to say that this gift is not within the prohibition of the rule as we have inherited it. It is agreed that the only conceivable means of escape is either, by construction or otherwise, to confine the apparently general expression "my brothers and sisters" to the brothers and sisters of the testator in being at the date of his codicil. On construction, it is not, I think, open to your lordships so to limit these words. Nor is it, in my judgment, permissible, by reference to surrounding circumstances, to confine them, as Atkin, L.J., thought he could, to those same brothers and sisters as being the only brothers and sisters whom the testator knew, and as being, in consequence and in the circumstances, those with reference to whom alone he must be taken to have spoken. I think that such evidence is for such a purpose quite inadmissible. The evidence here sought to be relied on was, in *Jee* v. *Audley* (4), rejected as proof of the impossibility of further births. It would be strange if it were admissible for the purpose of showing that the testator referred in his will only to his existing brothers and sisters, because it demonstrated that he knew perfectly well that he never could have any others. Indeed, with reference to *Jee* v. *Audley* (4), I find Rolfe, B., when advising this House in *Lord Dungannon* v. *Smith* (5), saying (12 Cl. & Fin. at p. 576) that it was there quite clear that the testator never had in his contemplation any daughters other than those already born. Yet that circumstance was not allowed to affect the ordinary meaning of the words. To my mind, that case is a complete answer on this point. If further authority for the rejection of the proposed evidence is required, it will be found in *Re Sayer's Trusts* (20). I need not say anything upon the question whether the evidence, if admissible, would be effective for its purpose. I greatly doubt. On the whole matter I agree with your lordships on the first question.

Upon the second question, whether the codicil, although inoperative to dispose of the testator's residue, was effective to revoke the gifts in the will to his own children and to the children of his brothers and sisters, I have also arrived, as I have said, at the conclusion that it was ineffective for either purpose. But, upon this matter, I prefer to rest my judgment entirely upon the ground chosen by the learned judge, as the basis of his. In view of the express revocation in the codicil of the power of appointment given to his wife by the will—a revocation confined to that power—I find myself, like Lawrence, J., able from the language of the testator employed in both documents to conclude that his intention was that the gifts of his residue contained in the will should not altogether be displaced by the codicil, but that they should be displaced only in favour of the class of nephews and nieces therein described. But, had these words of express revocation, applicable only to another provision of the will, been wanting, I should, myself, have had difficulty in reaching this conclusion. The question being whether, on the construction of the two documents, the gift in the codicil indicates a supersession of, or only a preference over, the gifts made by the will, I am struck by the entire inconsistency of the two gifts. The similarity between this clause of the codicil and the corresponding provisions of the will is superficial and apparent rather than

real. The codicil in relation to nephews and nieces not only defines a class which in its membership may in the event be entirely exclusive of the class of nephews and nieces as described in the will, but it also entirely shuts out from benefit the testator's possible children whose interests under the will preceded any thereby conferred upon any nephews and nieces. Apart from outside circumstances, to the possibility of which I am fully alive, but to the existence of which I apprehend that I am not entitled to have regard, even if I knew them—see *Venkatanarayana Pillai* v. *Subbammal* (16)—I should find it difficult to conjecture how the testator's intention with regard to his own children, once displaced by a gift, could properly be said to be subsequently dependent upon the question whether the gift in favour of a postponed class was in the result effective or not. There is another consideration operative in the same direction. Under the will, apart from the codicil, Philip P. Burnyeat, as the son of one of the testator's brothers born in the lifetime of his widow, would clearly be included. Under the codicil he is equally clearly included, with no personal bar to his own participation. In either contingency, therefore, whether the widow took an interest for life or one more limited, this respondent is included by the testator among those in benefit. But if the residuary clause in the will is now restored, it has to be restored to a class which excludes this respondent. Could such an intention be imputed to the testator if there were no words to assist that result? I have difficulty in seeing how it could. His intention to the contrary has been expressed both in the will apart from the codicil, and in the codicil apart from the will. Exclusion from a class of any person comprised in it affects the whole gift. ROLFE, B., if I may again quote from his advice to this House in *Lord Dungannon* v. *Smith* (5), refers to this subject (12 Cl. & Fin. at p. 575). He says:

> "The reason why a gift to a class, as children or the like, is void where it may embrace some objects too remote, is this:—there is no intention to give to any member short of the whole class; and, therefore, if the prescribed limit may be transferred before the class is filled up, the whole gift fails, . . ."

Has then the testator here ever manifested an intention to give anything to any class of nephews from which this respondent is excluded? The answer, I think, must be that he has not. For this reason also, apart from the express but limited words of revocation, I should have had difficulty in reaching any conclusion on this point other than that adopted by the Court of Appeal.

Nor would the English authorities, as I read them, have assisted another conclusion. These are none too clear. Perhaps they are not all quite consistent. But while they do not, I think, establish, as was contended by counsel for the respondents, that the doctrine of dependent relative revocation is confined to cases where the second bequest fails from the infirmity of the instrument by which it is made, and does not extend to cases where it fails from the incapacity of the legatee to take, the cases do, I think, show that there has hitherto in England been held to be a marked distinction between the two classes of cases, and the instances are few in which in the latter class of cases the implied revocation has not been held to be effectual for all purposes. The recent case in the Privy Council of *Venkatanarayana Pillai* v. *Subbammal* (16) is one of these; the view of HALL, V.-C., in *Re Fleetwood* (21) may, perhaps, doubtfully be claimed as another. Of course, in the extreme case where revocation is sought to be effected by an ineffective testamentary instrument there is little difficulty. The intention to revoke may there be as clear as it can be, but it is contained in an instrument at which, for the purposes of indicating testamentary intention, the court may not even look. An instrument not operative as a will is, for that purpose, no better than an unattested or even an unsigned memorandum. The case is, however, more difficult where, as happened before the Wills Act, a will in question might be good as a revocation, but be quite invalid for any dispositive purpose. *Onions* v. *Tyrer* (7) is the leading case on this subject. But there it is, I think, doubtful whether the Lord Chancellor regarded the revocation as effectual for any purpose, and he was certainly

A greatly influenced in his conclusion that it was not by the fact that the second instrument did not even purport to alter the beneficial dispositions of the first. It may be, however, that the true explanation of this case is to be found in the judgment of Lord Hatherley, when Vice-Chancellor, in *Tupper* v. *Tupper* (17), where he says that the testator in such a case intends the instrument to operate in an entire and not in a mutilated form so that either the whole of it must be looked B at or no part of it. *Tupper* v. *Tupper* (17) is also important for the fact that the Vice-Chancellor clearly recognised the distinction in this matter between the two classes of cases, and expressly approved of its application in *French's Case* (22), to which he refers in his judgment. A most learned disquisition on the whole subject, and to the same effect, will be found in the note to *Onions* v. *Tyrer* (7), in which a number of cases, beginning with *Roper* v. *Radcliffe* (13), are referred to C in support of the proposition that "a devise of lands void in respect of the incapacity of the devisee to take shall revoke a former devise." This same view has, in more recent times, been taken by Sir George Jessel, M.R., in the case to which your Lordships' attention has already been drawn.

Nor, so far as the English authorities go, is this question of relative revocation held necessarily to be conclusive either by the presence or absence of express words D of revocation. I find nothing in any of the cases cited which precludes me from accepting as correct this passage from the judgment of Neville, J., in *Re Bernard's Settlement* (23) ([1916] 1 Ch. at p. 560):

> "It does not seem to me that the real point is determined by the question of whether there are words of direct revocation or whether such words are absent. I think it is far too narrow a view to apply any such rule in construE ing documents of this kind, because it seems to me that when you have a gift in lieu of a previous appointment, either by necessary implication or by direct words, you must revoke the original appointment if you are to give effect to the second; and, therefore, whether the testator says in so many words 'I do revoke,' or whether he uses words which necessarily involve revocation, it seems to me the result is the same, and that it would not be a wise distinction F to make, except so far as the use of the direct words may be some guide as to the intention of the testator."

In connection with these last observations of the learned judge, it must, I think, be agreed that the presence of express words of revocation may frequently be decisive. It is more difficult to say that their absence necessarily, or even naturG ally, connotes that only a relative revocation is intended. The fact that a later gift of the same thing to another beneficiary is intended to supersede the earlier gift in any event may frequently be apparent from the very change in its destination. Suppose a testator, being at the date of his will an Anglican, gives the residue of his estate to the Church Association, and, having during the interval entered the Roman Church, he by a codicil in which there are no express words of revocation, gives the same residue to a Roman Catholic institution. Suppose that H another testator by his will gives his residue to the Lord's Day Observance Association, and by a codicil some years later gives the same residue to the Sunday Concert Society, and suppose, further, that in each case the second gift fails, either because the society ceased to exist before it became effective, or for some other reason, can it be doubted that each testator had lost all interest in the objects of his first donee, and that his intention to supersede the gift in its favour I entirely would hardly be made clearer by the addition of express words of revocation? Many similar cases naturally suggest themselves. I do not think that this view is effected by the statement of Cairns, L.C., in *Alexander* v. *Kirkpatrick* (8), where he says (L.R. Sc. & Div. at p. 403):

> "It appears to me that no case has been produced, and that no case can be produced, where either in England or Scotland a mere alternative inconsistent disposition which is not valid or effectual in itself has been held to revoke an earlier disposition of the same property."

That the Lord Chancellor, so far at all events as the English authorities are concerned, was referring only to cases where the infirmity in question was that of the instrument, and was not to be found in the incapacity of the legatee, is, I think, shown not only by the fact that it was an infirm instrument that was then in question, but also by the fact that among the cases cited to the House was that of *Onions* v. *Tyrer* (7), with its elaborate note in which at least three cases to the effect stated, where the infirmity was due to the incapacity of the legatee, are set forth and relied upon. It is noticeable, too, that LORD HATHERLEY'S observations in the same case are confined to the first class of cases, and that he himself had recognised the distinctions just referred to in *Tupper* v. *Tupper* (17) above cited.

Feeling, for these reasons, the difficulty in the way of reaching the same conclusion on more general grounds of principle, I am glad to find, in the special, but limited, provision as to revocation contained in this codicil, warrant enough for adopting, as I very readily do, the conclusions at which, although perhaps on other grounds, your Lordships have arrived.

Appeal allowed.

Solicitors: *Pritchard & Co.*, for *North, Kirk & Co.*, Liverpool; *Beachcroft, Hay & Ledward*, for *Brown, Auld & Brown*, Whitehaven.

[*Reported by* W. C. SANDFORD, ESQ., *Barrister-at-Law.*]

DIMENT *v.* ROBERTS AND ANOTHER

[COURT OF APPEAL (Sir Ernest Pollock, M.R., Warrington and Atkin, L.JJ.), July 23, 1924]

[Reported [1925] 1 K.B. 9; 93 L.J.K.B. 1038; 132 L.T. 235; 40 T.L.R. 861; 68 Sol. Jo. 842; 22 L.G.R. 742]

Rent Restriction—Recovery of overpaid rent—"Recoverable within six months from date of payment"—Action begun within period, but judgment obtained after it—Rent and Mortgage Interest Restrictions Act, 1923 (13 & 14 *Geo.* 5, *c.* 32), *s.* 8 (2).

The words "recoverable within six months" in the Rent and Mortgage Interest Restrictions Act, 1923, s. 8 (2), limiting the time within which a tenant may recover rent paid by him in excess of the sum permitted under the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, are satisfied if the tenant commences proceedings to obtain repayment of any such excess within six months from the date of payment, or, in the case of a payment made before the passing of the Act of 1923, within six months from the passing of that Act. It is not necessary that the tenant should have obtained judgment within the six months.

Lewis v. *McKay* (1), post, p. 562, approved and applied.

Notes. The period of six months fixed by s. 8 (2) of the Act of 1923 was extended to two years by s. 7 (6) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1938.

Applied: *Bayley* v. *Walker*, post, p. 665; *Gee* v. *Harwood*, [1933] Ch. 712. Referred to: *Pringle* v. *Hales*, [1925] 1 K.B. 573; *Re Keystone Knitting Mills Trade Mark*, [1928] All E.R.Rep. 276.

As to recovery of overpayments, see 23 HALSBURY'S LAWS (3rd Edn.) 794, 795; and for cases see 31 DIGEST (Repl.) 690–692. For Rent Restriction Acts, 1923 and 1938, see 13 HALSBURY'S STATUTES (2nd Edn.) 1033, 1068.

A Cases referred to:

(1) *Lewis* v. *McKay*, *Algate* v. *Vugler*, *Clark* v. *Potter*, [1924] 2 K.B. 136; 93 L.J.K.B. 840; 131 L.T. 504; 40 T.L.R. 579; 68 Sol. Jo. 739; 22 L.G.R. 476, D.C.; 31 Digest (Repl.) 691, *7820*.

(2) *Ings* v. *London and South Western Rail. Co.* (1868), L.R. 4 C.P. 17; 38 L.J.C.P. 8; 17 W.R. 120.

B (3) *Morris* v. *Duncan*, [1899] 1 Q.B. 4; 68 L.J.Q.B. 49; 79 L.T. 379; 62 J.P. 823; 47 W.R. 96; 15 T.L.R. 8; 43 Sol. Jo. 14; 19 Cox, C.C. 186, D.C.; 25 Digest 62, *517*.

(4) *Collins* v. *Hopwood* (1846), 15 M. & W. 459; 16 L.J.Ex. 124; 7 L.T.O.S. 115; 10 J.P.Jo. 339; 153 E.R. 930; 44 Digest 143, *106*.

C **Appeal** from an order of a Divisional Court of the King's Bench Division.

The plaintiff, who was the tenant of the defendants, had made, prior to July 31, 1923, the date of the passing of the Rent and Mortgage Interest Restrictions Act, 1923, certain payments for rent which, being in excess of the rent permitted by the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, became recoverable from the defendants, the landlords, under s. 14 (1) of that Act. By D s. 8 (2) of the Act of 1923, any such excess was recoverable, in the case of a payment made before the passing of that Act, only at a time within six months from the passing of the Act. The tenant issued a plaint in the county court for recovery on Jan. 24, 1924, which was within six months of the passing of the Act of 1923, but the hearing of the case was not until Mar. 3, when it was adjourned until Mar. 28, 1924. The county court judge held that the overpayment of rent was E only recoverable, under sub-s. (2) of s. 8 of the Act of 1923, where a judgment had been obtained within six months of the passing of that Act, and, therefore, he did not hear the case. The plaintiff tenant appealed to a Divisional Court, who held that the decision of the county court judge was wrong and that the tenant was within sub-s. (2) of s. 8 if he commenced his action for recovery within six months of the passing of the Act, and, therefore, his action must be heard. The land- F lords appealed.

By s. 14 (1) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920:

> "Where any sum has, whether before or after the passing of this Act, been paid on account of any rent or mortgage interest, being a sum which is by G virtue of this Act, or any Act repealed by this Act, irrecoverable by the landlord or mortgagee, the sum so paid shall be recoverable from the landlord or mortgagee who received the payment or his legal personal representative by the tenant or mortgagor by whom it was paid, and any such sum, and any other sum which under this Act is recoverable by a tenant from a landlord or payable or repayable by a landlord to a tenant may, without prejudice to any other method of recovery, be deducted by the tenant or mortgagor from any H rent or interest payable by him to the landlord or mortgagee."

By s. 8 (2) of the Rent and Mortgage Interest Restrictions Act, 1923:

> "Any sum paid by a tenant or mortgagor which, under s. 14 (1) of the [Act of 1920] is recoverable by the tenant or mortgagor shall be recoverable at any time within six months from the date of payment but not afterwards, or in I the case of a payment made before the passing of this Act, at any time within six months from the passing of this Act but not afterwards."

G. J. Paull for the landlords.

J. Duncan, for the tenant, was not called on to argue.

SIR ERNEST POLLOCK, M.R.—This appeal must be dismissed, and I agree with the judgment of SWIFT, J., given in *Lewis* v. *McKay* (1). The question is what is the true meaning of sub-s. (2) of s. 8 of the Rent and Mortgage Interest Restrictions Act, 1923. Certain payments for rent were made by the tenant which

she sought to recover under s. 14 (1) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, which provided that over-payments of rent should be recoverable by the tenant. By s. 8 (2) of the Act of 1923 it is provided that over-payments should be recoverable by the tenant at any time within six months from the date of payment. When the case came before the county court judge an objection was taken that the case could not be heard by him because the time had run out during which the tenant could successfully recover. The county court judge accepted that argument. He said that the time limit imposed by sub-s. (2) of s. 8 of the Rent and Mortgage Interest Restrictions Act, 1923, had been exceeded because that Act came into operation on July 31, 1923; the rent which the tenant sought to recover had been paid prior to July 31, 1923, and, therefore, it was recoverable within six months of that date so that the time within which it was recoverable expired on Jan. 31, 1924; while the plaint was issued on Jan. 24, 1924, the hearing did not take place until some date in March of this year; with the result that at the date of hearing the time limit for recovery had been exceeded. Accordingly, the county court judge did not hear, and the tenant appealed from this decision to a Divisional Court. The Divisional Court had a number of cases cited before them which involved the same point: *Lewis* v. *McKay*, *Algate* v. *Vugler, and Clarke* v. *Potter* (1); and when the case came before the Divisional Court it was held that the decision must follow *Lewis* v. *McKay* (1) and the other cases. We have to say whether we agree with that decision of the Divisional Court.

Section 8 (2) of the Rent and Mortgage Interest Restrictions Act, 1923, provides that any sum paid by a tenant which under s. 14 (1) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, is recoverable by the tenant shall be recoverable at any time within six months from the passing of the Act, but not afterwards, in the event, as in this case, of the payment having been made before the passing of that Act. What is the meaning of the word "recoverable" in that collocation? Does it mean that the cause of action has passed into a judgment or does it mean that the tenant has taken steps by bringing his suit even though the hearing of his case has not been able to be dealt with by the court until after the expiration of the limit of time imposed. The Divisional Court has decided that it is sufficient if the tenant has taken steps to bring his suit, and, in my judgment, has rightly so decided. Counsel for the landlords has cited one or two cases on behalf of his clients. *Ings* v. *London and South Western Rail. Co.* (2), which he cited, I think has no bearing on the point before us. One must look at the purpose of the Act of Parliament in each case and the basis of each decision. In that case the statute was dealing with the right to recover a sum for costs, and it is quite clear that in the circumstances there it was necessary that judgment should be obtained within the time limited. *Morris* v. *Duncan* (3) was also relied upon, particularly for a dictum of WILLES, J., as to the primâ facie meaning of the word "recovery" being the obtaining of the judgment of the court; but so far as the decision of that case is concerned it is directly contrary to counsel's argument. I am satisfied that the judgment of the Divisional Court was right. It is difficult to suppose that the legislature, by imposing this limit of time, intended to leave the tenant to the chance whether his suit fell within the area of a very busy court or within that of a court where his suit would be heard within a very short time of his commencing proceedings. It seems that the intention of the Act was to maintain the right of the tenant or mortgagor to recover, but to put a limit on the time for taking proceedings. The date of proceedings for many purposes is taken to be the date on which a writ is issued. The time up to which the sum was recoverable was six months and some legal steps must be taken by the tenant during that period to recover the money. I see no reason to suppose that what is a right given to a tenant or mortgagor is to be a right dependent upon the action of persons who are wholly independent of the tenant or mortgagor, such as judges, or persons whose duty it is to arrange the work of the courts. SWIFT, J., in *Lewis* v.

McKay (1), has given reasons for his judgment with which I agree,* and I think that any different construction of sub-s. (2) of s. 8 of the Act of 1923 would be antagonistic to the reason for which the Act was passed to benefit the tenant or mortgagor. The appeal must be dismissed.

WARRINGTON, L.J.—I am of the same opinion. The action was brought by a tenant to recover from the landlord excessive rent paid by her to the landlord. The action was brought on Jan. 24, 1924, which was within six months from the passing of the Rent and Mortgage Interest Restrictions Act, 1923, but the matter did not come up for hearing before the county court judge until Mar. 3, when it was adjourned until Mar. 28, both of these dates being more than six months from the passing, on July 31, 1923, of the Act. The county court judge decided that the period of limitation imposed by the Act expired before judgment, and, therefore, the sum overpaid by rent ceased to be recoverable although proceedings had been commenced within that period. The Divisional Court reversed that decision, and, in my opinion, rightly reversed it. Section 14 (1) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, provided that, where sums of money for rent made irrecoverable by the landlord or mortgagee by s. 1 of that Act should have been actually paid, they should be recoverable by the tenant or mortgagor. That Act provided no period of time within which the rent overpaid should be recoverable. But the Act of 1923, by s. 8 (2), provided that, in the case of a tenant having made payments so recoverable under s. 14 (1) of the Act of 1920 before the passing of the Act, that overpayment should be recoverable at any time within six months of the passing of the Act of 1923, and not afterwards. I think that those words mean that any sum recoverable shall continue to be recoverable for the period mentioned in the subsection. The word "recoverable" there means that the sum in question is a sum of which the persons shall be entitled to obtain payment by means of legal proceedings taken for its recovery within the period of six months. Therefore, it means that the sum of money shall continue to be one which may be recovered if legal proceedings for its recovery are taken within the period prescribed by the subsection.

I cannot attribute to the legislature any such absurdity as the right to recover being liable to the state of the business of any court in which the action to recover is commenced. One of the best known statutes of limitations would have afforded the same grounds for a contention to that effect as the statute in question here. Section 42 of the Real Property Limitation Act, 1833, is an example of a statutory limit for the recovery of a sum by action; it reads

> "No arrears of rent or of interest in respect of any sum of money charged upon or payable out of any land or rent or in respect of any legacy or any damages in respect of such arrears of rent or interest shall be recovered by any distress, action, or suit, but within six years next after the sum shall have respectively become due. . . ."

So far as I know, it has never even been suggested—see Carson's Real Property Statutes (2nd Edn.) p. 197, et seq.—that that means that the judgment shall be obtained before the expiration of the period mentioned. In my opinion, therefore, the judgment of the Divisional Court is right and this appeal must be dismissed.

ATKIN, L.J.—This case arises owing to an unfortunate expression used in the Rent Restriction Act of 1923, but I agree with my brethren that the decision of the Divisional Court was right. The words "right to recover" in the ordinary way mean to obtain judgment for the sum which one has the right to recover, but the word is capable of being used in another sense, namely, that a person is entitled to sue for it: see *Collins* v. *Hopwood* (4). I need not go into the details of that case which was concerned with a private Act, the London Coal Act, 1831, but Parke, B., said: "The word 'recovered' in the eighty-fifth section must therefore

* See p. 562 post.

be read 'sued for.'" The case cited by counsel for the landlords, *Morris* v. *Duncan* (3), is another authority for the proposition that, though primâ facie the word "recovery" means the obtaining of the judgment of the court, upon which the sum becomes payable, yet in the context of a statute of limitation the word "recovery" might be held to mean "sued for," that is to say, that the sum may be recovered if any proceedings have been brought within the period of time limited. I think that, on its true construction, s. 8 (2) of the Act of 1923 means that a tenant must assert his claim within six months, and that the words "recoverable within six months" mean that the sums may be recovered if any proceedings have been brought within six months. Section 14 of the Act of 1920 gives one method of recovery by deducting from the next rent payable, and that would clearly continue for six months. The cases in which rent is payable weekly are the vast bulk of the cases which arise under the Rent Restrictions Acts. It is improbable, therefore, that the legislature, when it came to the tenant taking legal proceedings, have restricted his right and intended that the tenant should recover up to the last week by deducting from the rent, but not recover by taking proceedings unless judgment has actually been delivered within six months. We all know that there are county courts where a court is not held except at considerable intervals. It is very unlikely that it was intended that the tenant's right to recover should be rendered entirely uncertain by the vicissitudes of the state of business of the courts. It seems to me that the manner in which the section of the Real Property Limitation Act, 1833, referred to by WARRINGTON, L.J., has been dealt with is of great guidance in a case such as this, and I agree, therefore, the construction put on sub-s. (2) of s. 8 of the Act of 1923 is correct, and that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *E. A. R. Llewellyn*; *Bono & Nimmo.*

[*Reported by* G. P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

NOTE

LEWIS *v.* McKAY; ALGATE *v.* VUGLER; CLARK *v.* POTTER

[KING'S BENCH DIVISION (Swift and Acton, JJ.), April 9, 1924]

[Reported [1924] 2 K.B. 136; 93 L.J.K.B. 840; 131 L.T. 504; 40 T.L.R. 579; 68 Sol. Jo. 739; 22 L.G.R. 476]

Appeals from Llanelly, Plymouth, and Woolwich County Courts.

These three cases raised the same point, namely, what was the true construction of s. 8 (2) of the Rent and Mortgage Interest Restrictions Act, 1923. The tenants in each case claimed to recover overpayments of rent made before the passing of the Act of 1923. In each case the summons was issued within six months of the passing of the Act of 1923, but judgment was not given until after the end of that period.

SWIFT, J., in giving judgment, said: In *Lewis* v. *McKay* and *Algate* v. *Vugler* the county court judges held that if the tenant starts the proceedings to recover the overpayment within the period of six months he is entitled to recover although judgment is not given until after the expiration of the six months. In *Clark* v. *Potter* the county court judge held not only that the action must be brought, but

that it must be pursued to judgment and judgment obtained within the six months. The question we have to decide is which of these two conflicting views is the correct one. Is it right to say that s. 8 (2) of the Act of 1923 means that the claim is barred unless the tenant actually recovers judgment within the six months, or that it means that it is sufficient if the action be brought within that period? I have no doubt whatever that the latter is the correct meaning. It is impossible, in my opinion, to think that the legislature intended to put upon a tenant who had paid more rent than he should have paid the onus of compelling the court to decide his case at a particular time so as to bring its decision within the six months. He has no control whatever over the matter. In my view, the sole object of the subsection was to put the tenant in the position that, whether he sought to recover the money by action or by deduction from rent becoming due, the claim must be brought or the deduction made within the six months, and the claim is brought when the summons is issued. In these circumstances, I think that the appeals in *Lewis* v. *McKay* and *Algate* v. *Vugler* must be dismissed, and that *Clark* v. *Potter* must be sent back to the county court judge.

ACTON, J.—I agree.

Orders accordingly.

[*Reported by* T. W. MORGAN, ESQ., *Barrister-at-Law.*]

Re ST. GERMAN'S SETTLED ESTATES

[CHANCERY DIVISION (Lord Buckmaster sitting for Astbury, J.), May 29, 1924]

[Reported [1924] 2 Ch. 236; 93 L.J.Ch. 611; 132 L.T. 55]

Settled Land—Improvement—Application of capital money—Matters for consideration—Payment out of capital authorised by settlement—Tenant for life misled into making no claim—Subsequent claim by executors—Settled Land Act, 1890 (53 *& 54 Vict., c.* 69), *s.* 15.

The life tenant under a settlement had power to direct the application of capital money upon improvements authorised by the settlement, which were more extensive than those specified in the Settled Land Acts, without submitting a scheme, but upon the certificate of an engineer, architect, or surveyor approved by the trustees. In August, 1919, in the absence of the partner who attended to the estate matters, the solicitors to the estate erroneously advised the life tenant that improvements coming within that provision of the settlement which he (the life tenant) contemplated to the mansion-house could not be paid for out of capital. The life tenant, therefore, ordered the work to be done at his own expense, and on its completion paid the whole cost himself. He died in March, 1922, and, the new tenant for life and the first tenant in tail in remainder being subject to disabilities which rendered them incapable of consenting to the cost of the improvements being paid out of capital, his executors now asked, under s. 15 of the Settled Land Act, 1890 [now s. 87 of the Settled Land Act, 1925], that capital money might be so applied, notwithstanding that no scheme had been submitted.

Held: in an application under s. 15 of the Act of 1890 the court must look at the matter from a business point of view and consider whether, in all the circumstances, it was fair and right, as between tenant for life and remainderman, that the expense should come out of capital, or whether it was incurred in respect of things which were the ordinary incidents of occupation; the

improvements made would not last for ever, and the benefit of the expenditure might have passed away before the remainderman came into possession, but the settlement not only contemplated that improvements of that very nature should be paid out of capital, but enabled the life tenant expressly to direct such payment; the late life tenant had been misled by erroneous advice, and, in the circumstances, the application would be granted.

Notes. As to improvements under the Settled Land Acts, see 23 HALSBURY'S LAWS (3rd Edn.) 116–124, 134–138; and for cases see 30 DIGEST (Repl.) 317 et seq. For Settled Land Act, 1925, see 23 HALSBURY'S STATUTES (2nd Edn.) 12.

Case referred to:

(1) *Re Tucker's Settled Estates*, [1895] 2 Ch. 468; 64 L.J.Ch. 513; 72 L.T. 619; 43 W.R. 581; 39 Sol. Jo. 502; 12 R. 320, C.A.; 30 Digest (Repl.) 318, *69*.

Also referred to in argument:

Re Allen's Settled Estates (1909), 126 L.T.Jo. 282; 30 Digest (Repl.) 330, *207*.

Re Lord Leconfield's Settled Estates, [1907] 2 Ch. 340; 76 L.J.Ch. 562; 97 L.T. 163; 23 T.L.R. 573; 30 Digest (Repl.) 320, *90*.

Re Earl of Lisburne's Settled Estates, [1901] W.N. 91; 30 Digest (Repl.) 321, *105*.

Adjourned Summons.

By a settlement dated May 1, 1908, and made between the Right Hon. Henry Cornwallis, sixth Earl of St. Germans (hereinafter called "the late earl"), of the first part, the Hon. Edward Henry John Cornwallis Eliot, of the second part, and the Hon. Cyril Walter Ponsonby and Eliot George Bromley Martin, of the third part, certain estates in the counties of Cornwall, Gloucester, Wilts, and Kent, including a mansion-house known as Port Eliot in the county of Cornwall, were settled and assured to certain uses, all of which had failed or determined prior to October, 1911, and subject thereto to the use of the late earl during his life without impeachment of waste, with remainder to the use of his first and other sons in tail male, with remainder to the use of Granville John Eliot during his life without impeachment of waste, with remainder to the use of his first and other sons successively in tail male, with remainder to the use of Montague Charles Eliot during his life without impeachment of waste, with remainder to the use of his first and other sons successively in tail male, with remainders over. By the settlement it was agreed and declared that, notwithstanding any restriction contained in the Settled Land Acts, 1882 to 1890, the powers and benefits thereinafter mentioned additional to or larger than those conferred by the said Acts were thereby conferred on every tenant for life of the premises thereby settled, and on every person having by reason thereof the powers of a tenant for life under the said Acts. Among the powers and benefits set out were:

"(D) Capital money arising under the Settled Land Acts, 1882 to 1890, or otherwise subject to these presents may be applied by the direction of a tenant for life of the premises hereby settled in or towards payment for an improvement authorised by those Acts or by these presents without any scheme being first submitted to or approved by any trustees or trustee and without an order of the court and upon the certificate of any engineer architect or surveyor nominated or approved by the trustees or trustee that the work or operation or part thereof has been properly executed, and what amount is properly payable in respect thereof. (E) Capital money arising under the Settled Land Acts, 1882 to 1890, or otherwise comprised in or subject to these presents may be applied in or towards payment for the following improvements hereby authorised on any hereditaments hereby settled, that is to say, (1) Erecting, re-roofing, re-draining, repairing, improving or re-building any house or other building or erection (including any mansion-houses or outbuildings or erections belonging thereto) or making any addition to or alteration in the same, whether structural or not, for the purpose of enabling the same to be let, and whether

there is or is not any intention of letting the same, including (without prejudice to the generality of this clause) any water-pipes or cisterns or heating apparatus and anything necessary for an electric light or gas supply, and any other permanent convenience, . . . (5) The doing of any other work or the carrying out of any other operation on any part of the settled hereditaments which shall be certified to be of a lasting nature by some engineer architect or surveyor nominated or approved by the trustees or trustee."

The said C. W. Ponsonby and E. G. B. Martin were appointed trustees of the settlement for all the purposes of the Settled Land Acts, 1882 to 1890.

The late earl resided at the mansion-house of Port Eliot from the time of his succession to the title and estates in the year 1911, except during the war of 1914–18, when he was on military duty. He found that the arrangements of the mansion-house were very inconvenient and expensive to maintain. The main points which he considered should be altered were: (i) There was no proper arrangements for heating the house; (ii) the number of bathrooms was insufficient, there being only three for the large house; (iii) the supply of hot and cold water to the house was very insufficient; and (iv) the cooking arrangements in the kitchen were antiquated and inefficient, so as to cause much unnecessary expense and inconvenience. In July, 1919, the late earl instructed a firm of engineers in Exeter to give him an estimate of the works necessary for remedying these defects, which was done. This involved the removal of old boilers and the putting in of modern boilers, pipes, and radiators for central heating, the making of new bathrooms, and the providing of a new kitchen range. The estimate for this work was about £1,000. The late earl instructed his estate agent to write Messrs. Dawson & Co., the solicitors for the late earl, and the trustees of the settlement, and inquire whether the cost of the proposed improvements could be paid by the trustees out of capital. At the time when this letter was received by Messrs. Dawson & Co., Mr. A. B. B. Wilson, the partner who attended to the affairs of the St. Germans' estates, was absent on his holiday, and the member of the firm who answered the letter overlooked the special provisions of the settlement giving the power of directing improvements and extending the nature of such improvements. On Aug. 21, 1919, accordingly, Messrs. Dawson & Co. wrote to the estate agent a letter in which they said: "The cost of the installation of central heating at Port Eliot could not be paid by the trustees out of capital." On receipt of this letter the late earl determined to proceed with the work at his own expense, and did not give any direction to the trustees to pay the costs under the settlement, nor did he submit to the trustees any scheme under the Settled Land Acts. On Mar. 26, 1920, he paid to the contractors £500 on account of the work, and in April, 1920, the contractors asked for another £300 on account. On April 22, 1920, the late earl wrote to Mr. Wilson enclosing the letter from the contractors, and desiring him to ask the bank to pay the £300 if it was available. On April 24, 1920, Mr. Wilson replied enclosing a cheque for £300 to be signed by the late earl, and continued:

> "I have no particulars of the work you have been doing at Port Eliot, but it is quite possible that a considerable portion of it might be paid for by your trustees out of capital under the powers in the settlement if you so wish. I merely mention this in case you may not have it in mind."

At the time of writing this letter Mr. Wilson was unaware of his firm's letter of Aug. 21, 1919. The late earl returned the cheque signed, but did not at any time reply to or mention the suggestion contained in Mr. Wilson's letter. All the work done at Port Eliot was, with the exception of one small item, within the provisions of clause (E) of the settlement. The works were completed in August, 1920, at the total cost of £1,036 16s., and on Oct. 16 the late earl paid to the contractors the final instalment of £236 15s. The whole of the payments for the works was made by the late earl out of his own moneys. The income of the late earl was at that time much diminished, and, after payment of prior charges and the expenses of

keeping up the mansion-house, did not exceed £1,200 a year. He found such income insufficient for him to reside at Port Eliot, and in March, 1921, he removed to a smaller house. The settled estates in the counties of Gloucester and Wilts had before 1919 been disposed of, and there was then in the hands of the trustees, and still was at the date of the hearing, capital money of a large amount, far more than sufficient to pay the costs of the works. In April, 1921, the late earl met with a serious accident, and from that time until his death on Mar. 31, 1922, he was in very bad health and unable to pay attention to business matters.

The late earl by his will, which was duly proved, appointed the Hon. Cyril Walter Ponsonby (one of the trustees of the settlement) and the Right Hon. Archibald Alexander Earl of Leven and Melville executors thereof. The late earl died without male issue, and upon his death his cousin, the above-mentioned Granville John Eliot, succeeded to the title and became tenant for life of the settled estates under the settlement. He was a bachelor and of unsound mind, and on Mar. 23, 1923, the Hon. Montague Charles Eliot was appointed his committee. The first tenant in tail in remainder was Nicholas Richard Michael Eliot, the eldest son of the said Montague Charles Eliot and was an infant. When the executors of the late earl investigated his affairs, they became aware of the facts hereinbefore stated, and of the letter of Messrs. Dawson & Co. of Aug. 21, which appeared to have given the late earl erroneous advice, of which letter the said A. B. B. Wilson then first became aware. In the circumstances, neither the present earl, as tenant for life, nor his committee, nor the infant tenant in tail in remainder were able to consent to the cost of the works being recouped to the executors out of capital. The executors were advised that, as no direction under the settlement could now be given for payment out of capital, the only course by which they could obtain recoupment was by applying to the court under s. 15 of the Settled Land Act, 1890, for the application of capital money in payment for the improvements, notwithstanding that a scheme had not been submitted for the approval of the trustees. The trustees obtained the certificate of a surveyor approved by them that the works had been carried out efficiently. On May 23, 1923, the executors issued a summons asking that the trustees might be authorised to apply the sum of £1,031 11s. 9d. (being the total cost less the small deduction before mentioned) out of capital in repayment to the executors of the cost of the said improvements notwithstanding that a scheme had not been submitted. The defendants were Eliot George Bromley Martin, the trustee of the settlement other than the said Cyril Walter Ponsonby, who was one of the executors, the present Earl of St. Germans, the tenant for life, and the infant tenant in tail in remainder.

Luxmoore, *K.C.*, and *Bryan Farrer* for the executors.
Eardley-Wilmot for Mr. Bromley Martin, the other trustee.
Ward Coldridge, *K.C.*, and *Andrewes-Uthwatt* for the present tenant for life.
Watmough for the infant tenant in tail in remainder.

LORD BUCKMASTER, after stating the facts: The present tenant for life is of unsound mind and the tenant in tail in remainder is an infant, and, even if they agreed to the cost of the improvements being paid out of capital, they are not in a position to consent to this being done. The provisions of the settlement of May 1, 1908, are important, and they are much more generous as to the application of capital money in payment for improvements than the Settled Land Acts are. First, cl. (D) authorises the application of capital money by the direction of the tenant for life, without any scheme being first submitted to or approved by the trustees, upon the certificate of any engineer, architect or surveyor nominated or approved by the trustees that the work has been properly executed, and that the amount charged is a proper one. Secondly, cl. (E) authorises the application of capital money in payment for re-draining, repairing, or improving any house, including any mansion-house, whether necessary or not for the purpose of enabling the house to be let, and among the improvements mentioned are water-pipes or cisterns or heating apparatus, or any other permanent convenience, or any work

that shall be certified to be of a lasting nature. There is no doubt that the improvements here added materially to the comfort of the house, and that they were within the terms of the settlement, and that, if the late life tenant had given a direction, and a proper certificate had been given, the trustees would have been bound to apply capital money in payment for them. When the late life tenant was minded to make the improvements, he was at the outset misled by the letter of Aug. 21, 1919, which was undoubtedly incorrect. He, therefore, gave no direction to the trustees, but executed the improvements and paid for them himself, and made no application to the trustees down to his death on Mar. 31, 1922.

This is a summons by the late life tenant's executors, and as cl. (D) was not complied with, it can only succeed under s. 15 of the Settled Land Act, 1890. The care and vigilance with which the court ought to exercise its discretion under that section were considered in *Re Tucker's Settled Estates* (1). It is not sufficient for the applicants to say that the improvements were, in fact, authorised improvements. Where no scheme has been submitted, the court must exercise a different sort of discretion. It must look at the matter from a business point of view and consider whether, in all the circumstances, it is fair and right, as between tenant for life and remainderman, that the expense should come out of capital, or whether it was incurred in respect of things which are the ordinary incidents of occupation. Bearing in mind, as I must, the provisions of the settlement, it is my duty to consider what, in the circumstances, ought to be done. I have been much impressed by the argument on behalf of the infant remainderman that these improvements, although adding to the comfort and convenience of the mansion-house, will not last for ever, and it may well be that the benefit of the expenditure will have passed away before he comes into possession. That is a formidable argument, but I cannot shut my eyes to the fact that the settlement not only contemplated that improvements of this very nature should be paid out of capital, but enabled the life tenant expressly to direct such payment. It is urged that the late life tenant, although originally misled by the solicitors' letter of Aug. 21, 1919, must have known his rights on receiving Wilson's letter of April 24, 1920, and, nevertheless, lay by and did nothing. It is, however, impossible to know what the late life tenant thought of Wilson's suggestions in face of the clear negative in his firm's previous letter. Being in such financial difficulties that he had to leave Port Eliot for a smaller house, it is extremely difficult to believe that he knew that his expenditure on the improvements could be recouped out of capital. On the whole, I have come to this conclusion. Having been told definitely by the estate solicitors that the improvements could not come out of capital, the late life tenant accepted that view to the end of his life, notwithstanding Wilson's suggestions. In these circumstances, I do not think that the delay disentitles me to exercise my discretion, and, on the whole, I think that I ought to exercise it for the following reasons. The settlement itself contemplated that improvements of this very nature should be paid for out of capital, if the life tenant so asked, and when the late life tenant was preparing to make that request, the estate solicitors told him that it would be useless to do so. I shall, therefore, allow the application.

Solicitors: *Dawson & Co.*; *Kennedy, Ponsonby, Ryde & Co.*

[*Reported by* E. K. Corrie, Esq., *Barrister-at-Law.*]

A

Re BJORNSTAD AND OUSE SHIPPING CO., LTD.

[Court of Appeal (Bankes, Warrington and Scrutton, L.JJ.), April 30, 1924]

[Reported [1924] 2 K.B. 673; 93 L.J.K.B. 977; 131 L.T. 663; 40 T.L.R. 636; 68 Sol. Jo. 75; 30 Com. Cas. 14]

B

Arbitration—Appointment of arbitrator—Appointment by court—Application by foreign firm resident out of jurisdiction—Discretion—Arbitration Act, 1889 (52 & 53 *Vict.*, c. 49), *s.* 5.

A contract which had been made between a British firm and a firm which was resident out of the jurisdiction provided for a reference to arbitration in case of any dispute or difference between the parties. Disputes having arisen C and the parties having failed to concur in the appointment of an arbitrator, the foreign residents applied to the court under s. 5 of the Arbitration Act, 1889, for the court to appoint an arbitrator.

Held: in view of the fact that the applicants were a foreign firm resident outside the jurisdiction the court had a discretion under s. 5 of the Act whether they should appoint an arbitrator or not, and, if they granted the application, D they were entitled to attach such conditions to the exercise of their discretion as they thought reasonable.

Re Eyre and Leicester Corpn., [1892] 1 Q.B. 136, distinguished.

Notes. The Arbitration Act, 1889, s. 5, has been replaced by the Arbitration Act, 1950, s. 10 (2 Halsbury's Statutes (2nd Edn.) 89).

As to appointment of arbitrators by the court, see 2 Halsbury's Laws E (3rd Edn.) 29; and for cases see 2 Digest (Repl.) 529–530.

Cases referred to:

(1) *Re Eyre and Leicester Corpn.*, [1892] 1 Q.B. 136; 61 L.J.Q.B. 438; 65 L.T. 733; 56 J.P. 228; 8 T.L.R. 136; 36 Sol. Jo. 107, C.A.; 2 Digest (Repl.) 529, *690*.

(2) *The Newbattle* (1885), 10 P.D. 33; 54 L.J.P. 16; 52 L.T. 15; 33 W.R. 318; F 5 Asp.M.L.C. 356, C.A.; 1 Digest 47, *375*.

Appeal by the respondents from an order of Talbot, J., at chambers upon an application by the applicants for the appointment of an arbitrator pursuant to s. 5 of the Arbitration Act, 1889.

By an agreement in writing dated Oct. 31, 1919, made between the applicants, a G firm carrying on business at Bergen in the kingdom of Norway, and the respondents, a firm of shipbuilders carrying on business near Goole, in the county of York, the respondents agreed to build and launch and the applicants agreed to purchase a steel single deck vessel according to the dimensions and specifications more particularly set out in the contract. There were three further agreements of the same tenor and date with reference to three other vessels. Each contract contained an H arbitration clause whereby it was provided that in case any dispute or difference should arise in respect of any matter or thing contained in the specification, drawings, or, inter alia, as to the carrying capacity of the vessel, such dispute should be referred to arbitration pursuant to the Arbitration Act, 1889. Disputes having arisen between the parties as to the construction of the agreement the applicants on Jan. 25, 1924, gave written notice to the defendants to concur in the appoint- I ment of an arbitrator under the submission to arbitration contained in the said agreement. The respondents having refused to concur in appointing an arbitrator to decide the disputes between the parties the applicants made an application to the court by an originating summons under s. 5 of the Arbitration Act, 1889, asking the court to appoint an arbitrator. The respondents objected upon the grounds, inter alia, that the applicants were a foreign firm not carrying on business within the jurisdiction and that they were not carrying on business as a firm at all. Master Jelf made an order upon this application appointing a named arbitrator,

A and on appeal this order was affirmed by TALBOT, J. The respondents appealed by leave to the Court of Appeal.

Clement Davies for the respondents.
C. T. Le Quesne for the applicants.

BANKES, L.J.—This appeal raises an important point under these circumB stances. The parties are Norwegians on one side, and shipbuilders in this country on the other side, and an agreement was entered into in 1919 for the building of a number of ships by the shipbuilding company for the Norwegians. The agreement contained an arbitration clause. Disputes having arisen between the parties whether the ships were or were not of the contract carrying capacity, the Norwegian firm, who are parties, have claimed arbitration under the contract. The C shipbuilding company have refused to concur in the appointment of an arbitrator, and the Norwegians have made an application under s. 5 of the Arbitration Act, 1889, to the court by an originating summons, asking the court to appoint an arbitrator, all conditions precedent under the section having been complied with. The section provides as follows:

> "In any of the following cases: (a) Where a submission provides that the D reference shall be to a single arbitrator, and all the parties do not after differences have arisen concur in the appointment of an arbitrator [which is this case] . . . any party may serve the other parties . . . with a written notice to appoint an arbitrator. . . ."

That has been done. The section goes on:

> E "If the appointment is not made within seven clear days after the service of the notice, the court or a judge may, on application by the party who gave the notice, appoint an arbitrator. . . ."

The language of the section itself, apart from any judicial decision upon it, would appear to indicate that the court has a discretion with reference to the appointment of an arbitrator, because the words used are "the court may appoint an arbitrator," F which are the same words as are used in s. 4 of the same statute, which there is ample judicial authority for saying give the court a jurisdiction with reference to the matter.

Our attention, however, has been called to a decision of this court—*Re Eyre and Leicester Corpn.* (1)—as to the proper construction to be placed upon the language of s. 5, and it is said that that is a decision to the effect that the word "may" in G s. 5 must always be read as "must," with the consequence that the court, when called upon to exercise its powers under s. 5 has no discretion at all, but must appoint an arbitrator if the conditions precedent have been complied with. If that was the effect of *Re Eyre and Leicester Corpn.* (1) we must follow that decision, whether we agree with it or whether we do not; but in my opinion that decision does not cover this case, and for this reason. The parties in *Re Eyre and Leicester* H *Corpn.* (1) were both resident in this country, and, therefore, the question which arises in this case was not before the court in that case. It may be that without that explanation the language used by LOPES, L.J., in particular would seem to be language wide enough to cover every case; but when one considers the facts of that case and the language used by LORD ESHER, M.R., and KAY, L.J., I think it is plain that the intention of the court there was to confine its decision to the facts of I that case, or, at any rate, not to deal with a case which contains the exceptional features of the present case, namely, that it is a foreigner residing outside the jurisdiction who is seeking to invoke the assistance of the court. I desire to refer to the language used in the judgments in *Re Eyre and Leicester Corpn.* (1). LORD ESHER says this ([1892] 1 Q.B. at p. 142):

> "The parties have agreed with regard to certain matters to substitute arbitration by a single arbitrator for a trial in court; it is admitted that there is a dispute within the submission; the parties have failed to concur in the appointment of an arbitrator; and there has been a proper notice given which has not

been complied with. What under these circumstances does the section provide that the court is to do? It says that the court 'may' appoint an arbitrator. It is argued that under this provision the court may say in this case, where it is admitted and the court has decided that there is a dispute within the submission, that it will not force the corporation to go to arbitration, but will leave the contractor to bring an action—that is, that the court has a discretion to say in such a case that, though one side has contracted to refer the matter to arbitration, they need not act according to their contract, and that the court will relieve them from it, and the other side must bring their action. I do not think that that is so. I think that in such a case as this 'may' means 'must,' and that the court is bound to appoint an arbitrator."

I think that those words that I have just read, especially the last words I have read, justify the court in saying that LORD ESHER was there confining his decision to the particular facts of that case. I think that LOPES, L.J., expresses himself, perhaps, in language which covers a wider ground; but I do not think that one ought to read that as language applicable to any case except the one immediately before him, and as a decision by the learned lord justice that where the three conditions precedent were all complied with, and there being no other circumstance in the case, then the word "may" should be read as the equivalent of "must." But when one comes to KAY, L.J.'s judgment it seems to me very instructive because he says (ibid. at p. 143):

"I understand that in this case it is admitted that some of the matters in dispute were clearly such as came within, and ought to be referred under, the submission. In such a case, I do not think that the court would have a discretion to say that it would not entertain the application, assuming, of course, that all the necessary preliminary steps had been taken—that is to say, that there had been a sufficient notice within the section, and no appointment had been made within the seven days. In such a case I do not think the court ought to exercise any discretion, if it has any; its duty under such circumstances really becomes only ministerial. I, therefore, agree that for the purposes of this case the word 'may' must be treated as equivalent to 'must.' But I do not wish to hold that in every case 'may' in this section is equivalent to 'must.'"

I think the learned lord justice is there expressing his own opinion and explaining what is his view as to the meaning of the language used by the other members of the court when he says in effect, "I do not think here the court has a discretion, because I consider its duty is ministerial; but I am not prepared to say that under different circumstances the court has no discretion in the matter." Speaking for myself, I think that this case does not bind us in a case where, as here, the person invoking the assistance of the court is a foreigner residing outside the jurisdiction.

With regard to such a person the rule is very clear. I agree with the argument of counsel for the applicants that Ord. 65, r. 6, gives the court power to order security for costs in something that is, strictly speaking, a cause or matter, and it may be that we should have no right to make an order in an arbitration directly affecting the costs of that arbitration, or to order that security should be given in an arbitration, but I think it is a very different matter if there is a discretion to refuse to appoint an arbitrator at all; it is a very different matter when one comes to consider the terms upon which one should exercise that discretion in favour of an applicant, if it is to be exercised at all. I begin, therefore, by saying that in my opinion in this particular case this court has a discretion to refuse to appoint an arbitrator at all under the circumstances of this case, and to refuse because the applicant is a foreigner resident outside the jurisdiction. If the court has that discretion, it seems to me that it can attach any reasonable condition to the exercise of its discretion in granting the application. One knows that very often in applications under s. 4 the fact that an arbitrator has no power to make an order for a commission to examine witnesses abroad is a ground for refusing to stay

proceedings. Equally, I think, it would be a ground, or might in this case be a ground, for refusing to exercise one's discretion, that the applicant is a foreigner outside the jurisdiction, and, I think, that it is perfectly competent to this court to make an order in this form—that if the applicant within a certain time gives security for the costs of the arbitration, and of this appeal, then the order of TALBOT, J., may stand; but if the security is not given within the time limited, then the order is discharged, and in either event that the respondents should have the costs here and below. One will consider what time should be allowed, or whether counsel for the applicants is prepared to consider the question of time; but I think myself that not being bound by the decision referred to, and having a discretion, it is perfectly competent to this court to make an order in that form, and to attach that condition to the exercise of its discretion.

WARRINGTON, L.J.—I am of the same opinion. The application is one under s. 5 of the Arbitration Act, 1889, which provides that in certain circumstances enumerated in the section the court may appoint an arbitrator. Now, as far as the language of the section is concerned, it does appear to give to the court some discretion; but it is said that *Re Eyre and Leicester Corpn.* (1) has decided that there is no discretion in the court under that section. With all respect, I do not think that that point has been decided in the case referred to. I think that what was really decided was that where the facts enumerated by LORD ESHER are found, and there is no other fact which modifies their effect, and there are no materials on which it could refuse to do so, then it is the duty of the court to appoint an arbitrator; but it is quite obvious, and especially when one looks at the judgment of KAY, L.J., which was not a dissenting judgment, that he had in mind cases in which some fact other than those enumerated by LORD ESHER and LOPES, L.J., might occur, by which it would not be the duty of the court to accede to the application. I will read a few words which BANKES, L.J., has not read, which occur at the very commencement of his judgment:

> "I desire, however, not to bind myself with regard to the question whether the word 'may' in the section may not in certain cases give a discretion to the court. I conceive that cases might arise where it would be necessary to exercise some discretion."

and then he goes on to state that in that case there were the facts which had already been referred to by LORD ESHER, and he thought then that the duty of the court was merely ministerial, a duty which ought to be performed. In the present case there arises a most material fact outside those which appear in *Re Eyre and Leicester Corpn.* (1), namely, that the person who invokes the assistance of the court is a foreigner out of the jurisdiction. It seems to me that this is just one of those cases which were contemplated as likely to arise by the judgment of KAY, L.J., and I feel quite satisfied, reading LORD ESHER's judgment, and with rather more hesitation LOPES, L.J.'s judgment, that if any such fact had been in their minds or had been established in the case before them, the decision they gave would not have been what it was. At any rate, I do not consider that we are bound by that decision to hold that the court has in the present case no discretion at all. With regard to the form of the order, I have nothing to add. It seems to me that it is an order which it is quite competent for us to make, an order which should be fair to both parties.

SCRUTTON, L.J.—Two Norwegian gentlemen trading in partnership made a contract with an English firm for the construction of a certain number of ships. The contract contained an arbitration clause as to disputes and differences and a clause providing that the Norwegian gentlemen should provide an English gentleman on whom writs should be served. The ships were built. By a supplementary agreement, the effect of which may have to be considered in the proceedings, the two Norwegian gentlemen dissolved partnership. One of them is alleged now to be in an impecunious position, the other to be in the employ of another firm. But

the two gentlemen, describing themselves as formerly trading in partnership, desire to make a claim with respect to the construction of the ships, of the merits of which, of course, I know nothing. The English firm, for various reasons, does not want the proceedings under the arbitration clause, and, therefore, does not appoint an arbitrator. Thereupon the two Norwegian gentlemen come to the court and ask the court to exercise its powers by appointing an arbitrator in the case. It is said of them: "But you are foreigners and as foreigners you ought to give security." They reply through their counsel: "It is quite immaterial that we are foreigners; it is quite immaterial even if we were both bankrupt; you, the court, must appoint an arbitrator, and start this arbitration, though we are foreigners, and even if we are bankrupt." I do not think there is any justification for that haughty attitude.

It is a well-recognised principle of these courts that the courts do not as a matter of right give redress to foreigners. The courts do not allow a foreigner to claim protection as of right. The courts have always in their inherent jurisdiction refused to act at the instance of foreigners, unless the foreigners afford sufficient protection to the other party whom they desire to involve in litigation. I do not know any more striking instance of that than the attitude which the courts adopt towards foreign sovereigns. A foreign sovereign is not subject to the laws of this country, and his property is free from seizure under the laws of this country, but the courts, when a foreign sovereign has come and asked to institute an action in this country, have declined to allow him to proceed unless he gives security for a counter-claim brought by the defendant in respect of a collision with regard to which the foreign sovereign is claiming, see the decision of this court in *The Newbattle* (2), where LORD ESHER says:

> "It has always been held that if a sovereign prince invokes the jurisdiction of the court as a plaintiff, the court can make all proper orders against him."

COTTON, L.J., says:

> "But when a government comes in as a suitor, it submits to the jurisdiction of the court, and to all orders which may properly be made."

In that case the foreign sovereign was refused leave to proceed till he gave security for the counter-claim which the defendant he desired to proceed against wished to bring against him. That principle appears to me to cover this case. The applicants are coming here asking the court to do something. Their counsel agrees that the court may refuse to do that something unless they secure the costs of this particular proceeding, but he says, "Though I am asking you to institute an expensive arbitration in which I shall make the other side liable for costs, or make them incur costs, you have no power to say to me, 'We, the court, will not accede to your application unless you secure the person against whom you are wishing to proceed against costs.'" I think that is entirely contrary to the principle on which the court acts with regard to foreigners.

It is further said that that may be so as a general principle, but that in the case of arbitrations the Court of Appeal has decided that the court must act, and has no discretion. Of course, if the Court of Appeal has so decided, this court is bound by its decision, and I should loyally follow it, and leave the House of Lords to deal with the matter, if so requested. But I cannot find in *Re Eyre and Leicester Corpn.* (1) any trace that there was ever present to the mind of the court, or that they ever thought that they were deciding to act on the instance of a foreigner, not giving to the British subject against whom the foreigner was proceeding the protection that they would give in any other case. While I think that I am bound by the decision of *Re Eyre and Leicester Corpn.* (1), however I should decide it myself, in cases which come within the facts on which that case was decided, I do not think I am bound in the case of an application by a foreigner on a question the merits of which were never before the court. It appears to me to follow that if we say to their counsel in this case "You shall not make this application at all till you have secured the other side against the costs," we may also say, "You shall not

make this application to us unless you are prepared to provide for the costs of the proceedings which you are asking to set on foot." For that reason I think the appeal succeeds.

Appeal allowed.

Solicitors: *Pritchard & Sons*, for *A. M. Jackson & Co.*, Hull; *Botterell & Roche*, for *Sanderson & Co.*, Hull.

[*Reported by* J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

PRECIOUS *v.* REEDIE

[KING'S BENCH DIVISION (Bailhache and Sankey, JJ.), April 14, 1924]

[Reported [1924] 2 K.B. 149; 93 L.J.K.B. 800; 131 L.T. 568; 40 T.L.R. 578; 68 Sol. Jo. 706; 22 L.G.R. 613]

Landlord and Tenant—Monthly tenancy—Notice to quit—Need for notice to correspond with length of tenancy—Need to terminate on day of month on which tenancy began.

The defendant was the tenant of premises on a monthly tenancy beginning on the first day of the month. On Sept. 5, 1923, he received from the plaintiff, the landlord, a notice dated Sept. 1, in this form: "I hereby give you one month's notice to quit 5 Commercial Street, as I require the house for occupation."

Held: to determine a monthly tenancy a notice to quit must correspond in length with the period of the tenancy and must terminate on the day of the month on which the tenancy began unless there was agreement to the contrary; there was no such agreement in the present case; and, as the notice did not expire at the end of the monthly term, it was invalid.

Reasoning of LUSH, J., in *Queen's Club Garden Estates, Ltd.* v. *Bignell* (1), [1924] 1 K.B. 117, applied.

Notes. The minimum length of notice to quit a dwelling-house is now four weeks under s. 16 of the Rent Act, 1957 (37 HALSBURY'S STATUTES (2nd Edn.) 567), and six months in the case of business premises under s. 25 (2) of the Landlord and Tenant Act, 1954 (34 HALSBURY'S STATUTES (2nd Edn.) 410).

Considered: *Lemon* v. *Lardeur*, [1946] 2 All E.R. 329.

As to determination of weekly and periodic tenancies, see 23 HALSBURY'S LAWS (3rd Edn.) 530, para. 1185; and for cases see 31 DIGEST (Repl.) 484–485.

Cases referred to:

(1) *Queen's Club Garden Estates, Ltd.* v. *Bignell*, [1924] 1 K.B. 117; 93 L.J.K.B. 107; 130 L.T. 26; 39 T.L.R. 496; 21 L.G.R. 688, D.C.; 31 Digest (Repl.) 494, *6203.*

(2) *Simmons* v. *Crossley*, [1922] 2 K.B. 95; 91 L.J.K.B. 643; 127 L.T. 337; 38 T.L.R. 571; 66 Sol. Jo. 524; 20 L.G.R. 653, D.C.; 31 Digest (Repl.) 485, *6109.*

(3) *May* v. *Borup*, [1915] 1 K.B. 830; 84 L.J.K.B. 823; 113 L.T. 694, D.C.; 31 Digest (Repl.) 494, *6199.*

Appeal from Scarborough County Court.

The plaintiff was the landlord and the defendant was the tenant of premises in Commercial Street, Scarborough. The tenancy was a monthly one, beginning on the first of the month. On Sept. 5, 1923, the plaintiff served on the defendant a notice dated Sept. 1 in the following terms: "I hereby give you one month's

notice to quit 5, Commercial Street, as I require the house for occupation." The county court judge held that this was a good notice for the end of the next complete month of the tenancy after Sept. 5, 1924, i.e., for Oct. 31, and he made an order for possession. A

The defendant appealed.

Alexander Cairns for the defendant.
C. Paley Scott for the plaintiff. B

BAILHACHE, J.—This case raises the question whether a certain notice to quit was a good notice. The tenant was a monthly tenant, and it was agreed that the tenancy began on the first of the month. A notice in the form:

> "I hereby give you one month's notice to quit 5, Commercial Street, as I require the house for occupation," C

dated Sept. 1, 1923, was served on the tenant on Sept. 5. If a month's notice expiring with a month of the tenancy was necessary it was obvious that that was not a good notice. The county court judge has not dealt with the question whether it was a reasonable notice, but he has held that it was a good notice for the next month, expiring on Oct. 31. He has referred to two or three cases: a decision of LUSH and SALTER, JJ., in *Queen's Club Garden Estates, Ltd.* v. *Bignell* (1); D an earlier decision of SWIFT, J., in *Simmons* v. *Crossley* (2); and a decision of LAWRENCE, and SANKEY, JJ., in *May* v. *Borup* (3). He has acted on the last-mentioned case. That was a case of a yearly tenancy subject to a six months' notice to be given on Mar. 1 or Sept. 1 in any year. A notice to quit "at the earliest possible moment" given on Dec. 23, 1913, was held to be a good notice E to determine the tenancy at the expiration of six months from Mar. 1, 1914. There was nothing uncertain in such a notice, because the tenant would know when the tenancy began, and therefore would know what was the earliest possible moment at which it could be determined. In *Simmons* v. *Crossley* (2) SWIFT, J., held that a reasonable notice was sufficient even though it did not expire on the last day of a month of the tenancy; but in *Queen's Club Garden Estates, Ltd.* v. *Bignell* (1), F a case of a weekly tenancy, the judges came to a different conclusion. LUSH, J., in an elaborate and careful judgment, came to the conclusion that a week's notice was necessary and must expire on the day on which the tenancy began. I think that the reasoning of that case leads irresistibly to the conclusion that a monthly tenancy cannot be distinguished from a weekly one in principle. There is authority that a month's notice must be sufficient. I have come to the conclusion that in a G monthly tenancy the notice must correspond in length with the period of the tenancy, and must terminate on the day of the month on which the tenancy began. On that basis the notice in this case was obviously bad; it was not a case of a reasonable notice. The notice might have been made good for Nov. 1, if it had contained saving words such as "or on the expiration of a month of the tenancy next after one month from the date hereof." Without such words, in our view, H it was a bad notice, and the appeal must be allowed, with costs.

SANKEY, J.—I agree that the notice must be regulated by the length of the tenancy. *May* v. *Borup* (3) was distinct from this case, the notice there being for "the earliest possible moment." No such saving words appeared in this notice, and, for the reasons given by my Lord, I agree that the appeal must be allowed.

Appeal allowed. I

Solicitors: *Radford & Frankland*, for *Whitfield, Bell & Ward*, Scarborough; *A. F. & R. W. Tweedie*, for *Watts, Kitching & Donner*, Scarborough.

[*Reported by* T. W. MORGAN, ESQ., *Barrister-at-Law.*]

ATTORNEY-GENERAL v. GREAT WESTERN RAIL. CO.

[KING'S BENCH DIVISION (McCardie, J.), January 18, 1924]

[Reported [1924] 2 K.B. 1; 93 L.J.K.B. 524; 131 L.T. 222; 40 T.L.R. 255; 68 Sol. Jo. 500; 88 J.P.Jo. 86]

Railway—Fire arising from sparks from engine—Damage to agricultural land—Damage exceeding amount claimable under statute—Claim for statutory amount, disclaiming excess—Notice of particulars—Not stated to be given under statute—Inclusion of amount exceeding statutory limit—Railway Fires Act, 1905 (5 *Edw.* 7, *c.* 11), *s.* 1 (1), (3), *s.* 3.

By the Railway Fires Act, 1905, s. 1 (1): "Where . . . damage is caused to agricultural land . . . as in this Act defined, by fire arising from sparks or cinders emitted from any locomotive engine used on a railway, the fact that the engine was used under statutory powers shall not affect liability in an action for such damage." By s. 1 (3): "This section shall not apply in the case of any action for damages unless the claim for damage in the action does not exceed £100." By s. 3: "This Act shall not apply in the case of any action for damage by fire brought against a railway company unless notice of claim and particulars of damage, in writing, shall have been sent to the said railway company within seven days of the occurrence of the damage as regards the notice of claim, and within fourteen days as regards the particulars of damage."

The defendant railway company had statutory power to run locomotive engines and while one of their trains was being drawn along their lines sparks from the engine caused a fire to break out on agricultural land under the management of the Commissioners of Woods and Forests. The representative of the commissioners notified the defendants of the fire, and later stated the amount of the claim for damage as £3,475 odd, giving particulars of the items of damage. The commissioners intended to base their claim on negligence, but later they wrote to the defendants saying that they did not wish to raise that issue. Subsequently, they claimed £100 compensation, which was the maximum amount claimable under the Act of 1905, and disclaimed the excess. The defendants contended that no action was maintainable under s. 1 of the Act since the damage suffered was more than £100 and no notice of claim and particulars in writing of damage had been sent to the defendants in compliance with s. 3 of the Act.

Held: (i) an action was maintainable for £100 compensation under s. 1 of the Act even though the damage suffered exceeded £100 since the material matter was the amount of the claim finally made against the railway company and not the amount stated in the notice of the claim; (ii) the notice of particulars of damage given by the plaintiff was a valid notice under the Act even though it did not appear on the face of it to be given under the Act, and the fact that the plaintiff had claimed more than £100 in the statutory document did not preclude him from later commencing proceedings under the Act for the amount limited thereby.

Practice—Writ—Joinder of claims—Damages for negligence and compensation under Railway Fires Act, 1905.

Per **Curiam:** There was nothing to prevent a joinder upon one writ of a claim for damages for negligence with a claim for compensation as given under the Act of 1905.

Notes. The Railway Fires Act, 1905, was amended by the Railway Fires Act (1905) Amendment Act, 1923. Section 3 of the 1905 Act was repealed by s. 3 and substantially replaced by s. 2 of the 1923 Act.

As to damage caused to agricultural land and crops by sparks from railway

engines, see 27 HALSBURY'S LAWS (2nd Edn.), pp. 16–18; and for cases see 38 DIGEST 351–352. For the Railway Fires Act, 1905, and the Railway Fires (1905) Amendment Act, 1923, see 19 HALSBURY'S STATUTES (2nd Edn.) 895, 987.

Case referred to:

(1) *Martin* v. *Great Eastern Rail. Co.*, [1912] 2 K.B. 406; 81 L.J.K.B. 825; 106 L.T. 884; 38 Digest 352, *575*.

Information by the Attorney-General on behalf of the Crown.

On July 20, 1921, a fire broke out in Beechenhurst enclosure, Forest of Dean, caused by sparks from one of the respondents' engines while drawing a train along their line from Speech House Road Station to Drybrook Road Station. The forest and enclosure are under the management of His Majesty's Commissioners of Woods and Forests. On July 22, 1921, the assistant deputy surveyor of the Forest of Dean wrote to the respondents as follows:

> "I beg to notify you that a fire occurred in Beechenhurst enclosure on Wednesday, July 20, which destroyed over one hundred acres of wood. The fire was caused by sparks from the engine of the 12.40 p.m. train ex Speech House Road Station, igniting the grass in three places inside the enclosure and in one place on the company's ground. Details and estimate of damage, which will be claimed from the company, will be forwarded later."

On July 30, 1921, the commissioners again wrote to the respondents as follows:

> "I am now in a position to state the amount of the claim for the damage done by the above fire. The figure is £3,475 12s. On behalf of the Commissioners of Woods and Forests, I therefore claim this amount from the railway companies concerned."

Attached to this letter were detailed particulars of the damage suffered showing how the sum of £3,475 12s. was made up. At the conclusion of the details this statement appeared:

> "The claim entered against the railway company for the fires started by sparks from one of their engines on July 20, 1921, resulting in the above damage is therefore £3,475 12s."

Correspondence passed between the parties showing that the Crown were basing their claim against the respondents upon negligence in the working of the engine. But in February, 1922, the commissioners wrote to the respondents stating that they would not raise the issue of negligence to substantiate their claim. On July 20, 1922, they wrote claiming the sum of £100 under the Railway Fires Act, 1905, and, on July 31, 1922, they abandoned any claim for damage in excess of £100. The respondents contended that the Act did not apply inasmuch as (a) the damage suffered by the claimants exceeded the statutory limit of £100; (b) the amount claimed exceeded £100; (c) that the notice of claim and particulars of damage were not in accordance with the requirements of the Act and were not in fact given under the Act. It was admitted at the trial that the land was agricultural land within the meaning of the Act; that the damage exceeded £100; that the fire was caused by sparks from the respondents' engine; that the engine was being used by the respondents under statutory powers; and that the respondents were not guilty of negligence.

Sir Harold Smith, K.C. (*Sir Douglas Hogg*, K.C., with him), for the Crown.
Barrington-Ward, K.C., and *Wilfrid Lewis* for the respondents.

McCARDIE, J.—This action raises several somewhat novel points under the Railway Fires Act, 1905. The facts are not in dispute. In July, 1921, a fire occurred upon Crown property, which was agricultural land within the Railway Fires Act, 1905. The damage to that property largely exceeded the sum of £100. The fire arose through sparks, which were emitted from one of the defendants' engines working under the well-known statutory powers, and without negligence.

Immediately the fire arose, the plaintiffs sent a notice to the defendants, the Great Western Rail. Co., dated July 22. They said:

> "I beg to notify you that a fire occurred in Beechenhurst enclosure on Wednesday, July 20, which destroyed over one hundred acres of wood. The fire was caused by sparks from the engine of the 12.40 p.m. train ex Speech House Road Station, igniting the grass in three places inside the enclosure and in one place on the company's ground. Details and estimate of damage, which will be claimed from the company, will be forwarded later."

On July 30 a figured claim was made. It said this:

> "I am now in a position to state the amount of the claim for the damage done by the above fire. The figure is £3,475 12s. On behalf of the Commissioners of H.M. Woods and Forests I therefore claim this amount from the railway companies concerned."

They attach to that letter a large number of most carefully prepared details, and at the conclusion of the details the plaintiffs say:

> "The claim entered against the railway company for the fires started by sparks from one of their engines on July 20, 1921, resulting in the above damage, is therefore £3,475 12s."

Those are all the facts except this: I should add that from the outbreak of the fire onwards, for some months, it is plain that the Crown were basing this claim against the defendants upon negligence in the working of the engine.

The Act of 1905 was passed for a well-known purpose. Before the Act it was essential that a plaintiff, whose crops or barns were injured by sparks from a railway company's engine, should prove negligence; that proof of negligence was a difficult and costly, and sometimes impossible, thing to establish. The object of this Act, I conceive, was to make the railway company liable for the fire caused by their working of their railway, even though they were not guilty of any negligence whatever, provided that the railway company were not to be responsible for more than £100 damage. Subsection (1) of s. 1 provides the liability of the railway company, and in sub-s. (3) it is said:

> "This section shall not apply in the case of any action for damage unless the claim in the action does not exceed one hundred pounds."

I will come back to those words to point out the curious wording which at once strikes the eye in the section. There are certain conditions precedent imposed by this Act upon a plaintiff. Section 3 provides:

> "This Act shall not apply in the case of any action for damage by fire brought against any railway company unless notice of claim and particulars of damage, in writing, shall have been sent to the said railway company within seven days of the occurrence of the damage as regards the notice of claim, and within fourteen days as regards the particulars of damage."

There has been but one decision upon this Act, so far as one is aware, as to the points raised by s. 3. That decision is *Martin* v. *Great Eastern Rail. Co.* (1), before Channell, J., when that learned and distinguished judge ruled that, in order that particulars should be particulars of damage within s. 3 of this Act of 1905 they must contain a statement of the amount claimed against the railway company. I think that is the effect of the decision, limited strictly to that point. Those are the circumstances, and the several questions argued before me are, I think, questions not free from doubt. I shall state quite concisely my view upon the several points which arise.

The first is a point of practice which, although not strictly before me, is one on which it is desirable to express a view, and I express it now. In my opinion, there is nothing to prevent a joinder upon one writ of a claim for damages for the negligence of the railway company with a claim by the plaintiff for compensation as given under the Act of 1905. I see nothing whatever, either in good

sense or in law, to prevent a joinder of those two claims, and I should certainly rule that it could be done. A

The second point that arose is this. In the present case it is admitted that the damage very largely exceeded £100. In fact, it was about £3,000. Counsel for the defendant says that if the actual damage which has fallen to the plaintiff through the fire exceeds £100 in fact, then the Act does not apply at all, and the plaintiff can get no compensation whatever under these provisions. The result B would be, therefore, that if, after full investigation, it were found that the damage actually sustained was £105, then the plaintiff apparently would be wholly defeated and have to pay the costs of his action. In my opinion, that point is not a good one. I do not think it matters whether the damage be less or more than £100. The point is not, what is the actual amount of damage, but what is the amount of the claim that is finally made against the defendant company, and therefore, in C my view, it matters not that the actual damage here amounted to £3,000.

The next point is this. Counsel for the defendant company takes the two documents in question, the one of July 22, the notice, and the one of July 30, the particulars of damage, which mention the particular amount of £3,000 odd, and he submits that those documents do not comply with s. 3 at all, because they do not appear on the face of them to be given under the provisions of the Railway D Fires Act, 1905. It is true that those documents do not refer to the Act, and I conceive it to be doubtful whether the plaintiffs, the Crown, had the Act in mind at the time; but I am satisfied, subject to the amount, that those documents in fact comply with the requirements of s. 3. That being so, in my opinion it is immaterial what may have been in the mind of the person who framed the documents; in other words, even though the Act of 1905 was not in the mind of E the writer of the letters, yet, if the letters comply with the provisions of the statute, they are documents within s. 3. The next point taken by counsel for the defendants is that, even though primâ facie these documents may be within s. 3, yet the particulars of damage are not in accordance with s. 3 because they claim more than £100. So they do. They claim £3,400. This case gives rise to a F point obviously of much practical importance in view of the wide operation of the Act of 1905. The point, therefore, is a neat one. Does the fact that a plaintiff has claimed more than £100 in his statutory document preclude him from commencing proceedings in which he does not ask for more than £100? I can see no reason at all why the plaintiff should be necessarily bound by the amount that he has mentioned in his document, and, in my view, the wording of the statute G does not support the contention of the defendants. If the intention which the defendants desire me to attribute to the legislature existed, sub-s. (3) of s. 1 would have been worded, I think, in this way: "This section shall not apply in the case of any claim for damages where the particulars or notice of claim ask for more than £100." But the section is worded in directly the opposite fashion. It does not refer at all to the amount mentioned in the notice of claim; it does not H refer to the amount mentioned in the particulars of claim; and, as I said before, the subsection is striking. It says:

> "This section shall not apply in the case of any action for damage unless the claim for damage in the action does not exceed one hundred pounds."

I can see nothing again there in good sense which should preclude a man who I happens to have sent in a claim for £150. I can see no reason why he should not say: "I am not satisfied that I can get that sum because of the words of the Act. I cannot prove negligence, but I shall get what the Act intended to give me. I give particulars of the actual damage suffered and particulars that I claim £100 in the action." I see no hardship on the defendants, because the particulars under s. 3 must give them an adequate notion of the general nature of the claim, and the writ must give them notice that £100 only is claimed against them. Therefore, in my opinion, these various points, which are raised by the Great

Western Rail. Co. and have been argued so well by counsel on both sides, fail the defendants, and I think that the Crown is entitled to succeed.

I ought just to add that counsel have been good enough to call my attention to the recent Act called the Railway Fires Act (1905) Amendment Act, 1923, which to some extent affects the procedure under the Act of 1905. But I am unable to derive from that more recent statute anything which throws light upon the true construction of the Act of 1905.

Judgment for the Crown.

Solicitors: *Frank A. Jones*; *A. G. Hubbard.*

[*Reported by* T. W. Morgan, Esq., *Barrister-at-Law.*]

GLASBROOK BROS., LTD. *v.* GLAMORGAN COUNTY COUNCIL

[House of Lords (Viscount Cave, L.C., Viscount Finlay, Lord Shaw, Lord Carson, and Lord Blanesburgh), November 3, 4, 6, December 19, 1924]

[Reported [1925] A.C. 270; 94 L.J.K.B. 272; 132 L.T. 611; 89 J.P. 29; 41 T.L.R. 213; 69 Sol. Jo. 212; 23 L.G.R. 61]

Police—Execution of duty—Protection of life and property—Right to provide special protection in consideration of payment—Validity of agreement to pay—Public policy.

There is an absolute and unconditional obligation binding the police authorities to take all steps which appear to them to be necessary for keeping the peace, preventing crime, or protecting property from criminal injury, and the public, who pay for this protection through the rates and taxes, cannot lawfully be called on to make a further payment for that which is their right. But where private persons desire that services of a special kind which, though not within the scope of the absolute obligations of a police authority, yet fall within the powers of the police and can most effectively be rendered by them, may be performed by members of the police force, the police authority may "lend" the services of constables for that purpose in consideration of payment, provided that there will result no interference with the ordinary duties of the police elsewhere. In such a case there is abundant consideration for a promise by the person seeking the special service to pay the police authority for that service. The duty of deciding whether a particular service is necessary for the protection of life and property or whether it is a special service affording a special protection desired by the person who requests it is cast on the police authority.

During a strike at the appellants' mine the appellants' manager requested the police authority to supply a resident garrison of police to ensure protection of the "safety men" without whose services the mine would be flooded and rendered unworkable for a considerable period. The police authority took the view that this was unnecessary and that adequate protection could be given by the police in other ways, but on the insistence of the appellants' manager agreed to give the special protection requested. The manager, on behalf of the appellants, agreed with the superintendent to pay for the cost of rationing the garrison and the services of the police at specified rates. The strike having ended, the appellants refused to pay the amount due under this agreement, and the police authority brought an action to recover it.

Held (by VISCOUNT CAVE, L.C., VISCOUNT FINLAY, and LORD SHAW; LORD CARSON and LORD BLANESBURGH dissentiente): the question was whether the decision of the police authority to refuse special protection unless it were paid for was reasonable; the true inference from the evidence was that the provision of the garrison formed an additional, and not a substituted or alternative, means of protection, and that the safety of the mine would have been attained without it; the agreement was not void as being against public policy; and, therefore, the police authority were entitled to succeed.

Decision of the Court of Appeal, [1924] 1 K.B. 879, affirmed.

Notes. Considered: *China Navigation Co.* v. *A.-G.*, [1932] All E.R.Rep. 626. Referred to: *Fisher* v. *Oldham Corpn.*, [1930] All E.R.Rep. 96.

As to the powers and duties of police constables, see 25 HALSBURY'S LAWS (2nd Edn.) 320 et seq.; and for cases see 37 DIGEST 186–188.

Cases referred to:

(1) *Glamorgan Coal Co. v. Glamorganshire Standing Joint Committee, Powell Duffryn Steam Coal Co.* v. *Same*, [1916] 2 K.B. 206; 85 L.J.K.B. 1193; 114 L.T. 717; 80 J.P. 289; 32 T.L.R. 293; 14 L.G.R. 419, C.A.; 37 Digest 185, *79*.

(2) *Miller* v. *Knox* (1838), 4 Bing.N.C. 574; 6 Scott. 1; 132 E.R. 910, H.L.; 16 Digest 6, *3*.

Appeal from an order of the Court of Appeal, reported [1924] 1 K.B. 879, affirming by a majority a judgment of BAILHACHE, J.

The action was brought to recover £2,200 11s. 10d. for the services of police supplied by the respondents to the appellants at their request and under an agreement by appellants to pay for their services. The appellants contended that there was no consideration for the agreement, and that it was made under compulsion and was exacted as a condition of the police merely carrying out their legal obligations. The appellants counter-claimed to recover £1,330 which they had paid for housing and billeting the police so supplied. BAILHACHE, J., held that as the appellants were asking for special protection in excess of the sufficient protection which the police were prepared to give, the express promise to pay for their services was valid. The Court of Appeal (BANKES and SCRUTTON, L.JJ., ATKIN, L.J., dissenting) affirmed his decision. The defendants appealed to the House of Lords.

Sir John Simon, *K.C.*, and *Montgomery*, *K.C.* (with them *A. T. James*), for the appellants.

Vaughan Williams, *K.C.* (with him *Trevor Hunter*), for the respondents.

The House took time for consideration.

Dec. 19. The following opinions were read.

VISCOUNT CAVE, L.C.—The national coal strike, which commenced on April 1, 1921, came to an end on July 4 of that year, certain terms being then agreed upon as to the payment of wages to the miners. The appellants, Glasbrook Bros., Ltd., who are the owners of a valuable group of collieries in Glamorganshire situated about two miles from Swansea, proposed to pay their men (numbering about 1,000) on the agreed scale, but this was not agreeable to the men, some of whom had before the strike been receiving better terms, and they refused to return to work. During the strike the "safety men" at the appellants' collieries—that is to say, the men employed to attend to the pumping which was necessary in order to preserve the mines from flooding—had been allowed to continue at work; but when the miners decided to remain out on strike they insisted (doubtless as a means of forcing the appellants to accept their terms) that the safety men should cease work and put severe pressure upon those men to comply with their wishes. During the week beginning on July 4 crowds of miners went to the collieries, and a deputation representing the miners was admitted to the works and had an interview with the safety men. Picketing which was not of a peaceful character took place, one of

the safety men when on his way to the works was pulled off his bicycle; and the workmen's committee informed Mr. James, the agent for the collieries, that "they meant to get all the safety men out." As a result of this pressure the safety men held a meeting and resolved that owing to the pressure put upon them and the insufficient police protection, they would not work any longer; and on Saturday, July 9, the safety men who were expected (six at each of the two principal collieries) did not turn up, and the fires had to be drawn and the pumping discontinued. On the same day—July 9—Mr. James went to the police station at Gowerton and saw Lieut.-Col. Smith, the superintendent of the "H" Division of the Glamorganshire Constabulary, told him the facts, and said that it would be necessary to have police billeted in the colliery. Col. Smith demurred, saying that he was able to protect the collieries without installing a police garrison. He had been keeping what he called a thin shield of police at the colliery to watch and give information if any large body of miners appeared, and in that event an ample force of police could at once be sent up; and he thought that with such a body of watchers at the points of danger and a mobile force of police ready for action wherever they might be required he was stronger than with the garrison. Mr. James, however, insisted on his view and asked for a garrison of 100, adding: "I am of opinion that a garrison is the only thing that will inspire our fellows with confidence to work." Colonel Smith gave in, but suggested that seventy men would be enough for the purpose, and said that as it would be a "special duty" a requisition must be signed containing a promise to pay. Mr. James, who had been previously authorised by his directors to sign such a requisition, assented, and at once signed a requisition in the following form:

> "Glamorgan Constabulary.—Form of Requisition for special services of police. Garngoch Collieries.—Gorseinon, July 9, 1921.—Sir,— . . . Superintendent, two Inspectors, two Sergeants, and 66 Constables (in accordance with the First Schedule to this Form), are required for Special Duty at the Garngoch and Cape Collieries on the occasion of a strike from 6 p.m. on July 9, 1921, to .....m. on the ..... 1921. I hereby guarantee payment on the conditions specified in clause "C" of the Second Schedule to this form.—(Signed) A. JAMES.—To the Chief Constable."

The second schedule to the above requisition specified the amounts to be paid and the quality of the food to be supplied to the police. This matter having been settled, the police authorities, without reducing the force of police employed in the district, brought in seventy police from other divisions in the county and sent them up to the collieries, where they remained until the dispute was settled. For a few days the appellants employed some naval stokers, but this expedient was not successful and the fires were not at once re-lighted. On the following Tuesday, July 12, some of the safety men came to the works and expressed their willingness to resume work if they were billeted at the colliery; and ultimately they all came back and the fires were lighted on July 15 and pumping resumed. The safety men were informed that a force of police was in billet at the works, and no doubt their presence inspired confidence; but the duty of protecting the wives and families of these men, against whom some cowardly threats had been used, remained, of course, with the general body of police outside. After these events the behaviour of the miners appears to have improved, and no attack was made on the collieries or (so far as the evidence goes) at the homes of the safety men employed at the works. On Aug. 26 the dispute came to an end and the garrison of police was withdrawn. The charges for the pay and expenses of the billeted police, ascertained in accordance with the terms of the requisition, amounted to £2,200 11s. 10d. and payment of that sum was demanded of the appellants, but refused; and thereupon the Glamorganshire County Council, with the Standing Joint Committee and the Chief Constable, brought this action against the appellants claiming payment of that amount. The appellants by their defence did not contest the correctness of the charges claimed, but pleaded that the police officers in respect of whom the

charge was made were supplied for the purpose of carrying out the legal duties and obligations of the plaintiffs, which included the prevention of riot and violence and the protection of the appellants' servants and property against the danger or apprehended danger of injury by reason of riots, violence or tumults, and, accordingly, that there was no consideration for the agreement to pay, which, they said, was signed under compulsion, and they counter-claimed for the expenses of housing and maintaining the police, amounting to £1,330 4s. The action was heard by BAILHACHE, J., who gave judgment for the plaintiffs (the respondents) on the claim and counter-claim with costs; and on appeal this judgment was affirmed by a majority of the Court of Appeal (BANKES and SCRUTTON, L.JJ.; ATKIN, L.J., dissenting). Hence the present appeal.

Upon the argument of the appeal, two points were raised. First, it was argued that, when a subject has need of police protection and has done nothing to increase the risk, he is entitled to protection without payment and an agreement to pay is without consideration and contrary to public policy. Secondly, it was said, following a suggestion made in the Court of Appeal, that on general principles the police authorities are not entitled, except in the cases specifically provided for by statute, to make a charge for police services. It is convenient to deal first with the latter and more general contention.

The practice by which police authorities make a charge for "special services," that is to say, for services rendered outside the scope of their obligations, has been established for upwards of sixty years and is constantly followed by every police authority in the country with the approval of the Secretary of State; and it is difficult to understand on what grounds it should now be treated as illegal. No doubt there is an absolute and unconditional obligation binding the police authorities to take all steps which appear to them to be necessary for keeping the peace, for preventing crime, or for protecting property from criminal injury; and the public, who pay for this protection through the rates and taxes, cannot lawfully be called upon to make a further payment for that which is their right. This was laid down by PICKFORD, L.J., in *Glamorganshire Coal Co., Ltd.* v. *Glamorganshire Standing Joint Committee, Powell Duffryn Steam Coal Co., Ltd.* v. *Same* (1) in the following terms ([1916] 2 K.B. at p. 229):

> "If one party to a dispute is threatened with violence by the other party he is entitled to protection from such violence whether his contention in the dispute be right or wrong, and to allow the police authority to deny him protection from that violence unless he pays all the expense in addition to the contribution which with other ratepayers he makes to the support of the police is only one degree less dangerous than to allow that authority to decide which party is right in the dispute and grant or withhold protection accordingly. There is a moral duty on each party to the dispute to do nothing to aggravate it and to take reasonable means of self-protection, but the discharge of this duty by them is not a condition precedent to the discharge by the police authority of their own duty."

With this statement of the law I entirely agree, and I think that any attempt by a police authority to extract payment for services which fall within the plain obligations of the police force, should be firmly discountenanced by the courts. But it has always been recognised that, where individuals desire that services of a special kind which, though not within the obligations of a police authority, can most effectively be rendered by them, should be performed by members of the police force, the police authorities may (to use an expression which is found in the Police Pensions Act, 1890) "lend" the services of constables for that purpose in consideration of payment. Instances are the lending of constables on the occasions of large gatherings in and outside private premises, as on the occasions of weddings, athletic or boxing contests, or race meetings, and the provision of constables at large railway stations. Of course, no such lending could possibly take place if the constables were required elsewhere for the preservation of order; but (as

BANKES, L.J., pointed out) an effective police force requires a margin of reserve strength in order to deal with emergencies, and to employ that margin of reserve, when not otherwise required, on special police service for payment is to the advantage both of the persons utilising their services and of the public who are thereby relieved from some part of the police charges. ATKIN, L.J., put the contrary view in the form of a dilemma when he said:

> "Either they were performing this public duty in giving the protection asked for, in which case I think they cannot charge, or, which no one suggests, they were at the request of an individual doing something which it was not their duty to do, in which case it seems to me both public policy and s. 10 of the County Police Act, 1839, make the contract illegal and void."

With great respect to the learned lord justice I am disposed to think that this reasoning rests on an ambiguous use of the word "duty." There may be services rendered by the police which, although not within the scope of their absolute obligations to the public, may yet fall within their powers, and in such cases public policy does not forbid their performance. I do not understand the reference in the above passage to s. 10 of the Act of 1839.

The above view of the law is in accordance with certain passages in the judgments of PHILLIMORE and PICKFORD, L.JJ., in the previous Glamorganshire case cited above, but in that case the point did not actually arise. The argument also derives considerable support from the statutes dealing with the police. By the Police Act, 1838, it was provided that when the appointment of special constables had been occasioned by the behaviour or by reasonable apprehension of the behaviour of the persons employed upon any railway, canal or other public work made or carried on under the authority of Parliament, the justices might make orders upon the company making or carrying on such railway, canal or other public work for the payment to such special constables of reasonable allowances for their trouble, loss of time, and expenses. By the County Police Act, 1840, it was enacted that it should be lawful for the chief constable of any county with the approval of the justices in quarter session on an application of any person showing the necessity thereof to appoint and cause to be sworn in any additional number of constables at the charge of the person making such application, but subject to the orders of the chief constable and for such time as he should think fit. It is true that the provisions of this section are confined to the appointment of "additional" constables; but it would seem somewhat absurd to require that, if in any case where constables are required for special duty there are members of the existing force who can be spared for the purpose, the services of those constables shall not be utilised but additional constables shall be appointed. By the Police Act, 1890, s. 16, it was provided that there should be carried to the pension fund of every police force among other sums

> "(e) such proportion of any sum received on account of constables whose services have been lent in consideration of payment as the police authority may consider to be a fair contribution to the pension fund in respect of those constables."

No doubt, the above provision of the Act of 1890 was repealed by the Police Pensions Act, 1921, but that repeal was rendered necessary by reason of the fact that by s. 22 of that Act all pensions were directed to be paid out of the police fund and the pensions funds were abolished, and the repeal does not detract from the significance of the fact that by the terms of the Act of 1890 the lending of the services of constables in consideration of payment was expressly recognised by the legislature. I find it difficult to believe that if the legislature had considered the practice of lending constables for special duty, which in the year 1890 was of daily occurrence, to be against public policy, it would have provided for the application of payments received in consideration of such lending to pension purposes; and it appears to me that this statutory recognition of the practice in question affords a strong argument in favour of its legality.

I conclude, therefore, that the practice of lending constables for special duty in consideration of payment is not illegal or against public policy; and I pass to the second question—namely, whether in this particular case the lending of the seventy constables to be billeted in the appellants' colliery was a legitimate application of the principle. In this connection I think it important to bear in mind exactly what it was that the learned trial judge had to decide. It was no part of his duty to say—nor did he purport to say—whether in his judgment the billeting of the seventy men at the colliery was necessary for the prevention of violence or the protection of the mines from criminal injury. The duty of determining such questions is cast by law, not upon the courts after the event, but upon the police authorities at the time when the decision has to be taken; and a court which attempted to review such a decision from the point of view of its wisdom or prudence would (I think) be exceeding its proper functions. The question for the court was whether on July 9, 1921, the police authorities, acting reasonably and in good faith, considered a police garrison at the colliery necessary for the protection of life and property from violence, or, in other words, whether the decision of the chief constable in refusing special protection unless paid for was such a decision as a man in his position and with his duties could reasonably make. If in the judgment of the police authorities, formed reasonably and in good faith, the garrison was necessary for the protection of life and property, then they were not entitled to make a charge for it, for that would be to exact a payment for the performance of a duty which they clearly owed to the appellants and their servants; but if they thought the garrison a superfluity and only acceded to Mr. James' request with a view to meeting his wishes, then, in my opinion, they were entitled to treat the garrison duty as special duty and to charge for it. On this point the Divisional Superintendent, Col. Smith, who was a highly experienced officer, gave specific and detailed evidence, and the learned judge, having seen him in the witness-box and heard his examination and cross-examination, accepted his evidence upon the point, as the following extract from the judgment shows:

> "Colonel Smith says that if the matter had been left entirely to him without this requisition, he would have protected this colliery, and he would have protected it amply, but in quite a different way, and I accept his evidence that that is so. He would not have sent this garrison there, and, in my judgment, while not desiring for a moment to suggest that it was not the bounden duty of the county council to protect this colliery, and not for one moment suggesting that the performing of a legal duty will support a promise to pay, I have come to the conclusion that when a colliery company or an individual requisitions police protection of a special character for a particular purpose, he must pay for it, and he must pay for it whether he makes a contract to pay or whether he does not—a promise to pay would be implied under those circumstances. In this case, of course, there is an express promise, and, in my judgment, this promise is not without consideration and must be fulfilled."

Upon this point counsel for the appellants contended that the true inference to be drawn from the evidence was that the police authority, having a discretion to elect between protecting the collieries (which admittedly required protection in some form) by means of the "mobile body" to which Col. Smith referred or by means of a garrison, chose the latter alternative in consideration of payment, and that they could not so (as he put it) "sell their discretion." Upon the evidence, I do not think that they did anything of the kind. Col. Smith said clearly that the police garrison was no part of his scheme of protection and did not help him in his scheme at all; that he had ample force by which to protect the collieries from outside and was well able to cope with the situation. It does not appear that the provision of the garrison, who were brought in from distant parts of the county, relieved the force on the spot from any of their duties, or that the local force was reduced in consequence; and I think that the true inference is that the garrison formed an additional and not a substituted or alternative means of pro-

tection. There is another argument to be noticed. It was said that if the police garrison had not been provided the "safety men" would not have attended to work the pumps and the mines would have been flooded, and from this it is inferred that the garrison was necessary for the protection of the appellants' property. I think that there was evidence to that effect, but it does not appear to me to follow that it was the duty of the police authority to provide the garrison. They were no doubt bound to protect the "safety men" from violence, but it was not for the safety men to decide the form in which that protection should be given; and if they declined to safeguard the collieries from flooding unless protection was given in a particular form which the police authorities thought unnecessary, it was for the owners of the collieries and not for the police to overcome their reluctance. Upon the whole matter, I have come to the conclusion that the decision of the learned trial judge and of the Court of Appeal was right, and that the appellants, who deliberately entered into an agreement to pay for the services and maintenance of the police garrison and did not dispute their liability until they had had the benefit of those services for a period of nearly two months, cannot now repudiate their agreement upon any of the grounds put forward. In my opinion, therefore, this appeal fails and should be dismissed with costs.

VISCOUNT FINLAY.—The appellants are the owners of collieries on the Garngoch Common in the county of Glamorgan. In 1921 there was a national coal strike which began on April 1 and lasted till July 4, at which date work was generally resumed. The men at the appellants' collieries were, however, dissatisfied with the terms of settlement and refused to resume work. In these collieries over 1000 men had been employed, and they remained idle until Sept. 4, 1921. The "safety men," as they are called, who were engaged in working the pumps on which the preservation of the mine from flooding depended, remained at work. If the working of the pumps had been stopped, the mine in the course of a few days would have been most seriously damaged by the accumulation of water. The strikers endeavoured to get these "safety men" to join in the strike, the effect of which would have been that in three or four days the mine would have been drowned out. In these circumstances the agent of the owners, Mr. Alfred James, went to the Gowerton police station to arrange with the superintendent, Col. Smith, for police protection. He asked that an adequate force of police should be billeted in the houses in the immediate vicinity of the collieries. Col. Smith thought that protection would be best afforded by a flying column moving from point to point as required, but Mr. Alfred James insisted that a "garrison" near the mines should be provided and Col. Smith acquiesced. Mr. James in his evidence described what ensued as follows:

> "(Q.) Did he then tell you something about a form?—(A.) Yes. (Q.) What did he say exactly about the form?—(A.) As near as I remember he said: 'You will of course have to sign a form of requisition.' I said: 'Yes—that is the usual procedure in matters of this description'—and he told me it was, so I said: 'All right, I will sign the form.'"

The form was accordingly signed. It is headed: "Form of Requisition for Special Services of Police." It stated that certain men, seventy in all, were required for special duty at the Garngoch and Cape Collieries on the occasion of a strike from 6 p.m. on July 9. The form concluded: "I hereby guarantee payment on the conditions specified in clause 'C' in the second schedule to this form." This was signed by Mr. James and addressed to the chief constable. The schedule stated the terms as to payment, accommodation, and food. The seventy men arrived on the evening of the same day. The safety men remained at work, and it was admitted at the trial that police protection in some shape or form was required. No pressure was put upon Mr. James to sign the requisition; as his evidence shows, he was prepared to sign it and knew that it was usual in such cases. The action in this case was brought to recover the amount due on the terms of the

requisition. The colliery owners repudiated liability on the grounds that there was no consideration for the promise to pay for the police protection and that such an agreement was against public policy. The case was tried by BAILHACHE, J., and he entered judgment for the plaintiffs, saying:

> "There is an obligation on the police to afford efficient protection, but if an individual asks for special protection in a particular form, for the special protection so asked for in that particular form, the individual must pay."

This decision was affirmed by a majority on the appeal (BANKES and SCRUTTON, L.JJ., ATKIN, L.J., dissenting). The colliery owners now appeal and ask that judgment should be entered for them.

It appears to me that there is nothing in the first point made for the colliery owners that there was no consideration for the promise. It is clear that there was abundant consideration. The police authorities thought that it would be best to give protection by means of a flying column of police, but the colliery owners wanted the "garrison" and promised to pay for it if it was sent. I pass at once to the second objection made by the colliery owners, on which we have had a prolonged argument.

A great number of cases have been cited to us in which it has been held that fees extorted colore officii must be returned. These authorities seem to me to have no application to the present case. There is no doubt that it is the duty of the police to give adequate protection to all persons and to their property. In discharging this duty those in control of the police must exercise their judgment as to the manner in which that protection should be afforded. If a particular person desires protection of a special sort and the police can give this without interfering with the discharge of other duties elsewhere, it is difficult to see on what ground of public policy it should be illegal that a charge should be made in respect of special protection. The police must, of course, have a certain margin of strength to draw upon as from time to time occasion may arise, and for this purpose it is essential to have at the disposal of the authorities a force in excess of the bare amount which would in normal circumstances be sufficient for the discharge of their duties. For a long series of years it has been the practice to supply special police protection on the promise of payment. There has been a great deal of legislation about the police, but no attempt has ever been made to interfere with this practice. On the contrary it has been recognised and regulated by the authorities. I may refer in illustration to the memorandum from the Home Office, dated January, 1892, as to receipts in respect of the services of constables lent to private employers. Of course, if it were illegal to take such payments no amount of sanction by government Departments would legalise what was against the law, but the fact that the Home Office has regulated such payments goes a long way to show that there is nothing illegal about them. We have not been furnished with any substantial argument on the ground of public policy against such payments. Why should not the reserve strength of the police be used in this way on the terms that those who desire such special protection should make payment for it in aid of the expenses of maintaining the force, and so to that extent relieving the ratepayer? It was suggested that such a practice would enable those who could afford to pay for it to get special police protection which would not be given to their poorer neighbours. The police authorities may be trusted to see that such special service is never to be allowed in cases where it would interfere with the other duties of the force. I can see no ground of public policy on which employers should not make some contribution to the special cost of police required on emergency for the protection of their works.

I have referred to the fact that the legislature has never interfered with this practice, the existence of which for eighty years or upwards has been known to every one. But the legislature has actually made provision as to the application of the moneys to be derived from such payments. The Police Act, 1890, by s. 16 (1), made the following provisions:

A "There shall be a pension fund of every police force and there shall be carried to that fund . . . (e) Such proportion of any sum received on account of constables whose services have been lent in consideration of payment as the police authorities may consider to be a fair contribution to the pension fund in respect of these constables."

B The subsequent repeal of this Act as no longer necessary does not affect the inference to be drawn from this recognition of the practice. It was indeed a recognition that the practice was legal, as it cannot be supposed that Parliament would have directed such application of payments which were in themselves illegal. A much earlier statute, the County Police Act, 1840, by s. 19, makes provision for the appointing and swearing in of special constables "at the charge of the person C or persons by whom the application shall be made," such special constables to be discontinued on the request of those who have applied for their appointment. This enactment seems to me to destroy the contention of the appellants that there is some legal principle which makes it illegal to pay for special police assistance.

The case for the appellants is summarised in a sentence of the dissenting judgment of ATKIN, L.J., as follows:

D "Either they were performing this public duty in giving the protection asked for, in which case I think they cannot charge, or, which no one suggests, they were at the request of an individual doing something which it was not their duty to do, in which case it seems to me both public policy and s. 10 of the County Police Act, 1839, make the contract illegal and void."

E I think that this argument, like most arguments put in the form of a dilemma, fails to cover the whole ground. There was no duty on the police to give the special protection asked for, but it does not follow that it was their duty not to give it. Section 10 of the Act of 1839 seems to me to have no relevance to the circumstances of the present case, as it merely prohibits constables from taking for hire or gain work other than in the execution of their duties under the Act. It has no reference to special protection given by the police authorities to particular persons F and the work done by the constables in that respect under their orders. It would be useless to go through the cases in which exactions by officials of fees to which they have no right have been treated as illegal. The question here is an entirely different one. It is simply whether a charge may be made for special police protection desired by a particular person for which he is willing to pay and which the police are in a position to render without interfering with their ordinary duties. G Beyond all question it is the duty of the police to give protection to the persons and property of all His Majesty's subjects. The police must never be taken off for special duty so as to withdraw such protection as is wanted elsewhere. The fact that the system has so long existed without giving rise to any complaint that it interferes with the ordinary duties of the police is the best evidence that the H objections to the practice are not real. These objections are, indeed, merely theoretical. The practice has existed for nearly a century and has not been attended by any of the mischiefs which it has been suggested might follow. If a particular person gets special police protection in a particular form on his promise to pay for it, he is bound by his contract legally as well as morally. In my opinion, this appeal must be dismissed with costs.

I **LORD SHAW** (read by LORD BLANESBURGH).—I concur. I hold it to be established that the position of the safety men in this mine was such as to justify the special attention of the police authority being called to their protection. As to the powers, position and duty of the police I venture to quote on this matter the judgment of PICKFORD, L.J., in *Glamorgan Coal Co., Ltd.* v. *Glamorganshire Standing Joint Committee, Powell Duffryn Steam Coal Co., Ltd.* v. *Same* (1). I respectfully and entirely agree with that judgment. The learned judge says of the police authority that

"they have to make proper police arrangements to maintain the peace. If one party to a dispute is threatened with violence by the other party he is entitled to protection from such violence whether his contention in the dispute be right or wrong, and to allow the police authority to deny him protection from that violence unless he pays all the expense in addition to the contribution which with other ratepayers he makes to the support of the police is only one degree less dangerous than to allow that authority to decide which party is right in the dispute and grant or withhold protection accordingly."

The circumstances of the situation which brought about a just call for police protection in the present instance were that in addition to the peril of the safety men there was, of course, a serious danger to property, for the reason that the stoppage of or impediment to pumping might flood the mines. The interview, accordingly, between Col. Smith, the police superintendent, and Mr. James on this subject was very natural; it was also, I think, an interview creditable to both parties. In the view which I take of their attitude and action I am of opinion that Col. Smith fully recognised the duties to which I have alluded, and was of opinion that he could sufficiently and properly carry out these duties by a thin shield of police round the pits, with such mobility of the general force as would permit of the special protection of the homes and families of the safety men if these should also be attacked. On the other hand, I think that Mr. James was honestly of opinion that that would not be enough, and held this opinion so strongly that he willingly agreed that if a garrison or a resident force were furnished this would be upon the terms of that force being paid for. In a conflict of view of that description I think that naturally courts of law should, to begin with, pay a considerable deference to the experience and view of the authority set up by law for the preservation of peace and order. This view, however, does not go very far, if it is confronted with the careful and experienced opinion of a man like Mr. James, who knew the locality, the industrial position, and the personnel. On the question, accordingly, whether the police did require the special force for due police protection in the circumstances, and cannot, therefore, charge for providing that force I am driven to consider the verdict upon the whole evidence which was formed by the learned Bailhache, J., at the trial. The issue tried was whether the installation of a garrison or resident police force at the colliery was what may be called a police necessity. The learned judge puts his verdict upon that topic in this way:

"Colonel Smith says that if the matter had been left entirely to him without this requisition [for a garrison] he would have protected this colliery, and he would have protected it amply, but in quite a different way,"

i.e., by the thin shield already referred to. The learned judge adds: "I accept his evidence that this is so." The majority of their Lordships in the Court of Appeal agree with that opinion. I cannot see my way to differ from it. I, accordingly, hold that the result of the evidence as found is that the safety of the mine, the object in view, would have been attained without the extra force, which was agreed to be paid for, being called in.

But a question remains—one carefully and anxiously considered in the opinion of Atkin, L.J.—whether calling in such a force to act as an additional precaution, and to make assurance of safety doubly sure, is outside the sphere of the duty committed to the police. The statutes have been cited by the noble viscount on the Woolsack, and by my noble and learned friend who has just resumed his seat. A perusal of these, taken along with the practice to which my colleagues have alluded, convinces me that there are functions of a surplus or extra character to which available policemen may be detailed on special terms, and that the moneys obtained for such services have been recognised by the legislature to be paid over in a particular manner, whether by way of assistance to a police pension fund or in the relief of general taxation. The question, accordingly, is whether in exercising the power to act in this fashion the police authority has gone beyond the sphere

of its duty. I cannot see my way to hold that it has. That authority has acted intra vires. I desire, however, to add that the whole of this part of the case depends upon the necessity for a special force being, in a reasonable sense, established. If that is done I clearly am of opinion that no charge can be exacted from a private citizen for the performance of a public duty. Furthermore, I would also add that, on the assumption that a payment is made to induce or secure that the public authority will perform such a duty, moneys paid under such a bargain are recoverable by the private citizen on the double ground, first, that it is against public policy that the performance of public duty shall be a matter of private purchase, and, second, that a promise or agreement to pay, accepted from a citizen in times of nervous alarm or anxiety, fails in legality on the ground of duress, and sums paid under it must be restored. In the present case, however, as I have explained, the agreement for payment must be supported, because it was for something which, although within the power of the police to give, could not be declared as a protection proved to be necessary for the reasonable demands of the occasion.

LORD CARSON.—I am of opinion that this appeal should be allowed. The questions raised are of great public importance, and as the decision I have come to is at variance with that of the three noble and learned Lords who have already addressed this House, I feel bound to state my reasons for the conclusions at which I have arrived at some length.

Before examining the facts of the present case it is necessary to make it perfectly clear what the duties of the police as preservers of the King's peace are in cases where either the person or the property of a subject is criminally assailed or threatened by the action of any other person or persons. I do not think, my Lords, that upon this point there is any difference of opinion. I notice that the Lord Chancellor, in the speech which he has just read, has stated as follows:

> "No doubt there is an absolute and unconditional obligation binding the police authorities to take all steps which appear to them to be necessary for keeping the peace, for preventing crime, or protecting property from criminal injury, and the public, who pay for this protection through the rates and taxes, cannot lawfully be called upon to make a further payment for that which is their right."

He quotes with approval the statement made by PICKFORD, L.J., in *Glamorganshire Coal Co., Ltd.* v. *Glamorganshire Standing Joint Committee*, *Powell Duffryn Steam Coal Co., Ltd.* v. *Same* (1), and he adds:

> "With this statement of the law I entirely agree and I think that any attempt by a police authority to extract payment for services which fall within the plain obligations of the police force should be firmly discountenanced by the courts."

I should like also to add the declaration made in the same case by PHILLIMORE, L.J.:

> "Nor can I pass over the contention frequently made in the course of the proceedings, that it was the duty of the plaintiffs to protect themselves against rioters. Such a contention strikes at the basis of all civilised society and logically leads to private war. The subject pays rates and taxes to ensure himself protection against domestic as well as foreign foes and it is the duty of the government to provide him with it."

BRAY, J., in the same case, states:

> "The real reason for the refusal of the county council to pay these claims seems to have been that they thought that the colliery proprietors ought to pay for having the lives of their employees and their property protected. The colliery proprietors have to pay rates like other persons living and owning property in the county."

If I might with respect offer any criticism on the Lord Chancellor's statement,

I would myself prefer to lay down that it is the duty of the police to take all steps that are necessary for the purposes mentioned by the Lord Chancellor.

I should like to supplement these statements by one further observation—namely, that it is not in the power of the executive through the Secretary of State or otherwise to limit the rights of the subject in obtaining such protection for life and property, and that any attempt to do so would be absolutely unconstitutional and illegal. A perusal of the judgments in *Miller* v. *Knox* (2), a case in your Lordships' House, though not upon this exact point, affords very useful commentary upon the right of the executive to refuse assistance in cases where it is necessary to apply for the assistance of the police. It is necessary therefore to examine carefully the facts of the present case and to ascertain whether, in the circumstances, the steps taken to protect the safety men and thus avoid the drowning of the colliery, for which the appellants are asked to pay, were outside the proper and necessary duties of the police which the appellants were entitled to have performed under the law to which I have just referred.

It was admitted at the trial that at the time when the requisition relied upon and the basis of this action was signed by Mr. James police protection in some shape or form was required to protect the safety men, but I cannot help thinking that it was a pity that the learned judge, on obtaining such an admission, prevented further evidence being given of the exact state of affairs which rendered such protection necessary. There is, however, a considerable amount of information to be gathered from the records and the evidence as to what the exact state of affairs was. It appears that on July 7, 1921, 700 strikers went to the collieries in order to compel the safety men to abstain from work, and that in consequence of this interference with the safety men the appellants' agent, Mr. James, interviewed Police Inspector Nicholls and informed him of the danger to the pits and to the safety men, and asked for police protection. On the next day, July 8, picketing was actively continued at the collieries and the approaches thereto. Large crowds of hostile workmen assembled near the collieries and interfered with the safety men. Instead of the normal number of safety men who were required to keep the pumps going, only one safety man attended work at the No. 1 Colliery, and the workmen's committee informed the said Mr. James that they were going to get all the safety men out. It was on the afternoon of this day that the safety men held a meeting at which they resolved that, owing to interference by the strikers and to the insufficiency of the police protection, they could not continue at work. On Saturday, July 9, none of the safety men came to work at any of the collieries and the fires had to be drawn, with the result that, if this continued, the colliery would have been drowned out in a few days. It was in this condition of affairs that Mr. James pointed out to Superintendent Smith that it would be necessary to have police billeted at the collieries if the safety men were to be given adequate protection to enable them to continue at work. There was some discussion as to the number of police required, and eventually Superintendent Smith said that seventy police officers would be sufficient, and, as a condition of sending the seventy police, procured the signature of Mr. James to the requisition upon which this action is founded. On the same day the seventy police came to the collieries for duty and some of them remained at the collieries until the strike ended on Aug. 26, 1921. It is to be specially noted that this action was not taken until the safety men had left owing, as they said, to the want of sufficient police protection. A few days after the arrival of the police the safety men returned to the colliery, where they also were billeted, and maintained the colliery in safety until the strike was ended and work was resumed.

An examination of the police journals which were put in evidence at the trial throws further light upon the matter. It states that, under the entries of July 10, 1921,

> "the men were afraid to remain in consequence of the attitude of the workmen, and, fearing their homes would be wrecked, they left the collieries, hence

A the importing of extra police for protection and re-starting the fire at the boiler."

It further shows the steps taken by Smith to co-operate with the men at the colliery premises and under date Tuesday, July 12, 1921, there is the following entry:

B "Col. F. W. Smith, Inspector Nicholls and fifteen men from 'H' Division arrived at the colliery premises at 4 a.m. The whole of the men kept on reserve at the colliery premises in consequence of a meeting announced to be held at Cadle Common, and in the event of the colliers deciding to march on the colliery in a body with a view to endeavouring to get the imported stokers to discontinue the work."

C As late as July 29 there is an entry as follows:

"It has been reported locally that at the meeting held at the Workmen's Hall, Treboath, it was decided not to allow the management to have any men to work the pumps after the holidays. This means that if the officials decide to come to work at the colliery they will be only able to work under police protection, as feeling ran very high in that locality against the employment of D safety men. The following officials employed at the colliery were taken home under police protection at 10.45 p.m. . . ."

It is instructive also to note that in a letter, dated May 29, 1923, from the chief constable of the county of Glamorgan to the Under-Secretary of State at the Home Office, the following statements were made:

E "A colliery company, having signed agreements to employ some constables of this force on their private premises so as to induce the workmen out on strike to come back to work, have now refused to pay the county for the services of the constables on the ground that it is illegal. . . . In this particular case our position is a very strong one. We sent the men employed on special duty from the most distant divisions in the county, thus keeping nearer divisions at hand as reserves. We also put a strong force of extra men at the F county's expense and also from the most distant division in the strike area, while a military officer came down to examine the position with a view to bringing military help there if necessary. The result of these precautions was that the men went back to their work and the strike, which had been hanging on for a long time, terminated without any disorder."

G This letter gives some idea of the necessity for and the success of placing "the garrison" in the colliery. On the other hand, Superintendent Smith stated, in his evidence, when asked what was his view as to the necessity of having these seventy men at the pits during this time, that it was against his advice, because he was able to protect, and had made arrangements to protect, the colliery without them. He also said that he preferred a mobile body in his own hands that he H could move about, that the seventy men in the garrison did not help him in his scheme at all, and that they were not part of his scheme at any time. The following questions and answers are very material. These are questions to Col. Smith:

"(Q.) You recognise that it was necessary to have the safety men at work if the property was not to be destroyed?—(A.) Some one must work the pumps, yes. (Q.) Do you think that the safety men would have remained at work I if there had not been police protection always there?—(A.) I do not think they would, they were over-anxious in my opinion. (Q.) In fact, if you had not had men always there the collieries would have drowned out?—(A.) Not at all. (Q.) Do you mean that the collieries do not drown out so soon or what is it?—(A.) I am certain that with the men in my district, without any importation at all, we could have protected any men whom Mr. James could have got to work the pumps. I quite understand that the pumps must be worked and we could have protected them but he would have what he desired and he did have it. (Q.) But you agreed that the safety men would not have remained without

the police protection.—(A.) My opinion is that they were nervous. I know their temperament very well; they were unduly nervous because there had never been trouble at that group of pits for twenty-five years."

The learned judge who tried the case stated that he accepted the evidence of Smith that if the matter had been left to him without the requisition he would have protected the appellants' collieries and would have protected them amply but in quite a different way. BANKES, L.J., felt bound to accept the trial judge's view, and SCRUTTON, L.J., stated:

"I am not satisfied he was wrong, and I am impressed by the difficulties of the courts interfering with the judgment of the police authorities when in fact no danger has occurred."

I am inclined to think the word "danger" is a misprint for "damage."

Having examined the evidence with great care I cannot myself come to any other conclusion but that the supplying of the garrison, as it has been called, in the circumstances in this case was an essential and necessary part of the protection which the police were bound to supply, both to the owners of the colliery and to the men who had to leave their work because of the want of protection and wanted to work there if they were left unmolested, and, in my opinion, without such protection it is reasonably probable that the appellants would have been unable to procure the services of the safety men and thus save the colliery from drowning. In these circumstances I find it impossible to come to the conclusion that anything was done by the police which was outside or beyond their obligations to the appellants in accordance with the law as laid down in the quotations which I have already made. It is said by the Lord Chancellor that these were services of a "special kind" which were not within the obligations of a police authority and were of such a character as entitled the police authority to lend the services of constables for that purpose in consideration of payment. Having regard to what I said I cannot come to that conclusion. I notice that BANKES, L.J., treats the matter in this way. He says:

"If people for their own pleasure or for their own profit or because any special cases of their peculiar circumstances desire special police protection, I see no reason why they should not be called upon to pay for it."

I would find it impossible to hold that the facts of the present case could possibly be brought within this formula. SCRUTTON, L.J., says:

"It does not appear to me to prohibit the police authorities from asking people who desire police protection which is rather a luxury than a reasonable necessity, to pay for it."

I cannot, on the facts of this case, myself see that the demands of the colliery owners were for anything in the nature of a luxury. The circumstances speak for themselves, and we must in the calmer atmosphere of this House be quite sure we realise the facts as existing at the time. The safety men had left the colliery under compulsion, owing, as they said themselves, to want of police protection, and it is not to my mind any justification for not protecting them that, to use the words of Superintendent Smith, they were very nervous or unduly nervous. When the protection in the form in which it was asked for had been granted they returned to work, and I cannot help thinking that it was in this way a great disaster was avoided. I find great difficulty in trying to define "special services" in a case where there is actually being carried on an open invasion of the rights of subjects and when riot and violence threaten the destruction of property of such individuals and the right to work of other individuals, and indeed it would, I think, render the law difficult to carry out in similar circumstances if those demanding protection were to be told at any moment in the course of such attacks that the limit of protection had been reached unless they were rich enough to buy further protection by agreeing to pay a sum which in this case amounted to some £3,000 to the police authorities.

A The Lord Chancellor has referred to other instances of "lending" or hiring out constables, e.g., on the occasions of large gatherings in and outside private premises, as on the occasion of weddings, athletic or boxing contests, &c. With great respect, I cannot see how any useful comparison can be made between arrangements of that kind freely entered into without any relation to violence and acts of terrorism in progress which the police are bound to put an end to and the case B such as the present, where it required every possible effort to save the colliery from destruction. As well might one compare a case where the burglar is already in possession of a person's house to one where there is no reasonable likelihood of any such terrifying incident. Where are we to get a definition or how are we to give any guide as to what are "special services" in such cases? Who is to lay down what are "special services" and what are ordinary services in relation to C protection of life and property? Can the rich man buy greater protection than the poor man; or are all to be equally entitled to protection in the eye of the law? I observe that in the letter to which I have already referred it is said there are regulations for special duty laid down by the Home Office, although they could not find the original authority from the Home Office for authorising a police force to charge private individuals for special services of police. The Home Office has no D authority to lay down when the police are to charge for their services and when they are not in such circumstances as arose in the present case. When asked by the chief constable of Glamorgan to supply an answer to the assertion by the appellants that the charges sued for in this case were illegal, I notice that the Secretary of State justifies the charge by stating "that the principle of the employment of county constables at private cost is as established by s. 19 of the Police E Act of 1840." As he himself states in the letter, that section only has reference to swearing in additional constables at the expense of an applicant and has no relation to the present state of affairs, when much larger forces of police are maintained and consequently a greater burthen thrown upon the ratepayer. However that may be, the section can have no reference to such a case as the present, as no such additional constables were appointed. It is said by your Lordships who F have preceded me that it is within the powers of the superintendent to himself say when a charge is to be made and when it is not, and, indeed, the trial judge laid it down that without any special contract the person who asks for the services may be charged upon an implied contract. I cannot think that that can be a correct application of the law. If it were so, the subject would appear to me to G have no means whatever of challenging a breach of duty upon the part of the police, nor do I see how the dictum of the Lord Chancellor, which I have already quoted, that any attempt by a police authority to extract payment for services which fall within the plain obligations of the police force should be firmly discountenanced by the courts, can be carried out. When the emergency arises, the subject who asks for protection would be entirely at the mercy of the police if H payment were demanded. He would not be contracting as a free agent, as, taking for example the present case, he would have no option, and indeed in this case he was given no option, but to enter into a contract of payment or lose his property. Moreover, the police on such an occasion would, in such a case, be demanding payment under instructions and regulations which had been already laid down by the executive power.

I Having arrived at the conclusion of fact which I have already stated, I think I am bound to come to the conclusion that the requisition and promise to pay signed by the appellants and sued upon in this case was without consideration. It was a promise made under pressure of the circumstances to pay for services which the appellants were entitled to have rendered without such payment. It is unnecessary to consider the further point that has been contended for—namely, that in every case the practice which has existed of hiring out the police to those who are able to pay is illegal, but I am prepared to hold that in such cases it is necessary for the police authorities to justify a demand for payment in accordance with the

principles I have already laid down. For these reasons, as I have already stated, I think this appeal should be allowed.

LORD BLANESBURGH.—During the national coal strike which was settled on July 4, 1921, the safety men at the collieries throughout the country were left undisturbed. The responsible leaders of that strike, shrinking, as they rightly as well as wisely did, from the wantonness of wrecking the mines on which the livelihood of the miners themselves ultimately depended, refused to countenance the policy of withdrawing the safety men from their posts, when effective pressure short of such a step could be brought to bear upon the employers. In the sectional strike at the appellants' collieries which persisted after the national strike had ended, the ability of the strikers to impose their will upon the owners was obviously less compelling, and, very likely for that reason, the withdrawal of the safety men became apparently very soon an objective of the strike. On July 7, after a demonstration in front of one of the appellants' collieries, a deputation of the strikers sought an interview with the safety men still at work there and pressed them to come out in sympathy. Their reply was that their own association had decided that work was to continue and they were resolved to remain. As the men were not to be persuaded, it was necessary to determine whether they were to be coerced. Accordingly, a mass meeting of the strikers was held later in that afternoon; and it was then decided that all the safety men should be compelled to come out. On the next morning this resolve, which had doubtless already become notorious in the district, was communicated by the workmen's committee to the appellants' manager, Mr. James, and he, when he sought to reason with the committee, was informed that the matter was no longer one for discussion and that the decision was final. This decision I should have thought changed the whole character of the strike, although it does not seem so to have struck the police superintendent, Col. Smith, who apparently assumed that the orderly character of the national strike would continue to be preserved. What had happened, however, was that a campaign which hitherto had been constitutional and responsible had become one charged with the possibility of serious disorder. Indications of the change were soon apparent. ATKIN, L.J., gives one in his judgment. On Friday, July 8, the superintendent of police attending at Tirdonken, an adjoining colliery affected also by the strike, with thirty-four extra men had met a crowd of 800 strong led by three rows of women carrying babies in the front rank. The crowd was hostile to the management and police. Moreover a new attitude of menace was assumed towards the safety men. As early as the afternoon of the 7th, the winding engine man was stopped by strikers on the common and prevented from reaching the colliery, and on the next morning one of the safety men was pulled off his bicycle on his way to work and hostile demonstrations were being made outside their homes.

All this had, and very naturally, an immediate effect upon these men. On the morning of the 8th, only one turned out; on the 9th none of them appeared at all. During the afternoon of the 8th they had as a body met and decided to cease work, and Mr. James was informed that they had thus decided because of the severity of the pressure brought to bear upon them and the insufficiency of the police protection afforded them. It was conveyed, however, to him that with adequate protection they would be willing to return. Now, the police protection which they regarded as insufficient had been in operation on the 7th and 8th. Their lack of confidence in it, confirmed possibly by the events of the 8th, had doubtless contributed to the resolution of that afternoon, and was the explanation of their complete absence from work on the 9th. The form of protection so far in force to which Col. Smith remained wedded as being best in the circumstances, had as its main feature the provision of what he termed a mobile body of police with scouts and telephone arrangements, whereby the column could always arrive at a threatened colliery in advance of any crowd. The safety men were not impressed. Like some people in other circumstances, they preferred cash to credit. The

support of the visible presence of the police while they were working the pumps seemed to them to be essential. They were, perhaps, less confident in the complete mobility of the colonel's column than he was. Scouts are sometimes at fault; telephones do not always work; tyres puncture even when no strikes are on. All the mischief might be done before any column arrived, and not necessarily by crowds. Mr. James put their view in his evidence. He told Col. Smith on the 9th, he said, that it was hopeless to try to keep the safety men at work with the local police dodging about in motor cars from one place and another. Accordingly, at his instance and on terms which are the subject of this appeal, the following protective scheme was ultimately adopted. A garrison of police was located at each of the appellants' three collieries; the safety men were billeted there, and their homes were protected by the outside police. These arrangements, when completed, were entirely successful; the reassured safety men returned to work, and they and the collieries were kept in safety till the strike was ended. In the course of his evidence Mr. James was asked: "In your opinion, if you had not had this force of police at the collieries would you have been able to get your safety men to work?" His answer, which is neither cross-examined to nor contradicted by any other witness, was "No, absolutely not." It is unfortunate that owing to the intervention of the learned judge, the appellants' witnesses on this part of the case were not fully heard. But I cannot doubt, from a survey of the evidence which was adduced, that, almost as a matter of common consent, this statement of Mr. James's expressed the actual situation. There is no suggestion, either in the police reports at the time or anywhere else, that the requirements of the safety men were unreasonable or their conduct unworthy. As ATKIN, L.J., says, it is perhaps easier to be heroic in London years after the occurrence than it was at Gorseinon in July, 1921. The men exhibited notable moral courage in returning to work at all, and it must be remembered that, although they had in preserving the mines the same real interest as the strikers, they were under no higher duty in that matter than any other of His Majesty's subjects. Why, then, should any exceptional exhibition of physical hardihood be expected or required of them?

What, however, is more immediately relevant is that without a force of police at the collieries these safety men could not have been induced by the appellants to take the place of the marine stokers who were unequal to the work, and there is no suggestion that in the emergency any other men were obtainable on any terms at all. No laxity or default of any kind in this matter is attributed by anybody to the appellants. In these circumstances the sufficiency of the police protection for their collieries must, I think, be determined from the standpoint indicated by the learned judge, when he says that it was, of course, very necessary that the safety men should remain working the pumps in order to keep the collieries from being flooded, because every one who knows anything about collieries knows that that is absolutely necessary, and when he adds:

> "There is no doubt that the safety men got very frightened, and there is no doubt that the safety men would not have continued to work without police protection; indeed, as a matter of fact, they did abstain from work—perhaps that is the right way to put it—for a period of four or five days. Their places were endeavoured to be filled by some marine stokers, but those marine stokers proved inefficient and ultimately the safety men were induced to come back"

by, I may add, the police dispositions, which had by that time been made and were thenceforth continued. In view of that statement by BAILHACHE, J., it is interesting to inquire what was the precise ground on which the learned judge nevertheless decided that the appellants must pay for the protection afforded by these dispositions. The answer is not in doubt. It was because he accepted Col. Smith's evidence that he would have given adequate protection in another and a different form, that is to say, by his mobile column, and the learned judge proceeds:

"While not desiring for a moment to suggest that it was not the bounden duty of the county council to protect this colliery and not for one moment suggesting that the performance of a legal duty will support a promise to pay, I have come to the conclusion that when a colliery company or an individual requisitions police protection of a special character for a particular purpose he must pay for it, and he must pay for it whether he makes a contract to pay or whether he does not—a promise to pay would be implied in these circumstances."

Colonel Smith was undoubtedly convinced of the efficiency of his own scheme, and if the whole of his evidence with reference to it is borne in mind his opinion that the mobile force method would have given ample protection may, open to criticism as it is, be accepted, as the learned judge accepted it. But an examination of Col. Smith's evidence shows what I think the learned judge did not perhaps fully appreciate, that this opinion was held by him, so to say, in vacuo. So far as the safety men were concerned his view was never more than that, if they had been as wise as he, they would have recognised that his mobile column was as complete a protection for them as the actual presence of the police at the collieries. Col. Smith, however, nowhere suggests that the safety men did so believe or that they could timeously have been induced so to believe. In truth, in propounding and adhering to his scheme, the attitude of these men towards it, so graphically described by Mr. James, was discounted by him if indeed it was not entirely ignored. The superintendent, convinced of the sufficiency of his proposals in the abstract, never seems to have even asked himself the question whether any scheme was in the circumstances of any value at all if it was not by reassuring the safety men and bringing them back to the pumps effective to protect the collieries from the only danger which threatened them. While, therefore, Col. Smith's opinion may so far be accepted, I nevertheless conclude, on what I consider to be the uncontradicted evidence of the case, that that scheme, however technically adequate, was lacking in the one thing needful to make it of any practical utility. It has, in my judgment, been shown that in the then emergency it was no alternative to the garrison scheme which was adopted with complete success. It is also, to my mind, shown that there was no other scheme either suggested or offered which would have had the same result, and the liability of the appellants to bear the expense of the protection they were in fact afforded must, I think, be determined on that footing.

With reference to the garrisons actually set apart for the duty of protection, it is to be observed that the number of men employed was fixed by Col. Smith himself and that the number was altered from time to time at his direction; the men remained throughout under his control, they had their part in the measures from time to time taken by him to maintain order. They made the situation, as Col. Smith admitted, very much stronger for him. In a word, they were and remained integral units of the divisional police as truly as any other constables under Col. Smith's command. Nor did the setting apart of the men for that garrison duty in any way interfere with the discharge by the county police force of its other duties. There is no evidence that it involved the authorities in any expense which the county would not otherwise have had to bear, and it is admitted that the police protection was required at the appellants' collieries in some shape or form. I am not myself disposed to underrate the responsibilities of the police in an emergency like that with which your Lordships are here concerned. Their absolute duty to afford protection to life and property was only, I think, limited by the extent of their available resources and by the urgency of competing claims upon their services. The protection in this case supplied was not made difficult of provision by any such considerations; it was adequate, but not extravagant; it was not improper, because otherwise it would not, I assume, have been rendered even in expectation of reward.

In these circumstances, accepting, as I do, the learned judge's view of the law,

I am myself unable to see how any payment for this police service can legally be demanded. The request by the appellants to Col. Smith to place these garrisons at their collieries is, I think, shown to have been no more than a request to him as representing the county council to perform its legal duty in the only way in which that duty could properly be discharged, and such a request cannot support a promise to pay for what the council were in the circumstances bound, as I think, to provide without payment. Accordingly, I arrive at the conclusion which has also been reached by the noble and learned Lord who has just spoken, and I reach it by reference to the facts of this case as I see them, so that the important questions so powerfully discussed by Atkin, L.J., do not, from my point of view, in this case arise for decision. I think it right to say, however, that in agreement with, I believe, all your Lordships, I find myself unable to subscribe to the extreme position that arrangements under which on the requisition of individuals police constables are assigned in consideration of payment to perform duties in the nature of maintaining order or preventing crime, are necessarily either illegal or made without consideration. The legislative recognition of the existence of some such arrangements to which reference has already been made was, I think, too emphatic to be ignored, and it would be highly inconvenient if it were now to be declared that a promise to pay for such services can never have any binding force. But the discussion in this case has, I think, shown that the exaction of payment for police services is only legitimate in exceptional circumstances, and it is, in my judgment, unfortunate that it has apparently come to be regarded as a normal incident more particularly in cases where the police are actually billeted in private premises. It is true that while the duty of the police to afford protection is undoubted, the nature of the protection to be supplied must primarily be left to them to determine. If, however, such protection can only or best be afforded by placing constables on garrison duty in private premises, payment cannot, as I think, properly be exacted merely because the protection takes that form as seems on both sides to have been assumed in the present case. On the other hand, such protection ought not to be provided even for payment if its provision unduly interferes with the discharge by the police of their duties to others. These considerations appear to lead inevitably to the conclusion that unless demands of payment for police services are jealously safeguarded the power to make them may readily become oppressive to the individual and injurious to the general interest. Where payment is required for protection in the nature of a luxury rather than a reasonable necessity, and where that protection is provided by the employment of the margin of reserve strength of the force not at the time otherwise more urgently employed, then, I suppose, everyone would agree with Bankes, L.J., that a demand and promise of payment are advantageous to all concerned. Where, further, an extra force being again available, protection beyond what the police deem necessary is on requisition supplied, then a demand for payment of a sum not greater in amount than the expense of the excess protection—which amount may properly be agreed beforehand—might well be justified. But when payment is demanded irrespective of the necessity for protection and merely because protection is afforded in a particular way and in response to an individual requisition, and most especially when the payment represents the total cost to the police authorities of the entire protection supplied, then the whole aspect of the arrangement is altered. In many cases it would become a mere sale of the police discretion, and such arrangements, if they came to be regarded as always permissible, would be, I cannot doubt, vicious in tendency. The possibility of making them would place the authorities in a position in which their interest would frequently conflict with their duty, tending to relegate to a secondary place their primary responsibility to provide adequate gratuitous protection to persons and property within their area, and calculated, on the one hand, to lead to the withdrawal or refusal of proper protection from or to an individual who cannot pay for it, and, on the other, to a too ready compliance with the requisition of the individual who can and will pay the total cost of the protection he receives, in relief of the rates, but it may well

be in prejudice of the general interest. This case will, I cannot doubt, be of great public advantage if it attracts the attention of those concerned to a practice so far unregulated, but which, if not carefully circumscribed, is readily open to abuse even by most honourable people. I am for allowing this appeal for the reasons I have given.

Appeal dismissed.

Solicitors: *Bell, Brodrick & Gray*, for *Kensholes & Prosser*, Aberdare; *John T. Lewis & Woods*, for *Andrew & Thompson*, Swansea.

[*Reported by* W. C. Sandford, Esq., *Barrister-at-Law.*]

Re PENTON'S SETTLEMENT TRUSTS. PENTON *v.* LANGLEY

[Chancery Division (Eve, J.), March 20, 21, April 15, 1924]

[Reported [1924] 2 Ch. 192; 93 L.J.Ch. 494; 131 L.T. 627; 68 Sol. Jo. 647]

Settlement—Heirlooms—To devolve and be enjoyed with the settled hereditaments—Joint power of appointment—Exercise as to heirlooms only.

By a settlement, made in 1907, freehold hereditaments were appointed and conveyed to such uses, on such trusts, and subject to such powers, as F.T.P. with his eldest son H.A.P. or other the person entitled to the first estate in remainder should appoint, and in default and until and subject to any such appointment, to trustees for a long term to secure certain charges and subject thereto to the use of F.T.P. for life and then to H.A.P. for life, with remainder to the use of his first and other sons, with remainder to C.F.P. the second son of F.T.P. for his life, with remainder to the use of his first or other sons, and with remainders over. Certain jewels were assigned to the trustees to allow the same to devolve and be enjoyed, so far as the law would permit, as heirlooms along with the hereditaments thereby settled. By an indenture made in 1923, F.T.P. and H.A.P., in purported exercise of the power conferred on them, appointed that the trustees of the settlement should stand possessed of the jewels in trust for F.T.P., his executors, administrators and assigns, absolutely discharged from the incumbrances. On a summons by F.T.P. and H.A.P. for a declaration that, under the trust in the settlement, they had a joint general power of appointment over the jewels corresponding to, but exercisable independently of, their joint general power of appointment over the settled hereditaments,

Held: the court must import into the trusts of the chattels a general power of appointment with the joint limitation of the realty as the only means of securing unity of ownership in the event of the realty being withdrawn from the settlement and the settlors desiring to maintain unity of ownership; if such a trust was included in the trusts affecting the personalty, it could not be restricted in its application to occasions when the realty was being dealt with under the corresponding limitation; and, therefore, F.T.P. and H.A.P. were entitled to the declaration asked for.

Notes. As to settlements of personalty to devolve with realty, see 29 Halsbury's Laws (2nd Edn.) 792 et seq.; and for cases see 40 Digest (Repl.) 874–876.

Cases referred to in argument:

Countess of Harrington v. *Earl of Harrington* (1871), L.R. 5 H.L. 87; 40 L.J.Ch. 716, H.L.; 44 Digest 948, *8023*.

Re Parker, Parker v. *Parkin*, [1910] 1 Ch. 581; 79 L.J.Ch. 161; 101 L.T. 943; 44 Digest 949, *8028*.

Portman v. *Viscount Portman*, [1922] 2 A.C. 473; 91 L.J.Ch. 708; 128 L.T. 129; 38 T.L.R. 887, H.L.; 44 Digest 949, *8032*.

Re Duke of Marlborough and Governors of Queen Anne's Bounty, [1897] 1 Ch. 712; 66 L.J.Ch. 323; 76 L.T. 388; 45 W.R. 426; 41 Sol. Jo. 387; 40 Digest 822, *2992*.

Re Fowler, Fowler v. *Fowler*, [1917] 2 Ch. 307; 86 L.J.Ch. 547; 117 L.T. 500; 33 T.L.R. 287; 44 Digest 945, *8005*.

Re Duke of Marlborough's Settlement, Duke of Marlborough v. *Marjoribanks* (1886), 32 Ch.D. 1; 55 L.J.Ch. 339; 54 L.T. 914; 34 W.R. 377; 2 T.L.R. 323, C.A.; 40 Digest 821, *2976*.

Summons.

The following facts are taken from the judgment. By the settlement in which this matter is intituled, the freehold hereditaments known as the Penton Estate, Clerkenwell, were appointed and conveyed (subject as therein mentioned) to such uses on such trusts and with and subject to such powers, provisions, agreements and declarations, and generally in such manner as the plaintiff F. T. Penton should, jointly with his eldest son, the plaintiff H. A. Penton, or with other the person for the time being entitled under the limitations of the settlement to the first estate of freehold in remainder expectant on the death of F. T. Penton in the hereditaments thereby settled, from time to time or at any time by deed revocable or irrevocable, appoint and in default of and until and subject to any such appointment to the use of trustees for the term of 1,000 years on trusts for raising the annual sums therein mentioned and subject to the said term and the trusts thereof to uses for securing certain rentcharges and annual sums for H. A. Penton and his widow and children respectively, and subject to the said rentcharges and annual sums to the use of F. T. Penton for his life, and from and after his death to the use of H. A. Penton for his life with remainder to the use of the first and other sons of H. A. Penton successively according to seniority in tail male, with remainder to the use of C. F. Penton, the second son of the said F. T. Penton, for his life, with remainder to the use of the first and other sons of C. F. Penton successively according to seniority in tail male, with divers remainders over. By the same indenture, certain jewels, enumerated in the third schedule thereto, were assigned to the trustees of the settlement on trusts that they should allow the same to devolve and be enjoyed, so far as the law would permit, as heirlooms along with the hereditaments thereby settled, but so nevertheless that they should not vest absolutely in any person thereby made tenant in tail male or in tail general by purchase unless and until such person should attain the age of twenty-one years and either become entitled before the expiration of twenty-one years from the determination of all estates for life preceding his or her estate in tail male or in tail general to the actual possession or to the receipt of the rents and profits of the settled hereditaments or, with the consent of the protector of the settlement, bar the entail therein, but on the death of any such person before attaining an absolutely vested interest in the said jewels the same should devolve in like manner as if they had been freeholds of inheritance and had been settled by the said indenture accordingly. The plaintiff H. A. Penton had one son only who died an infant in 1918. The defendant J. M. Penton was the only son of the said C. F. Penton and was born in 1910. By an indenture dated Oct. 30, 1923, and made between F. T. Penton of the first part, H. A. Penton of the second part and the present trustees of the settlement of the third part, the parties of the first and second parts, in purported exercise of the power in that behalf conferred on them by the settlement, jointly and irrevocably appointed that the trustees should, from and after the execution of that indenture, stand possessed of the jewels in trust for F. T. Penton, his executors, administrators and assigns absolutely, discharged (if and so far as the incumbrances referred to in the settlement or any of them were or was charged

on the said jewels or any of them) so far as might be from such incumbrances, and so that from and after the execution of the now stating indenture all such incumbrances (if and so far as the same or any of them were or was charged on the said jewels or any of them) should as between the other property charged therewith, and the said jewels be charged exclusively on such other property in exoneration of the jewels. A

This summons was taken out by the plaintiffs asking for a declaration that, on the true construction of the settlement, the trust therein contained to allow the jewels to devolve and be enjoyed, so far as the law would permit, as heirlooms along with the hereditaments thereby settled conferred on the plaintiffs a joint general power of appointment by deed of the jewels corresponding with, but exercisable independently of, their joint general power of appointment by deed over the settled hereditaments. B C

R. L. Ramsbotham for the trustees.
Stafford Crossman for the plaintiffs.
R. M. Pattisson for the infant remainderman.

Cur. adv. vult.

April 15. **EVE, J.**, read a judgment in which he stated the facts and continued: The question raised by this summons is whether, under the trust contained in the settlement to allow the jewels to devolve and be enjoyed so far as the law permits as heirlooms along with the settled hereditaments, the plaintiffs have a joint general power of appointment over the jewels corresponding to, but exercisable independently of, their joint general power of appointment over the settled hereditaments. D

The question is one of construction. Where chattels are settled as "heirlooms" simpliciter or in more elaborate terms to go along and be used and enjoyed with the settled estates so far as the rules of law or equity will permit, or, in other language sufficient to demonstrate the intention of the settlor, that the possession and enjoyment of the personal chattels shall accompany the settled real estate through all the changes of ownership that may occur during the time allowed by law for postponing the absolute vesting of personal property, the single word or the more lengthy expressions amount in each case to a declaration by implication of such trusts of the personalty as correspond with the limitations of the realty, and in this and all other cases where the trusts of the personalty are not expressed in extenso, these trusts must be ascertained by reference to the limitations of the realty. In the settlement with which I have to deal, the first of these limitations is to such uses as the father and son by the exercise of the overriding power may jointly appoint, and in considering whether a corresponding trust is to be implied in the case of the chattels, one is justified in inquiring what would be their devolution if father and son exercised their joint power over the realty, there being no such trust affecting the chattels. Would they be affected by appointment of the realty? If so, how? If not, what would be their destination? When these questions were put to counsel for the respondent remainderman, he argued that the chattels would remain vested in the trustees in trust for those who would have taken under the limitation in default of the exercise of the overriding power, but that seems to me an impossible position, seeing that it would have at once disjoined and severed the chattels from the realty. In such circumstances as exist here, I think one is bound to import into the trusts of the chattels a general power of appointment corresponding with the joint limitation of the realty as the only means of securing unity of ownership in the event of the realty being withdrawn from the settlement and the settlors desiring to maintain unity of ownership. E F G H I

The question then arises, if such a trust is included in the trusts affecting the personalty, can it be construed in a qualified sense so as to be restricted in its application to occasions when the realty is being dealt with under the corresponding limitation? I do not see how it can be. The effect of the overriding power is to reserve to the settlors the right to withdraw from the settlement the whole or any part of the settled property, and in the absence of any express restriction the

limitation of the realty and the trust of the personalty must, in my opinion, bear the same construction and may each be exercised separately. I think the plaintiffs are entitled to the declaration for which they ask. The costs as between solicitor and client will be paid out of any capital moneys in the hands of the trustees.

Solicitors: *Lee & Pembertons.*

[*Reported by* A. W. Chaster, Esq., *Barrister-at-Law.*]

GERALD McDONALD & CO. *v.* NASH & CO.

[House of Lords (Viscount Haldane, L.C., Lord Dunedin, Lord Atkinson, Lord Sumner and Lord Buckmaster), November 9, 12, 13, 20, 1923, March 21, 1924]

[Reported [1924] A.C. 625; 93 L.J.K.B. 610; 131 L.T. 428; 40 T.L.R. 530; 68 Sol. Jo. 594; 29 Com. Cas. 313]

Bill of Exchange—Completion of inchoate bill—Omission of "material particular"—Absence of drawers' name as payees—Drawers' name inserted by themselves above that of endorsers—Omission filled up within reasonable time—Accord with authority—Liability of endorsers—Bills of Exchange Act, 1882 (45 & 46 *Vict.*, *c.* 61), *s.* 20 (1) (2).

In order to finance the payment of goods sold by the appellants to A. & Co. it was agreed between A. & Co. and the respondents that the appellants should draw bills, payable to the drawers, on A. & Co., which were accepted by them, and, after being endorsed by the respondents, were handed back to the appellants in exchange for delivery orders for the goods. Room was left above the respondents' endorsement for the insertion of the name of any person to whom the appellants might direct payment to be made. Shortly before the bills became payable the appellants endorsed their own names upon the bills as payees above the name of the respondents. When the bills became due the appellants presented them to A. & Co., who dishonoured them. The appellants thereupon gave notice of dishonour and claimed payment from the respondents. The respondents having refused payment, the present action was brought by the appellants to recover the amount due on the bills.

Held: the proper inference from the facts was that it was the common intention of the appellants and the respondents that the latter should be directly liable to the former on the bills and did not endorse the bills merely to enable the appellants to discount them, in which case the liability of the respondents would have been to third parties exclusively; the absence of the appellants' name as payees was a "material particular" in which the bills were wanting within s. 20 (1) of the Bills of Exchange Act, 1882, and the appellants, as persons in possession of the bills, had authority to fill up the omission as they thought fit; the omission had been filled up within a reasonable time and was strictly in accordance with the authority given within s. 20 (2); and, therefore, the bills as completed were enforceable against the respondents.

Glenie v. *Tucker and Smith* (1), [1908] 1 K.B. 263, approved.

Steele v. *McKinlay* (2) (1880), 5 App. Cas. 754, distinguished.

Notes. Explained: *National Sales Corpn., Ltd.* v. *Bernardi*, *Bernardi* v. *National Sales Corpn., Ltd.*, [1931] All E.R. Rep. 320. Applied: *McCall Bros., Ltd.* v. *Hargreaves*, [1932] All E.R.Rep. 854. Referred to: *Elliott* v. *Box-Ironside*, [1925]

All E.R.Rep. 209; *Kreditbank Cassell G.m.b.H.* v. *Schenkers*, [1926] 2 K.B. 459. A
As to incomplete bills and the liability of indorsers, see 3 HALSBURY'S LAWS (3rd Edn.) 166, 215–217; and for cases see 6 DIGEST 68 et seq., 308 et seq. For Bills of Exchange Act, 1882, see 2 HALSBURY'S STATUTES (2nd Edn.) 505.

Cases referred to:

(1) *Glenie* v. *Tucker and Smith*, [1908] 1 K.B. 263; 77 L.J.K.B. 193; 98 L.T. 515; 24 T.L.R. 177, C.A.; 6 Digest 203, *1250*. B
(2) *Steele* v. *McKinlay* (1880), 5 App. Cas. 754; 43 L.T. 358; 29 W.R. 17, H.L.; 6 Digest 59, *468*.
(3) *Re Gooch, Ex parte Judd*, [1921] 2 K.B. 593; 90 L.J.K.B. 932; 125 L.T. 583; [1921] B. & C.R. 100, C.A.; 26 Digest 45, *310*.
(4) *Matt T. Shaw & Co., Ltd.* v. *Holland*, [1913] 2 K.B. 15; 82 L.J.K.B. 592; 108 L.T. 543; 29 T.L.R. 341; 18 Com. Cas. 153, C.A.; 6 Digest 314, *2096*. C
(5) *Bank of England* v. *Vagliano Bros.*, [1891] A.C. 107; 60 L.J.Q.B. 145; 64 L.T. 353; 55 J.P. 676; 39 W.R. 657; 7 T.L.R. 333, H.L.; 6 Digest 31, *205*.
(6) *Smith* v. *McClure* (1804), 5 East. 476; 2 Smith, K.B. 43; 102 E.R. 1153; 6 Digest 61, *490*.
(7) *Keene* v. *Beard* (1860), 8 C.B.N.S. 372; 29 L.J.C.P. 287; 2 L.T. 240; 6 Jur.N.S. 1248; 8 W.R. 469; 141 E.R. 1210; 6 Digest 33, *215*. D
(8) *Wilkinson* v. *Unwin* (1881), 7 Q.B.D. 636; 50 L.J.Q.B. 338; 46 L.T. 123; 29 W.R. 458, C.A.; 6 Digest 203, *1248*.
(9) *Jenkins & Sons* v. *Coomber*, [1898] 2 Q.B. 168; 67 L.J.Q.B. 780; 78 L.T. 752; 47 W.R. 48; 14 T.L.R. 425; 6 Digest 314, *2095*.
(10) *Macdonald* v. *Whitfield* (1883), 8 App. Cas. 733; 52 L.J.P.C. 70; 49 L.T. 446; 32 W.R. 730, P.C.; 6 Digest 313, *2088*. E
(11) *Hirschfeld* v. *Smith* (1866), L.R. 1 C.P. 340; Har. & Ruth. 284; 35 L.J.C.P. 177; 14 L.T. 886; 12 Jur.N.S. 523; 14 W.R. 455; 6 Digest 375, *2473*.
(12) *Russel* v. *Langstaffe* (1780), 2 Doug.K.B. 514; 99 E.R. 328; 6 Digest 70, *565*.
(13) *Lickbarrow* v. *Mason* (1787), 2 Tem. Rep. 63; 6 East, 20, n.; 100 E.R. 35; 6 Digest 456, *2911*. F
(14) *Schultz* v. *Astley* (1836), 2 Bing.N.C. 544; 1 Hodg. 425; 2 Scott, 815; 5 L.J.C.P. 130; 132 E.R. 212; 6 Digest 69, *555*.
(15) *Re Hayward, Ex parte Hayward* (1871), 6 Ch. App. 546; 40 L.J.Bcy. 49; 24 L.T. 782; 19 W.R. 833, L.JJ., 6 Digest 19, *95*.

Also referred to in argument: G
Lloyd's Bank, Ltd. v. *Cooke*, [1907] 1 K.B. 794; 76 L.J.K.B. 666; 96 L.T. 715; 23 T.L.R. 429, C.A.; 6 Digest 74, *587*.
Herdman v. *Wheeler*, [1902] 1 K.B. 361; 71 L.J.K.B. 270; 86 L.T. 48; 50 W.R. 300; 18 T.L.R. 190; sub nom. *Hurdman* v. *Wheeler*, 46 Sol. Jo. 139, A.C.; 6 Digest 74, *586*.
Singer v. *Elliott* (1888), 4 T.L.R. 524, C.A.; 6 Digest 314, *2094*. H
Day v. *Longhurst* (1893), 62 L.J.Ch. 334; 68 L.T. 17; 41 W.R. 283; 37 Sol. Jo. 175; 3 R. 234; 6 Digest 184, *1149*.
Dublin City Distillery, Ltd. v. *Doherty*, [1914] A.C. 823; 83 L.J.P.C. 265; 111 L.T. 81; 58 Sol. Jo. 413, H.L.; 10 Digest (Repl.) 814, *5285*.
Mayer v. *Jadis* (1833), 1 Mood. & R. 247, N.P.; 6 Digest 482, *3059*.
Suffell v. *Bank of England* (1882), 9 Q.B.D. 555; 51 L.J.Q.B. 401; 47 L.T. 146; 46 J.P. 500; 30 W.R. 932, C.A.; 6 Digest 378, *2484*. I
Britten v. *Webb* (1824), 2 B. & C. 483; 3 Dow. & Ry.K.B. 650; 2 L.J.O.S.K.B. 118; 107 E.R. 463; 6 Digest 203, *1246*.
National Park Bank of New York v. *Berggren & Co.* (1914), 110 L.T. 907; 30 T.L.R. 387; 19 Com. Cas. 234; 6 Digest 138, *909*.

Appeal from an order of the Court of Appeal (BANKES and ATKIN, L.JJ., SCRUTTON, L.J., dissenting) reversing the decision of ROWLATT, J., in favour of the plaintiffs in the action.

In the autumn of 1919 the appellants bought from the Government Disposal Board nearly 20,000 cases of Australian tinned soup. On May 18, 1920, they sold over 19,000 of these cases to the firm of Archer & Co., Ltd., at the price of 10s. per case on the terms that a deposit of £500 should be made (which was done), and for the rest, cash to be paid against delivery order on May 31, 1920. Archer & Co. being unable to find the money required approached the respondents for financial assistance. As the result, it was agreed, in July, 1920, that by way of consideration for assisting Archer & Co., the respondents were to get from them bills for payment at the rate of 3s. a case for the whole of the cases which had not been taken up. On Aug. 10, 1920, the appellants, the respondents, and Archer & Co. met and made final arrangements for the delivery over and payment as regards the cases. It was agreed that the respondents should endorse a series of eight bills, seven for £1,000 each and one for £117 6s. 4d., to be drawn by the appellants on Archer & Co., payable six months after date to the appellants' order, and that the appellants, in consideration of the bills being duly endorsed by the respondents, should hand to the latter delivery orders for the balance of the cases. These bills were at once drawn by the appellants on Archer & Co., expressed to be payable to the appellants' order, and were accepted by Archer & Co., indorsed by the respondents, and handed by the latter to the appellants. Sufficient room was left over the names of the respondents for the endorsement, if necessary, of the names of any persons to whom the appellants should direct payment. On Aug. 18, the respondents took up 2,000 cases and paid the appellants £1,000, whereupon the latter returned to them one of the bills for that amount discharged. The respondents did not pay any of the remaining bills, and shortly before Feb. 21, 1921, the date when they became payable, the appellants endorsed their names as payees on them above the signature of the respondents. When the bills became due the appellants presented them for payment to Archer & Co., who dishonoured them. The appellants gave notice of dishonour and claimed payment from the respondents as endorsees. The respondents refused payment and the present action was brought by the appellants to recover from them the amount due on the bills. The Court of Appeal (BANKES and ATKIN, L.JJ., SCRUTTON, L.J., dissenting) held on the evidence that the respondents had not authorised the appellants to endorse the bills so as to create a right of action against the respondents otherwise than one which would be the outcome of the negotiation of the bills to outside parties.

R. A. Wright, K.C., and *C. T. Le Quesne* for the appellants.

Schiller, K.C., and *J. B. Melville* for the respondents.

The House took time for consideration.

Mar. 21. The following opinions were read.

VISCOUNT HALDANE, L.C.—In the autumn of 1919 the appellants bought from the Government Disposal Board nearly 20,000 cases of Australian tinned soup. On May 18, 1920, they sold over 19,000 of these cases to William Archer & Co., Ltd., at the price of 10s. per case, on the terms that a deposit of £500 should be made (which was done), and for the rest cash to be paid against delivery order on May 31, 1920. Archer & Co. were unable to find the money required, and approached the respondents for financial assistance. As the result, in July, 1920, it was agreed that, by way of consideration for assisting Archer & Co., the respondents were to get from them bills for payment at the rate of 3s. a case for the whole of the cases which had not then been taken up, amounting to about 16,000 cases. If the appellants agreed, Archer & Co. were to give them a six months' bill for the whole of the price of the cases of soup not taken up under the contract of May 18. The respondents were to take up and pay for the cases in 1,000 or 2,000 case lots, and were, as between themselves and Archer & Co., to find 75 per cent. of the money required; in other words, for every £1,000 found for the price, Archer and Co. were to pay the respondents £250. As Archer & Co. drew on the

cases taken up, they were to remit to the respondents cash at the rate of 10s. 6d. per case, against which the latter would issue delivery orders for the soup to the value received. On Aug. 6, the appellants, before whom the agreement between Archer & Co. and the respondents had been brought, wrote to the respondents agreeing to accept it. On Aug. 10, 1920, the appellants, the respondents, and Archer & Co. met and made final arrangements for their delivery over and payment as regarded the cases. It was agreed that the respondents should endorse a series of eight bills, seven for £1,000 each, and one for £117 6s. 4d., to be drawn by the appellants on Archer & Co., payable six months after date to the appellants' order, and that the appellants, in consideration of the bills being duly endorsed by the respondents, should hand to the latter delivery orders for the balance of the cases. These bills were at once drawn by the appellants on Archer & Co., expressed to be payable to the appellants' order, and were accepted by Archer & Co., endorsed by the respondents, and handed by the latter to the appellants. There was left sufficient room over the names of the respondents for the endorsement, if necessary, of the names of any persons to whom the appellants should direct payment. On receipt of the bills the appellants were to hand to the respondents in exchange the delivery orders. On Aug. 18 the respondents took up 2,000 cases and paid the appellants £1,000, whereupon the latter returned to them one of the bills for that amount discharged. The respondents did not pay and so withdraw any of the remaining bills, and shortly before Feb. 21, 1921, the date when the bills became payable, the appellants endorsed their names as payees on them, above the signature of the respondents. When the bills became due the appellants presented them for payment to Archer & Co., who dishonoured them. The appellants gave notice of dishonour and claimed payment from the respondents as endorsees. The respondents refused payment, and this action was brought against the respondents to recover the amount due on the bills, with interest.

The action was tried before Rowlatt, J. Various defences were raised. One was that the respondents had been induced by misrepresentation by appellants to enter into the transaction. This was negatived by the learned judge after hearing the witnesses. It was also said that the endorsement (which was made by one of the respondents' firm) was not binding on the respondents' firm by reason of want of authority. This also was decided adversely to the respondents. Then it was said that the bills were only accommodation bills, and that the appellants could not sue on them. The learned judge rejected this defence also. On appeal to the Court of Appeal none of these contentions was insisted on, but a point of law was pressed. It was said that the appellants could not recover because the endorsement of the respondents was made before the name of the appellants had been written on the bills, which were to be payable to order of the appellants as drawers. Rowlatt, J., held that it was proved that the appellants had the authority of the respondents to put the appellants' own name on them in the form they did. He considered, after weighing the testimony on both sides, that as the result of the evidence it was established that the bills were endorsed by the respondents and handed to the appellants for the very purpose of making the respondents, as endorsers, liable to pay the appellants. In the Court of Appeal the decision of Rowlatt, J., was reversed by Bankes and Atkin, L.JJ., Scrutton, L.J., dissenting. The latter took the same view as the judge who saw the witnesses and tried the case. He was of opinion that the respondents intended to render themselves liable to the appellants, and had not, as was argued, put their names on the paper merely in order to enable the appellants to discount, in which case the liability would have been to third parties exclusively. Bankes and Atkin, L.JJ., took a different view of the facts. They thought that as the result of the evidence the respondents had not authorised the appellants to endorse the bills so as to create a right of action against the respondents otherwise than one which would be the outcome of the negotiation of the bills to outside parties. If so, the drawers could not, on well-known principles, sue the endorsers. After considering the evidence, I am unable to think that the majority of the Court of Appeal were justified in

overruling the conclusion of fact arrived at by ROWLATT, J. I think with the latter and with SCRUTTON, L.J., that the respondents must be taken to have intended to make themselves liable to the appellants. I come to this conclusion as the result of a scrutiny of the documents and the evidence, and of the opinion as to the credibility of the learned judge who saw the witnesses in the box. I believe that all of your Lordships agree with the view that his finding of fact was the true one, and that the majority in the Court of Appeal ought not to have disturbed it.

Still, even assuming this finding to prevail, there remains a question of law. The drawers wrote on the bills no names of payees till the bills became due, six months after they had been drawn, and subsequently to the respondents' endorsement. What happened was that the bills when drawn were sent to Archer & Co., to whom they were addressed, for acceptance. When Archer & Co. had accepted, they sent on the bills, in accordance with what had been agreed, to the respondents for endorsement. This endorsement was made by the latter in pursuance of the agreement on the terms of which the appellants had entered into the transaction. Under that agreement the respondents must be taken to have endorsed so as to be liable to the appellants themselves. The respondents, accordingly, did endorse the bills. But it is said that the bills they endorsed were not complete or regular bills, inasmuch as the drawers had not written on them their own names as payees, and that it was only to their order that the bills were expressed to be payable at all. It is, therefore, contended that the respondents did not become, when they wrote their names on the backs of the bills, holders of them in due course within s. 29 of the Bills of Exchange Act, 1882, or even holders within s. 2 of the Act, the definition section, since complete bills were not handed to them for endorsement nor were in their possession so as to enable them to transfer them to the appellants as holders of complete bills in due course. This is a contention which I am unable to accept. Even by the law as it stood, apart from the code contained in the Bills of Exchange Act, I do not think it was a sound one, having regard to what had been agreed on between the parties. As LORD WATSON said, in *Steele* v. *McKinlay* (2), a person who writes an endorsement with intent to become a party to a bill may be held, notwithstanding that he has not, and therefore cannot give, any right to its contents, to be subject, in a question with subsequent holders, to all the liabilities of a proper endorser, and s. 56 of the Act itself, which governs here, provides that where a person signs a bill otherwise than as a drawer or acceptor, he thereby incurs the liability of an endorser to a holder in due course. This section appears to me to make him become liable as an endorser if, as here, he has intended to become so. As to the lack of the material particulars of the insertion by the drawers of the name of a payee, s. 20 of the Act in that event, in my view, enabled the drawers in the circumstances of the case to exercise the authority which the agreement conferred on them to secure the liability to themselves, or other payees, of the respondents as endorsers. For the section provides that where a bill is wanting in any material particular the person in possession of it has a primâ facie authority to fill up the omission in any way he thinks fit. It was, I think, in accordance with the meaning of the sections I have quoted, within the capacity of the appellants to exercise the power conferred by s. 20. I think that this was a material particular which there was authority to fill in. *Glenie* v. *Tucker and Smith* (1) appears to me to lay down a principle which extends as far, and I think that case was rightly decided. *Re Gooch, Ex parte Judd* (3) was also decided on s. 20, and is to the same effect. As pointed out by LORD STERNDALE in *Re Gooch, Ex parte Judd* (3), *Matt. T. Shaw & Co., Ltd.* v. *Holland* (4) turned mainly on the absence of actual authority to the drawer to complete the bill, as well as on the absence of an agreement by the endorser to become liable.

But speaking for myself, I do not consider it necessary to resort to the authority given by s. 20, for it appears to me that the bills were, from the beginning, complete and regular on the face of them, and that the respondents took them for endorsement in consideration of value given to them under the provisions of the

agreement, and for handing over to the appellants in due course under that agreement. It is true that the names of payees were not inserted by the drawers until after the endorsement by the respondents. But the bills were originally expressed to be payable to the order of the drawers, and, being so drawn, I am unable to resist the conclusion that they must be read as payable to the drawers themselves without another payee's name being written on them, if they choose to demand payment. Section 8 (5) of the Act provides that where a bill, either originally or by endorsement, is expressed to be payable to the order of a specified person and not to him or his order, it is nevertheless payable to him or his order at his option. As LORD HERSCHELL observed in *Bank of England* v. *Vagliano Bros.* (5) we must take the language of a code such as this without inserting a limitation which is not to be found in it or indicated in it. I think, therefore, that from the first the bills in the present case were in law payable to the drawers themselves, if they chose to demand payment, and were, therefore, complete bills when the respondents endorsed them. No doubt the person paying would have asked for a receipt, and he might very likely have been given this in the form of an endorsement by way of receipt. He would not the less be likely to do this since s. 9 of the Finance Act, 1895, provides that the name of the payee written upon a draft or order is not to constitute a receipt chargeable with stamp duty. Such an endorsement operating by way of receipt only is nothing which the subsection makes a novelty. In *Smith* v. *McClure* (6) LORD ELLENBOROUGH said in 1804 that

> "a bill payable to a man's own order was payable to himself, if he did not order it to be paid to any other."

In *Keene* v. *Beard* (7) BYLES, J., laid it down in 1860 that

> "one of the best receipts is the placing on the back of the instrument the name of the party who has received payment of it. Such an entry of the name on the instrument is not an endorsement."

Section 8 (5) is accordingly only declaratory of the old law, which has been the law throughout, whatever may have been the cautious practice of bankers and others in asking for what resembles a responsible endorsement for reasons of convenience. For these reasons I think that the judgment of ROWLATT, J., was right and should be restored, and that the appellants should have their costs here and below.

LORD DUNEDIN.—The facts are already stated. There is a question of fact which must first be decided before we can consider the law of this case, and that is whether the respondents, in putting their name on the bill, did intend to become liable to the appellants in all events. In company with, I believe, all of your Lordships, and agreeing with SCRUTTON, L.J., and ROWLATT, J., I think they did. I have had the advantage of reading the judgment about to be delivered by LORD ATKINSON, who has gone very fully into the correspondence and the evidence. I shall not duplicate what he says, but I can give my reasons for coming to the conclusion I do very shortly. Nash himself admits that he intended he should be liable to a third party if the bill were discounted. Now he must, on his own theory of the bargain as understood, have believed that in the event of his having to pay a third party either he had recourse against McDonald or he had not. If he had not it would have been pure idiocy of McDonald to keep a piece of paper which would be worthless if he kept it rather than discount it when it was worth the money. If he had, then I am asked to believe that McDonald was willing to part with control of the goods and Archer was content to be liable for £2,000 on what became a mere loan of the money for a few months. I refuse to believe it. In the courts below that question of fact was held to determine the law; in other words, the fact of Nash's intention one way or the other brought the case under the category of *Wilkinson* v. *Unwin* (8) and other cases, on the one hand, or *Jenkins & Sons* v. *Coomber* (9) and other cases, on the other. Before your Lordships, however, counsel for the respondents presented a very able and persistent argument that even upon the assumption that Nash did intend to become liable

A the parties had gone the wrong way about it, and that, standing the bill as it is, Nash was not liable. That would be an unfortunate result from the point of view of justice, though it may be the law. I am, however, glad to be of opinion that it is not. Counsel relied strongly on *Steele* v. *McKinlay* (2). I do not think that that case affords any help, because there is no question that there was no explanation given as to with what purpose or in what manner McKinlay's name
B found itself on the back of the bill.

The appellants say that they can arrive at the desired liability in one of two ways—namely, that under s. 56 of the Bills of Exchange Act, the respondents, having signed the bill other than as drawers or acceptors, incurred the liabilities of an endorser to a holder in due course, and that the appellants were holders in due course as they were holders who had taken a bill complete and regular upon
C the face of it in terms of s. 29. Failing that, the appellants say that they were entitled to do what they did under s. 20. Speaking for myself alone, I have not been able to convince myself that the bill was held by the appellants in due course in a question with the respondents. It seems to me that they never really took the bill from the respondents at all, as the respondents never had any property in the bill and never held it, but merely put his name on it at the instigation of the
D appellants. But, on the other hand, I feel no doubt that s. 20 fits the case. It is admitted that if the endorsement by the drawers had stood upon the bill when the respondents endorsed it, there would be no more to be said. Now, on the hypothesis that the respondents intended to become liable, which we have found is a fact, then it seems to me that the second part of s. 20 (1) precisely applies; for ex hypothesi the material particular that is wanting is that very endorsation
E which was afterwards filled in, and this is done as conditioned by s. 20 (1) in accordance with the authority given. This view seems to me strictly in accordance with what was decided by the Court of Appeal in *Glenie* v. *Tucker and Smith* (1). I, therefore, concur in the judgment proposed.

LORD ATKINSON.—The facts have been fully stated. Bankes, L.J., quotes
F in his judgment at some length a passage from the judgment of Lord Watson in *Macdonald* v. *Whitfield* (10) (3 App. Cas. at p. 744) to the effect that the liabilities inter se of the successive endorsers of a bill or promissory note are, in the absence of all evidence to the contrary, determinable according to the law merchant, but may be modified by the agreement of those parties and by the facts and circumstances attending upon the making, issuing, or transfer of the bill or note going
G to show what was the true relation to each other of the parties. That statement of the law is little more than an expansion of what the same noble Lord laid down in *Steele* v. *McKinlay* (2). He there said:

> "In some cases the precise character and consequent liabilities of parties to a bill are conclusively fixed by the tenor of the document. The person who draws a bill of exchange, and the addressee who accepts it, can never, according
H to the principles of the law merchant, be liable otherwise than in their respective characters of drawer and accepter. In other cases the character and liabilities of parties to a bill cannot be ascertained without the aid of proof, as, for instance, when a dispute arises in regard to the order of time in which endorsements were made upon a bill. But such proof, when it is admissible, must be strictly limited to facts and circumstances attendant upon the making,
I issue, or endorsement of the bill. On the other hand, it is undoubtedly competent for parties to a bill, by contract inter se, express or implied, to alter and even invert the positions and liabilities assigned to them by the law merchant. The drawer and acceptor of a bill may agree that, as between themselves, the acceptor shall have the rights of a drawer, and that the drawer shall be subject to the liabilities of an acceptor, and that agreement when proved will be binding upon them both, although it can have no effect upon the obligations to third parties interested in the bill imposed upon them by the law merchant."

Adopting those principles, the learned lord justice analysed the evidence with a view to determine what was in this case the nature of the contract expressed or implied (extrinsic to the bills sued on) which was entered into between the parties relatively to the endorsement of the bills by Nash. The conclusion at which he arrived was, as I understand it, in effect, this. Nash endorsed the several bills, not on the terms that he should incur no liability whatever upon them, nor yet on the terms that he should be subject to all the liabilities the law merchant imposed in ordinary circumstances upon an endorsee, but on the terms that his liability on the bills should be conditional upon the appellants discounting them, presumably at the appellants' own bank, so that, if the appellants did discount the bills, Nash, as endorsee of them, might be required to pay them, but that if the appellants omitted to discount them Nash would be no more liable to pay to McDonald, Ltd., anything in respect of any of them than if they were so much waste paper. The lord justice, in the course of his judgment, is reported to have expressed himself thus:

> "The conclusion at which I have arrived in reference to this all-important interview [i.e., the interview between the parties on Aug. 10, 1920] is that the question of the bills remaining in McDonald's possession until maturity was not in the contemplation of any of the parties, and consequently the question of the defendants' liability on their endorsement in the event of the plaintiffs' retaining them till maturity was never considered and no agreement was come to on that question."

But, with all respect, it did not require a special agreement between the parties, extrinsic to these bills, to entitle the appellants to retain them till maturity. The law merchant entitled them to do so, and it would require a special agreement, not to give them, but to deprive them of, that privilege. Lower down the learned lord justice proceeds to add:

> "If I have correctly interpreted the result of the interview of Aug. 10, coupled with the memo. of July 29, I think the plaintiff fails in making out any agreement that the defendants should be liable to the plaintiffs upon the bills, or that in no circumstances were the plaintiffs not to be liable to the defendants on the bills, and I come to the conclusion that the defendants were entitled to succeed in the action and their appeal must be allowed."

Atkin, L.J., is reported to have expressed himself thus:

> "We are brought, therefore, to the narrow question of fact. Did Nash authorise McDonald to endorse the bills so as to create a right of action in McDonald against Nash in the absence of negotiation of the bills, or did he only authorise McDonald to create a liability of Nash to a third party on negotiation of the bills. In other words, did he intend to be liable to McDonald or only to a third party? I was at first inclined to think the former inference was the right one, but my first impression was altered by the careful survey of the facts and documents made by [junior counsel for the respondents], and I have come to the conclusion that Nash never did intend to become liable to McDonald on the bills."

I do not think I misinterpret the result of those judgments in saying that the Court of Appeal decided that Nash's liability to McDonald on these bills was on the facts conditional on McDonald's discounting them. I have anxiously perused the evidence in the case, documentary and oral, more than once, and I find myself, with all respect, utterly unable to reach the conclusion at which the two learned lords justices have arrived on this point. I think it is improbable in itself, is inconsistent with the course of dealing pursued by the parties in reference to the adventure in which they became engaged, and is not supported by the evidence of James Walter McDonald upon which it purports to be based. I shall deal presently with the evidence touching the occurrences which took place on July 29, 1920, and on Aug. 10, respectively, but before doing so I may point out that if

A Nash's liability on the bills was subject to the condition mentioned, as it is now alleged to have been, then the appellants' omission to fulfil the condition and discount the bills was little less than idiotic. While McDonald & Co. abstained from discounting the bills they were trusting, so far as the bills were concerned, to be paid for the goods they had sold to the acceptance of an impecunious firm—Archer & Co.—not possessed of any adequate financial resources, and yet, notwith-
B standing this, they were furnishing Nash with delivery orders, enabling him and his firm to obtain possession of these very goods. These delivery orders were given from the very first. They were, by both parties, treated as being given, and were stated to have been given, as security to Nash. Yet, according to the assumption, Nash, the receiver, was under no liability whatever till the bills were discounted. Again, in the lengthy correspondence which passed between the parties from the
C month of July, 1920, to the month of April, 1921, not only is there no candid and clear statement made by Nash that his liability upon the bills was conditional on their being discounted, but with the possible exceptions hereafter mentioned, there is not the faintest allusion to anything of the kind. Various defences were put forward, but not this.

[His Lordship then discussed the evidence at length and continued:] The name
D of a solvent endorser on a bill accepted by a man without financial means always facilitates, I should think, the raising of money on bills, especially if they have six months to run; but there is all the difference in the world between the drawer of a bill asking a person of known means to endorse it so that he can, if need be, discount it and asking him to endorse it on the terms that the endorser shall not be liable at all upon it unless the drawer does discount it. For the reason I have
E given I think it is on the evidence clearly established first, that it was definitely agreed between the appellants, the respondents, and Archer & Co. that bills should be drawn by McDonald for the price of the soup sold by him, that Archer & Co. should accept those bills, and that Nash & Co. should back those bills; which, I presume, means that Nash & Co. would become a party to them, so as to be liable to pay the amounts of them when due, on the default of the acceptor, to the party
F entitled to receive the money. Secondly, the liability thus imposed on Nash & Co. was not by any agreement, express or implied, made conditional on the appellants' discounting the bills or any of them. Thirdly, this agreement was never altered or varied, but continued in full force and effect up to the decision of the action before Rowlatt, J., and that the drawing of these bills by McDonald & Co., the acceptance of them by Archer & Co., the endorsement of them by Nash & Co., and
G the delivery of them so endorsed by Archer & Co., through Nash & Co. to the appellants, were all things done by the respective parties with the intention and for the purpose of carrying out and giving effect to the before-mentioned agreement into which they all had entered. This conclusion is sustained by the fact that on the delivery of the bills by Nash & Co. to the appellants, the latter handed over to them in exchange for the bills the delivery orders for all the soup for which the
H appellants had not already been paid. The delivery of these delivery orders placed these goods under the absolute control of Nash & Co. It was so stipulated for in the agreement into which the parties had entered, but at the time the delivery was in fact made, it is only explicable upon the ground that Archer & Co. and Nash & Co. had performed their respective sides of their contracts.

I The case, therefore, is wholly different from *Steele* v. *McKinlay* (2). In that case there was no evidence produced to show why, or in what character, or for what purpose, or object, James McKinlay deceased, whose personal representative was sued, wrote his name across the back of the bill sued on. In this case the terms of the agreement entered into between the parties are clear. It is also clear that by the things they did and the steps they took they intended to perform, and thought they had performed, that agreement. The delivery of the delivery orders shows that their objects and intentions were right and honest. Their only blunder consisted in doing the right things in the wrong chronological order. The bills were drawn by the appellants to their own order. The natural and proper thing

to have done would have been for the appellants to have endorsed the bills so as to have named or indicated a payee, and that Nash & Co. should then have endorsed the bills. Had that been done no difficulty would have arisen. What the parties stupidly did was this. Archer & Co., after accepting the bills, sent them to Nash & Co., who, instead of deferring their endorsement of them till the appellants had endorsed them, naming or indicating a payee, and then themselves endorsing the bills, endorsed the bills before the appellants had endorsed them, handed them over to the appellants, and got in exchange the delivery orders, which they were not entitled to receive till the appellants' securities had been perfected. I think it is clear that Nash & Co., like the acceptors, intended to become liable on these bills when they endorsed them. Indeed, their case is that they did become liable upon them, but only conditionally upon the appellants' discounting them. The appellants did not, in fact, endorse these bills until months later—Feb. 26, 1921—and when they did endorse them they put their signature above that of Nash & Co. in a space left vacant for the purpose.

The question remains whether the appellants, being in possession of these bills on Feb. 26, 1921, were, by the provisions of s. 20 of the Bills of Exchange Act, 1882, empowered to make them complete and enforceable against Nash & Co. by endorsing them at that date, in the manner in which they should have been endorsed in priority to the endorsement of them by the respondents, and thus making the instrument effective to do what the parties to them desired and intended to do in performance of the agreement into which they had entered. Section 20 (1) provides that where a bill is wanting in any material particular the person in possession of it has a primâ facie authority to fill up the omission in any way he thinks fit. Subsection (2) provides that in order that any such instrument may, when completed, be enforceable against any person who became a party to it prior to its completion, it must be filled up within a reasonable time and strictly in accordance with the authority given. Reasonable time is on this subject a question of fact. Here the bills were endorsed by the appellants very shortly after they became due; that evidently was within a reasonable time. The first question to be determined upon the construction of sub-s. (1) of s. 20 is this: Is absence of endorsement by the drawers of a bill drawn simply to their order a "material particular"? Primâ facie I should say it was, because the other parties, whether acceptors or endorsers, do not know till that has been done who are the persons to be paid. No doubt a drawer who draws a bill payable to his order may under the provision of s. 8 (5) of the same statute, at his option treat the bill as payable to "him or his order." No time is mentioned within which this option must be exercised, or how it is to be exercised. It may well be that the endorsement of the bills by the appellants on Feb. 26 was a clear exercise of their option not to treat these bills or seek to enforce these bills as payable to the drawers themselves, or their order. Otherwise there would be no need of the endorsement so made. The next question for decision is by no means an easy one. It is whether an amendment made by the drawers on Feb. 26, 1921, was "strictly in accordance with the authority given," within the meaning of s. 20 (2), in order that the bills might be enforceable against the respondents who became parties to them before Feb. 26, 1921. Archer & Co., by the agreement of the parties, were bound to accept these bills which, primâ facie, means validly to accept them. Nash & Co. were, by the agreement of the three parties, bound to back those bills when accepted, which means to become a party to them in such a way as would make them legally enforceable against them in case the acceptors made default. Both Nash & Co. and Archer & Co., in my opinion, designed and intended to act in conformity with their contract in these respects. The appellants thought they had done so. The handing over of the delivery orders to the control of the respondents, if the bills were not perfected, would involve a gross wrong to the appellants. To deny to the appellants the right and authority to endorse these bills, as they did endorse them on Feb. 26, 1921, is in effect to confer upon the other parties to the bills the power to inflict a gross wrong upon the appellants, while to hold that

the appellants had authority to endorse the bills as they have done merely enables them to compel the other parties to the bills to perform their agreement. From all these facts and circumstances, I have come to the conclusion that the appellants had implied authority to make, on Feb. 26, 1921, the amendment they did make in those bills, by endorsing them in order to carry out their agreement so as to satisfy the requirements of s. 20 (2) of the Bills of Exchange Act, 1882. This conclusion is supported by *Glenie* v. *Tucker and Smith* (1), as well as by *Re Gooch, Ex parte Judd* (3), and I, therefore, think that the decision appealed from was erroneous and should be reversed, and that the judgment of Rowlatt, J., should be restored and the appeal be allowed with costs.

LORD SUMNER (read by Lord Dunedin).—After carefully considering the evidence in this case I agree with the conclusion of Rowlatt, J., who saw the witnesses, and of Scrutton, L.J., as against that of the majority of the lords justices in the Court of Appeal. The defendants' actual endorsement was unrestricted and, if they were to be liable at all, presumably they were to be liable to all holders of the bill. Mr. F. J. Nash deposed to statements made to him by the plaintiffs that the liability should arise only to third parties with whom the bills might be discounted; in other words, that Nash & Co. were to endorse for the accommodation of the plaintiffs, but no farther. This Rowlatt, J., did not believe. I appreciate that the evidence of Mr. G. T. W. McDonald was taken in a manner which hardly did full justice to his case, but this is not sufficient to negative what I conceive to be the business of the whole transaction. Archer & Co. needed to be accommodated; McDonald & Co. did not. They wanted to be paid, and Archer & Co. could not pay. They gave Nash & Co. delivery orders for the soup in exchange for their endorsements on the bills, and they must, in my opinion, have expected that Nash & Co. would be liable to them for payment of the bills at maturity. This must have been the intention of Mr. F. J. Nash also. To give Nash & Co. control of the goods on the terms that, if the bills were discounted and Nash & Co. were made to pay them, McDonald & Co. should be liable to reimburse Nash & Co. and should then look to Archer & Co. for their money, is something that I cannot understand. It was only because Archer & Co. were not good for the money that Nash & Co. were brought in at all, and, if this was to be the result, the plaintiffs would have been better off if they had never known Nash & Co. in the matter. The proper inference from the facts is that it was the common intention, both of the plaintiffs and of the defendants, that the latter should be directly liable to the former on the bills, so far as the law allowed. If Mr. F. J. Nash had any less intention, his conduct was dishonest, and of this I have no mind to suspect him.

What, then, does the law allow in the matter? Mr. F. J. Nash wrote his firm's name on the back of bills duly drawn by the plaintiffs on Archer & Co., and duly accepted by Archer & Co., payable to the plaintiffs' order, but when the name "F. J. Nash for Nash & Co." was thus written, McDonald & Co. had not yet endorsed the bills. What is the legal effect of that? After Mr. F. J. Nash had written this endorsement on the bills, he gave them back to Mr. G. T. W. McDonald, pursuant to the arrangement which I am satisfied had already been made and was fully understood. He gave them back in exchange for and in consideration of delivery orders for the soup, and the plaintiffs have had or held them ever since. Unless there is some decision or some principle which binds me to say the contrary, I think that on these facts I ought to hold that the bills thus delivered to the plaintiffs were "wanting in a material particular," namely, that they lacked the signature of the plaintiffs written on the back before that of Nash & Co. by way of a general direction to the acceptors to pay any person to whom the bills might thereafter have been delivered, except in so far as this liability might be specially modified inter partes.

The questions are: (i) whether this description of the bill is legally incompetent or incorrect within s. 20 (1) of the Bills of Exchange Act, 1882, or otherwise; and

(ii) what legal result, if any, follows from this description being true in the circumstances of this case. The section says "a bill," and I am of opinion that each of these instruments was a bill when it was passed to Mr. F. J. Nash to be endorsed, and was still a bill, and the same bill, when he re-delivered it to Mr. G. W. F. McDonald after writing on the back of it. Doubtless, it might have been treated as a complete bill within the statute before it reached the hands of Mr. Nash, but it did not cease to be a bill by becoming an endorsed bill, nor can I find any authority for saying that the new rights which arise upon the endorsement of a bill prevent the whole instrument—drawing, acceptance, and endorsements, such as they are—from being properly describable as a bill and dealt with as one instrument together. *Hirschfeld* v. *Smith* (11) is an instance to the contrary, where an alteration in an endorsement avoided the bill, as being a material alteration in the bill. If so, these bills were wanting in a material particular, for the gap between the acceptance, unendorsed by the payee, and the actual first writing of another name, viz., that of Nash & Co., on the back, is a want which is certainly material. The respondents do not dispute that what was wanting was material, but they say that the lack of it was fatal. The section then says that, in these circumstances, the person in possession of the bills, who indubitably was Mr. G. W. T. McDonald, had primâ facie authority to fill up the omission as he chose—that is, as he did. The way in which it was actually filled up certainly was in accordance with the common interests of the parties in so far as it had efficacy in making the defendants liable to the plaintiffs, and thus the authority, which was only a primâ facie authority by the statute, is not in any respect contradicted or varied by the facts. Then comes the question what, if any, is the efficacy of the plaintiffs' act in filling in their names above those of Nash & Co. on a later date? As I understand the contention, it is, that in this case it has no efficacy, for, first, in no case could s. 20 authorise a retrospective operation or enable the filling in of the blank to confer rights not previously existing; and, secondly, no rights did previously exist against Nash & Co., for, although Mr. W. J. Nash wrote their name as endorsees, they were not and could not be endorsees, since nobody entitled to do so had endorsed to them and so entitled them to endorse to others in their turn. Both propositions are said to be inherent in the nature of bills of exchange.

I think it is reasonably plain upon the language of s. 20 that filling in an omission in a bill under a proper authority to do so makes a bill complete, and thereupon enforceable, which without it could not have been enforced. This is involved in the provision that, if filled in within a reasonable time, the completed instrument becomes enforceable against any person who became a party to it before its completion, and without limit of time in favour of a holder in due course to whom it is negotiated after completion. It is, indeed, involved in the idea of completing by a subsequent act a bill which was incomplete before it that the result of completion is to be the same as if the bill had never been defective at all; and to limit its efficacy to rights which only come into existence after the omission is supplied, in effect deprives the section by mere implication of half its beneficial effect. As it seems to me the language of s. 20 contemplates the very case with which we are now dealing. The primâ facie authority, which it gives, is, in the case of delivery of a simple signature on a blank stamped paper, an authority "to fill it up as a complete bill for any amount the stamp will cover, using the signature for that of the drawer, or the acceptor, or an endorser." If, then, the signature is used for that of an endorser, we get in an extreme form the case of an endorser's name operating to charge him as endorser, although, when he wrote his name, not only had nothing been transferred to him which he could transfer in turn by endorsing and delivering the bill, but no draft, no acceptance, and no order by the drawer, general or special, was in existence at all. The whole efficacy of the endorsement is retrospective, and is dependent on the subsequent action of a person who, according as he fills up the blank in one way or another, can make the person who has thus given his signature, either the transferee of rights, which

A he subsequently passes on as transferor, or, at his choice, an acceptor, who has no right to transfer but is under an ambulatory liability to all other parties, who may come upon the bill. If, as I think is plain, this is the effect of the first part of the single sentence, of which sub-s. (1) consists, I do not see how a more restricted interpretation can be placed on the other part, so that the words "in like manner . . . has a primâ facie authority to fill up the omission in any way he thinks fit," B can be so limited so as to exclude endorsees. No doubt the authority, being primâ facie only, is limited by circumstances that may be proved, and these may narrow in some cases (*Matt T. Shaw & Co., Ltd.* v. *Holland* (4)) the authority, which otherwise would be general (*Glenie's Case* (1); *Gooch's Case* (3)), but in either case endorsees must be within the principle of the subsection. I think further that the language of sub-s. (2) points to the same conclusion. It expresses a condition C of general application to all the cases covered by sub-s. (1), and says:

> "In order that any such instrument when completed may be enforceable against any person who became a party thereto prior to its completion, it must be filled up within a reasonable time. . . ."

A bill, on which the signature to a blank is utilised as an endorser's signature, is D such an instrument. A bill, complete on its face, but purporting to be endorsed by a third party without that party's name being preceded by the endorsement of the drawer, is another such instrument. In both cases the bill is incomplete till it is filled up in one way or the other, and when so filled up, though not before, it becomes retrospectively enforceable, as if it had been complete throughout. That the filling up was done in the present case within a reasonable time has not been E contested at your Lordships' Bar.

It is, however, argued, as I understand the matter, that, as the Bills of Exchange Act, 1882, is a codifying Act, it ought, unless this be impossible on its language, to be construed so as not to alter the principles of the law merchant as applied in the decisions of the courts before the Act passed, and it is further said that, both on principle and on the cases, a name written on the back of a bill, as Nash F & Co.'s name was written here, cannot be turned into their endorsement, so as to make them liable on the bill as endorsees to a subsequent holder for value, otherwise than by estoppel, which does not arise between parties who know all the facts. It was said that there was no decision to the contrary and that there were dicta at least to be found in support of the proposition. The principle alleged, deep rooted in the nature of a bill of exchange, is this. He who becomes liable G as endorser of a bill is liable because he transfers to a holder by subsequent delivery his rights on the bill with the addition of his own credit as endorser, and he cannot do this, unless he then has rights on the bill, which he can transfer, and unless he is not only an endorser but also an endorsee himself, to whom, in any valid form, the bill or the rights upon it have been transferred by prior endorsement. No collateral agreement, no subsequent authority, can avail to transmit H at the time of the delivery of the bill a right on the bill which has not yet been regularly acquired on the bill, and, if no right on the bill can be transferred, neither can any liability on the bill be created. The liability, if any, must arise on the collateral agreement or by estoppel, but not simply on the bill. It is evident that this is a principle of rigid legitimacy, founded on the assumption of an indispensable ritual of transmissibility in time as well as in form, and that, if I it is a principle at all and not a mere observance, it is quite inconsistent with any effectual admission of amendments to cure the errors and to carry out the intentions of the parties to the bill. Yet it is beyond doubt that the law merchant has long admitted the making of amendments by filling in blanks so as to bring about the formal regularity of the bill and its endorsements. Such a principle would be equally fatal to filling in omissions from the face of the bill as to filling in omissions from the back, and decisions relating to the former class of cases ought to conform to this principle just as much as those which relate to the back. If such a principle is inherent in the law of bills of exchange, I think that *Glenie* v. *Tucker*

and Smith (1) ought to have been otherwise decided. Neither *Steele* v. *McKinlay* (2) nor *Macdonald* v. *Whitfield* (10), though strongly relied on by the respondents, are really authorities for this doctrine. In the former case the facts did not raise any question of authority to fill in blanks in an incomplete bill and there was no evidence to show what the past arrangement between the parties had been. Liability to the drawer had to be rested on the bare fact that James McKinlay had written his name on the back above the drawer's name and before the drawer's name was written. What was held was that, though McKinlay was an endorser both in fact and in law and might in a question with subsequent holders be subject to all the liabilities of a proper endorser, he could not thus be interpolated as a party between drawer and acceptor. There is nothing here to touch the case of an endorser, who by arrangement and in order to make himself liable to the drawer writes his name as endorser first, and for convenience leaves the drawer to write his name higher up, afterwards. On the other hand, *Macdonald* v. *Whitfield* (10) is a case where the true liability of endorsers, who all endorse on the same occasion without any subsequent filling in of blanks, is held to depend on the actual agreement between them and not on the mere ritual observed in putting their hands to paper.

On the other hand, I think there is authority which, though old, is an answer to the respondents' argument. In *Russel* v. *Langstaffe* (12) one G. had procured the defendant to write his name on the back of an engraved blank form of a promissory note without either date or amount or time of payment. G. then filled in these particulars and signed the form as maker of the note and discounted it with the plaintiff, who had knowledge of these facts. The first point taken in banco was that, at the time of the endorsement, no note had been made at all, and no subsequent act on the part of G. could alter the original nature or operation of the defendant's signature which, when written, was a mere nullity. This point the Attorney-General, counsel for the defendant, gave up, but Lee, who was with him, "thought it of consequence enough to be argued; it had never been determined." The argument is thus reported.

> "An endorsement supposes a bill or promissory note then actually existing, and if a party takes an endorsed bill or note, knowing at the time it was not the subject of an endorsement when the name was written on the back of it, he is not injured if he is afterwards told that he shall not be permitted to treat it as a bill or note."

To this contention, which seems to me hard to distinguish except in its brevity from that of the respondents, Lord Mansfield observed still more briefly :

> "There is nothing so clear as the first point . . . it does not lie in his mouth to say the endorsement was not regular,"

and so the defendant failed. This decision is afterwards referred to as being undoubted law by Buller, J., in *Lickbarrow* v. *Mason* (13), as reported 6 East, 22 in notis. In *Schultz* v. *Astley* (14) the same point appears to have been taken again. The defendant accepted in blank on a piece of stamped paper. One Clissold then wrote his name where a drawer and where an endorser would sign. Later on some other person filled in words of particulars which made the instrument a complete bill. Schultz sued Astley on the note, and among other points taken for the defendant there is this : "as an endorser cannot transfer, unless the matter to be transferred be in existence, Clissold's endorsement before the bill was drawn in effect transferred nothing to the plaintiff." In giving the judgment of the court for the plaintiff, Tindal, C.J., does not even mention this contention, but says more generally :

> "the objection is that this giving of a blank acceptance authorises only the party to whom it is given to draw the bill, not Clissold, a stranger, to sign his name on the same blank piece of paper as drawer. No authority has been cited to us for any such restriction of the general doctrine"

A that a party may be bound by his acceptance on a blank paper, so far as the stamp will cover it.

For these reasons I think that the appeal should be allowed. Speaking for myself only and always with great deference, I should not be prepared to say that this bill was a complete bill before ever Mr. Nash wrote his firm's name on the back of it, so that s. 20 need not be prayed in aid at all. Section 8 (5) merely B enables the drawer of a bill in the form—"pay to our order"—to demand payment and give a receipt for it, as well as the person to whom, specially or generally, it has been endorsed. It does not deal with the conditions necessary for a complete bill or declare that a bill drawn in this form is, therefore, complete. It is from the time when the instrument is issued in a complete form that the liabilities of the parties accrue (*Re Hayward, Ex parte Hayward* (15)), and it seems to me C that it must also be at the time of issue that the question of completeness or incompleteness must be determined in accordance with the intention of the parties. The time of issue in this case was not when the drawers signed as drawers or even when the acceptors signed as acceptors, but the time when Nash & Co., having endorsed their name, delivered the endorsed bill to McDonald & Co. in exchange for the delivery order. The bill was then a bill of exchange but incomplete, and D it is only under s. 20 that the incompleteness could be cured.

LORD BUCKMASTER.—I concur.

Appeal allowed.

Solicitors: *Stanley, Hedderwick & Co.*; *Newton G. Driver*, for *Smith, Davies & Jessop*, Aberystwyth.

E [*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

F

THE TUBANTIA

G [PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sir Henry Duke, P.), January 31, February 1, 2, 5, 6, 13, 1924]

[Reported [1924] P. 78; 93 L.J.P. 148; 131 L.T. 570; 40 T.L.R. 335; 16 Asp.M.L.C. 346; 18 Lloyd, L.R. 158]

Admiralty—Jurisdiction—Salvage—Interference by defendants with plaintiffs while engaged in salvage operations on wreck—Plaintiffs' possessory title— H *Intermittent work due to weather—Declaration—Injunction.*

In 1922 the plaintiffs began salvage operations on the wreck of a steamer lying in the North Sea which had been torpedoed and sunk in 1916 and lay with her cargo in about twenty fathoms of water, on the bed of the sea, outside any territorial waters. The plaintiffs worked, when tide and weather permitted, with divers and salvage apparatus, and had buoyed the wreck, I entered at least one of the steamer's holds, and made an artificial hole in her side, at a total expenditure of about £40,000. In 1923 the defendants, British subjects, appeared at the site of the wreck, and began independent salvage operations, sending down divers and otherwise interfering with the operations of the plaintiffs. In an action by the plaintiffs claiming a declaration that they were entitled to the wreck and cargo, an injunction restraining the defendants from interfering with their possession of the wreck, and damages,

Held: (i) the Admiralty Court had jurisdiction to entertain a suit in respect of injurious acts done on the high seas; the wreck and her cargo were derelict

in the sense that before the plaintiffs started operations they were not in the possession or under the control of any owner or person acting on behalf of an owner; the rights given to a salvor by possession of a ship or cargo or derelict wreck were as well known to the law as any other right of a salvor; although the plaintiffs' divers could only work two at a time in short spells with long interruptions and access to the holds of the wreck was often prevented altogether by stress of weather, the plaintiffs were doing with the wreck what an owner or purchaser would have done, their occupation was sufficient to exclude strangers from interfering with the wreck unless they used unlawful force, and there was animus possidendi in them; accordingly, the plaintiffs were in possession of the wreck and the cargo and had a legal interest therein; the defendants had been guilty of trespass on the plaintiffs' possession and had wilfully and wrongfully interrupted and molested them in their lawful undertaking; there was a danger of the repetition by the defendants of the wrongs complained of; and, therefore, the plaintiffs were entitled to an injunction restraining the defendants from preventing or hindering the plaintiffs' salvage operations, but not to a declaration as a possessory right was of a limited, and perhaps transitory, kind.

Notes. As to the jurisdiction of the Admiralty Court in salvage cases, see 1 HALSBURY'S LAWS (3rd Edn.) 65–68; and for cases see 1 DIGEST 151 et seq. See also Administration of Justice Act, 1956, s. 1 (1) (j): 36 HALSBURY'S STATUTES (2nd Edn.) 3. As to the granting of injunctions and declarations, see 21 HALSBURY'S LAWS (3rd Edn.) 345 et seq., and ibid., vol. 22, pp. 746–751. For cases see 28 DIGEST (Repl.) 766 et seq., and 30 DIGEST (Repl.) 165 et seq.

Cases referred to:

(1) *H.M.S. Thetis* (1835), 3 Hag. Adm. 228; 166 E.R. 390; 37 Digest 571, *13.*

(2) *The Aquila* (1798), 1 Ch. Rob. 37; 165 E.R. 87; 41 Digest 851, *7151.*

(3) *The Blenden Hall* (1814), 1 Dods. 414; 165 E.R. 1361; 41 Digest 882, *7650.*

(4) *Cossman* v. *West, Cossman* v. *British America Assurance Co.* (1887), 13 App. Cas. 160; 57 L.J.P.C. 17; 58 L.T. 122; 4 T.L.R. 65; 6 Asp.M.L.C. 233, P.C.; 41 Digest 892, *7813.*

(5) *Hogarth* v. *Jackson* (1827), 2 C. & P. 595; Mood. & M. 58, N.P.; 2 Digest (Repl.) 298, *68.*

(6) *Young* v. *Hitchens* (1843), 6 Q.B. 606; 1 Dav. & Mer. 592; 2 L.T.O.S. 420; 115 E.R. 228; 37 Digest 158, *31.*

(7) *Keeble* (*Keble*) v. *Hickeringill* (1706), 3 Salk. 9; Holt, K.B. 14, 17, 19; Kelw. 273; 11 Mod. 74, 130; 11 East, 574, n.; 91 E.R. 659; 2 Digest (Repl.) 295, *38.*

(8) *Carrington* v. *Taylor* (1809), 11 East, 571; 103 E.R. 1126; 2 Digest (Repl.) 295, *39.*

(9) *Skinner* v. *Chapman* (1827), Mood. & M. 59, n.; 25 Digest 59, *501.*

Also referred to in argument:

Constable's Case (1601), 5 Co. Rep. 1069; 1 And. 86; 77 E.R. 210; 1 Digest 153, *614.*

The Ruckers (1801), 4 Ch. Rob. 73; 1 Digest 106, *84.*

The Hercules (1819), 2 Dods. 353; 1 Hag. Adm. 143; 1 Digest 155, *635.*

Mersey Docks and Harbour Board v. *Turner, The Zeta*, [1893] A.C. 468; 63 L.J.P. 17; 69 L.T. 630; 57 J.P. 660; 9 T.L.R. 624; 7 Asp.M.L.C. 369; 1 R. 307, H.L.; 1 Digest 245, *1728.*

Lord Advocate v. *Young, North British Rail. Co.* v. *Young* (1887), 12 App. Cas. 544, H.L.; 44 Digest 75, *559.*

Brown v. *Mallett* (1848), 5 C.B. 599; 17 L.J.C.P. 227; 11 L.T.O.S. 64; 12 Jur. 204; 136 E.R. 1013; 41 Digest 790, *6501.*

White v. *Crisp* (1854), 10 Exch. 312; 2 C.L.R. 1215; 23 L.J.Ex. 317; 23 L.T.O.S. 300; 2 W.R. 624; 156 E.R. 463; 41 Digest 790, *6499.*

Arrow Shipping Co. v. *Tyne Improvement Comrs., The Crystal*, [1894] A.C. 508; 63 L.J.P. 146; 71 L.T. 346; 10 T.L.R. 551; 7 Asp.M.L.C. 513; 6 R. 258, H.L.; 41 Digest 822, *6807*.

Barraclough v. *Brown*, [1897] A.C. 615; 66 L.J.Q.B. 672; 76 L.T. 797; 62 J.P. 275; 13 T.L.R. 527; 8 Asp.M.L.C. 290; 2 Com. Cas. 249, H.L.; 44 Digest 125, *1007*.

Bridges v. *Hawkesworth* (1851), 21 L.J.Q.B. 75; 18 L.T.O.S. 154; 15 Jur. 1079; 3 Digest 64, *77*.

The Winkfield, [1902] P. 42; 71 L.J.P. 21; 85 L.T. 668; 50 W.R. 246; 18 T.L.R. 178; 46 Sol. Jo. 163; 9 Asp.M.L.C. 259, C.A.; 37 Digest 160, *45*.

Ibottson v. *Peat* (1865), 3 H. & C. 644; 159 E.R. 684; sub nom. *Ibbotson* v. *Peat*, 6 New Rep. 124; 34 L.J.Ex. 118; 12 L.T. 313; 29 J.P. 344; 11 Jur.N.S. 394; 13 W.R. 691; 25 Digest 364, *129*.

Jones v. *Chapman* (1849), 2 Exch. 803; 18 L.J.Ex. 456; 14 L.T.O.S. 45; 13 J.P. 730; 154 E.R. 717, Ex. Ch.; 43 Digest 406, *284*.

The Charlotta (1831), 2 Hag. Adm. 361; 166 E.R. 275; 41 Digest 846, *7086*.

The Eugene (1834), 3 Hag. Adm. 156; 166 E.R. 364; 41 Digest 891, *7805*.

R. v. *Property Derelict* (1825), 1 Hag. Adm. 383; 1 Digest 154, *619*.

The Clarisse (1856), Sw. 129; 166 E.R. 1056; on appeal sub nom. *Gann* v. *Brun, The Clarisse*, 12 Moo.P.C.C. 340, P.C.; 41 Digest 894, *7860*.

Duke of Newcastle v. *Clark* (1818), 8 Taunt. 602; 2 Moore, C.P. 665; 129 E.R. 518; 41 Digest 55, *407*.

Newman v. *Walters* (1804), 3 Bos. & P. 612; 127 E.R. 330; 41 Digest 839, *7006*.

The Elton, [1891] P. 265; 60 L.J.P. 69; 65 L.T. 232; 39 W.R. 703; 7 T.L.R. 434; 7 Asp.M.L.C. 66; 1 Digest 172, *838*.

British South Africa Co. v. *Compantua de Moçambique*, [1893] A.C. 602; 63 L.J.Q.B. 70; 69 L.T. 604; 10 T.L.R. 7; 37 Sol. Jo. 756; 6 R. 1, H.L.; 16 Digest 174, *798*.

Action for damages for trespass and/or for wrongful interference with the plaintiffs' salvage services on the wreck of the Dutch steamship *Tubantia* and her cargo.

The plaintiffs, Major Sippe and others, had, in April, 1922, commenced salvage operations on the wreck of the *Tubantia*, which, since she was torpedoed in 1916, had been lying on the bed of the North Sea, in some twenty fathoms of water in the vicinity of the North Hinder light vessel. The plaintiffs had fitted out an expedition with salvage steamers and tugs, divers, and salvage experts. Throughout the summer and autumn of 1922 they continued their operations, and in November they buoyed the wreck and left her until April, 1923, when it was possible for them to return and continue their operations. The defendants were Vincent Grech and Count Zanardi Landi, who were British subjects, and one Cecil Finlay Reed (who was added as a defendant by leave during the hearing, and who appeared to be a partner with the other two defendants in a partnership known as the British Semper Paratus Salvage Company) and the Ayeready Salvage and Towage Company. The plaintiffs did not pursue their claim against the last-named defendants. In July, 1923, the defendants Grech, Landi, and Reed approached the wreck of the *Tubantia* in the salvage steamer *Semper Paratus*, which was registered as a British ship, and commenced independent salvage operations with dragging gear, divers, and other apparatus. Though requested to leave, the defendants refused to do so, and continued to drag, send down divers, and conduct operations which the plaintiffs alleged interfered with their operations and endangered their divers. The plaintiffs thereupon commenced the present action in which they claimed a declaration that they were entitled to the possession of the *Tubantia* and her cargo, an injunction to restrain the defendants from proceeding to, or remaining at, or interfering with, the *Tubantia* and/or her cargo, damages and a reference to the registrar and merchants to assess the amount thereof. In July, 1923, the plaintiffs obtained an ex parte injunction, but on

July 31, 1923, HILL, J., refused to continue it until the trial upon the defendants undertaking to bring into court anything recovered in the salvage operations, upon the ground that it did not then appear that the plaintiffs had such possession of the remains of the *Tubantia* or any part of her, or her cargo, as to confer upon them such legal rights as they were entitled to have protected by injunction. The Court of Appeal refused to grant the injunction upon the defendants by their counsel giving certain undertakings.

Sir John Simon, K.C., *Stranger*, and *C. A. Hopper* for the plaintiffs.
Dunlop, K.C., and *Speirs* for the defendant Count Landi.
Bucknill for the defendant Vincent Grech.

Cur. adv. vult.

Feb. 13. **SIR HENRY DUKE, P.**, read the following judgment.—The plaintiffs in this action—a British subject and four citizens of the French Republic—bring their action in respect of alleged wrongful acts of the defendants upon the high seas. The place in question is a point in the North Sea some fifty miles from our shores, and from twenty to twenty-seven miles from the coasts of France, Belgium, and Holland, where, at a depth of nineteen or twenty fathoms, lies so much as is now in being of the hull and cargo of a Dutch steamer, the *Tubantia*, which was a vessel of 541 ft. long and of 15,000 tons register. Alleged rights over the *Tubantia* and her cargo are the real subject-matter of the controversy. The vessel was, as the parties say, sunk at the place in question in January, 1916, by a German warship. The plaintiffs assert possessory rights over the wreck and its contents and complain of trespasses thereon, and also of wrongful interference by the defendants and their servants with the lawful business of the plaintiffs. They claim a declaration to establish the possessory rights which they allege, an injunction to restrain interference by the defendants with their possession of or operations upon the *Tubantia*, and damages to be assessed by the registrar and merchants according to the practice of this Division. The defendants against whom the action has proceeded are Cecil Finlay Reed, Vincent Grech and C. Zanardi Landi, who constituted, as appears, the partnership called in the pleadings the Semper Paratus Salvage Co. and under that name added to the defendants in the cause. The steamship *Semper Paratus* was used by the defendants, as is alleged, in doing the acts complained of by the plaintiffs. She is of British register. The defendants deny the alleged possessory rights of the plaintiffs, and the alleged trespasses and molestations. The defendant Landi raises alternative defences which treat the plaintiffs as would-be salvors of the *Tubantia* who were unable to effect their salvage undertaking, and assert that the defendants were ready and willing to co-operate with the plaintiffs as salvors, and to bring into court any salved property. There was evidence at the hearing of a serious belief among the parties that the wreck of the *Tubantia* contains treasure of large value. A salvage agreement into which the three defendants entered for the purposes of their joint undertaking specifies a sum in gold of the German pre-war currency worth not less than two million pounds sterling.

The particulars I have stated show the controversy between the parties to be of an unusual kind, and the plaintiffs are invoking in respect of it powers of the court derived from the Judicature Acts which rarely come in question here. On the defendants' part one short answer which was made to the claims of the plaintiffs was that they are without precedent. The absence of specific authority, no doubt, necessitates caution in the consideration of the case. What is really to be decided, however, is whether in respect of the *Tubantia* and her cargo any rights of the plaintiffs have been infringed by the defendants, and, if so, what are the appropriate remedies. To some subjects of great juristic interest which were debated I shall refer only in passing. That the court has jurisdiction over the matters in question I cannot doubt. A suit in respect of injurious acts done upon the high seas was within the undisputed jurisdiction of the Court of Admiralty as appears upon reference to COMYN'S DIGEST (COMYN'S DIGEST TIT. "ADMIRALTY"

(E. 7)), and to Blackstone's Commentaries (Blackstone's Commentaries III, 106), and this Division now has the jurisdiction and powers defined, and in some cases conferred by the Judicature Acts. The property in a legal sense which is the subject of the activities of the parties is not for adjudication at this time. Whether the *Tubantia* and her cargo are things derelict in the sense in which the term "res derelicta" was used in Roman law I have not to decide; nor need I come to any conclusion as to the limits which international right may impose upon any claim under the prerogative of the British Crown to bona vacantia lying on the ocean floor in the North Sea. Sir John Nicholl explains in *H.M.S. Thetis* (1) how property may be derelict on the seas without being a droit of Admiralty. The derelict in question there was treasure in silver bullion of the amount of £157,000 recovered from deep water on the coast of South America, and as soon as it was proceeded against in the Admiralty on behalf of the Crown the owners appeared, and their claim was admitted, but subject to the rights of the salvors, who had reduced it into their possession under orders of British naval authorities. So far as the matter may be thought material I need only say there is here no proof or presumption sufficient to convince me that the owners of the wreck or the cargo in question have lost whatever rights they originally had. Without intention to abandon they would not have done so under Roman law (Digest, Bk. XLI, tit. 7, 1 (2), Bk. XLVII, tit. 2, 43, ss. 10, 11; Institutes, Bk. II, tit. 1, ss. 47, 48). Nor, so far as I am aware, would the ancient rule "Res nullius fit occupantis" be held to give property in the things in the courts of any of the States bordering on the North Sea. Some lengths of silk were produced before me. If they had been of value, and if property came in question, I must have seen that the Procurator-General had notice of the matter, and that lawful claimants were given an opportunity to appear. The things here in question are, as I find, derelict in the limited sense in which that term is constantly used here in cases of salvage—what Lord Stowell called "the legal sense": *The Aquila* (2), 1 Ch. Rob. at p. 40. They are not in the possession or under the control of any owner or person acting on behalf of an owner. The rights given to a salvor by possession of a ship or cargo, or wreck derelict in this sense, are, however, as well known to the law as any other right of a salvor. It has often been asserted, and, indeed, vindicated, in the Admiralty jurisdiction. The plaintiffs are, therefore, entitled to a decision whether they had in July, 1923, as they assert they had, possession by their agents of the wreck of the *Tubantia* and the cargo therein.

The facts on which the plaintiffs rely in support of their claim that they had possession in July, 1923, are fully set forth in the statement of claim, and, in all material particulars, were proved at the hearing. Their operations began in April, 1922, and for a long time were discontinuous. Their controversy with the defendants arose in July, 1923. They then had, and from that time to the hearing they have kept, craft and divers at the place in question. What had been done, and what was going on in July, 1923, are matters in dispute, and must be stated in some detail. The plaintiffs, by employing during two seasons various vessels suitable for salvage work with competent crews, ascertained and marked out the area occupied by the *Tubantia*, and by means of buoys properly moored they were able to, and did, keep in position, at and above the wreck, craft from which work could be carried on upon the hull, and in the holds. They established in July, 1923, and were using, various buoyed moorings by which they had a direct access to the deck at various points. They cut out a hole in the ship's side fourteen feet by ten, which gave them access to hold No. 4 in which a great bulk of cargo appears to have been stowed, and by means of tackle fixed at the side of the hold their divers had a way of approach to and entry upon that hold. The various appliances to which I have referred were of the nature of fixed plant on and around the *Tubantia*, such that when the weather and the state of the tide permitted, divers could by its use work in and upon the wreck and among the cargo. Two pairs of divers were so at work during May, June, and July, 1923. They explored the wreck, removed obstructions, opened the approaches to and worked upon the

cargo, and brought up parts of the structure and of the cargo. The possible working hours in each day, however, did not exceed two spells of one and three-quarter hours at a time, of which four minutes at a time were spent in the holds. The number of working days in 1923 seems not to have exceeded twenty-five, and the working plant was liable to be carried away or destroyed by the sea. Some of it sometimes was. The appliances I have mentioned, and the frequently interrupted access to the wreck which the plaintiffs had in the summer of 1922, are the evidences of possession at the dates in question in this case, on which the plaintiffs rely.

On the question whether in the state of facts I have described the plaintiffs could be found to have had possession of the *Tubantia* when the defendants appeared on the scene, counsel on both sides cited largely from SIR FREDERICK POLLOCK'S well-known treatise on possession (POLLOCK AND WRIGHT: POSSESSION IN THE COMMON LAW). The questions suggested in this way I have sought to apply. They involve inquiries such as these: What are the kinds of physical control and use of which the things in question were practically capable? Could physical control be applied to the res as a whole? Was there a complete taking? Had the plaintiffs' occupation sufficient for practical purposes to exclude strangers from interfering with the property? Was there the animus possidendi? I have also taken this to be a true proposition in English law—a thing taken by a person of his own motion and for himself and subject in his hands, or under his control, to the uses of which it is capable, is in that person's possession. Omnia ut dominum gessesse is, SIR FREDERICK POLLOCK says, a good working synonym for in possessione esse, and I cannot doubt that, if the owners of the *Tubantia* in 1916 had put themselves, in 1923, in the position in which the plaintiffs put themselves, they would be held to have been in actual possession. It would not be safe, though, to rely on this, for there is a presumption in law which aids the operative effect of the possessory acts of an owner. To illustrate my meaning, I am told that Trinity House commonly holds possession of the wreck of a ship by mooring upon it a single buoy. I had the advantage of the assistance of the Elder Brethren at the hearing, and I have consulted them as to the practical aspects of the matters in question. They advise me that by reason of the great depth at which the wreck lies the difficulties involved in the work of the plaintiffs are formidable, but that, if I accept the plaintiffs' evidence, they were in effective control of the wreck as a whole; that they were in a position to prevent any useful work by newcomers; that while the plaintiffs' people remained in the position they claimed to have taken up no newcomer could, without violence, have exercised upon the wreck the kind of control the plaintiffs had, or could have made any valuable use, of the wreck. They advise me that what the plaintiffs did upon the wreck was what a prudent owner would probably have done assuming he did not know how the holds of the *Tubantia* were stowed and desired to inform himself fully as to the situation on the wreck before employing larger craft or more powerful appliances than the plaintiffs were employing. These opinions entirely commend themselves to my judgment and I have come to certain conclusions which I will now state.

There was animus possidendi in the plaintiffs. There was the use and occupation of which the subject-matter was capable. There was power to exclude strangers from interfering if they did not use unlawful force. The plaintiffs did with the wreck what a purchaser could prudently have done. Unwieldy as the wreck was, they were dealing with it as a whole. The fact on the other side, which is outstanding, is the difficulty of possessing things which lie in very deep water and can only be entered upon by workmen in fine weather and for short periods of time. Must it be said that because the work of the plaintiffs' divers was that of only one pair at a time, in short spells with long interruptions, and because access to the holds of the *Tubantia* was often prevented altogether by stress of weather, therefore the vessel and her cargo were incapable of possession? To my mind this would be an unfortunate conclusion, very discouraging to salvage enterprise at a time when salvage, by means of bold and costly work, is of great public importance.

I do not feel bound to come to it. I hold that the plaintiffs had, in July, 1923, the possession of the *Tubantia* and her cargo, which they allege.

Did the defendants then trespass upon the possession of the plaintiffs? The acts which are complained of occurred during some eight days in July. They are described in very moderate terms in the statement of claim. The defendants came upon the scene with their vessel the *Semper Paratus*, a powerful and well-equipped ship, together with a motor launch equipped for dredging. They came to find the *Tubantia* and take possession. The defendant Landi, who was in charge, recognised when he arrived that the defendants had been forestalled, but deemed himself entitled to thrust in upon the plaintiffs, and if not to prevent further work by them, to establish himself with them in concurrent occupation. Seeing how the plaintiffs had laid out the ground, and the method of their work, the defendants' party dredged with loaded lines and grapnels to find the hull and the plaintiffs' moorings. They searched with dragging appliances among and about the buoys and moorings and working places of the plaintiffs, and carried on the process so thoroughly that the experienced divers whom the plaintiffs employed became justifiably alarmed and altered their mode of working after they descended. Instead of attaching their line and pipe at the entrance to the ship's hold, as they had previously done, and working together upon the cargo in the hold, one of them attended upon the line and pipe while the other worked in the hold. I say nothing in detail of the action of the defendants' representatives in mooring the *Semper Paratus* across the tide ahead of the wreck in a position which threatened the safety of the plaintiffs' ship and people. Besides doing the acts I have mentioned the defendants fouled the plaintiffs' moorings; they took a mooring upon the wreck; they sent down a diver who entered upon the wreck. These acts were done with the intention of hampering the plaintiffs and depriving them of any advantage they had gained by their work upon and possession of the wreck, and of securing possession for the defendants. Some of the things complained of were trespasses to goods; all were intentional interferences with and molestation of the plaintiffs' workmen in their work. The contention raised by the defendant Landi that in the circumstances of the plaintiffs' salvage undertaking the defendants were entitled, as would-be salvors, to do what was in fact done under this defendant's direction, raises a question to which I ought to refer. It is based upon assertions that the plaintiffs were not in possession, and they either were not able to effect salvage or would be better able to effect it with the defendants' help. Counsel contended for the right on the part of any number of persons who may desire to join in a salvage undertaking which is in progress to participate upon even terms with all other salvors, and salvage is, no doubt, an undertaking in which many parties often concur.

That the plaintiffs were in possession is, however, the governing factor in the present case. The principle of law which applies in such circumstances is that stated in the judgment of Lord Stowell in *The Blenden Hall* (3) (1 Dods. at p. 416) and also the judgment of the Privy Council in *Cossman* v. *West* (4). Lord Stowell in *The Blenden Hall* (3) laid down that those who have obtained possession of a ship as salvors have the legal interest which cannot be divested before adjudication takes place in a court of competent authority. The Privy Council in *Cossman* v. *West* (4) held that:

> "In the case of a derelict the salvors who take possession have not only a maritime lien on the ship for salvage services, but they have the entire and absolute possession and control of the vessel, and no one can interfere with them except in the case of manifest incompetence."

There was no manifest incompetence on the part of the plaintiffs and their servants. The Elder Brethren advise me that the work done appears to them to have been done efficiently and well, well directed, and so planned as to secure the best practicable results in salvage. The special defence of the defendant Landi fails, and I must add that if the plaintiffs had only begun the salvage undertaking and

had had no possession, and if the salvors might lawfully have joined in the enterprise, what was in fact done by the defendants' representatives would still seem to me unjustifiable. What follows from the findings I have stated is that the defendants personally, or by their servants or agents, have trespassed upon the plaintiffs' possession and wilfully and wrongfully interrupted and molested them in their lawful undertaking. Molestation such as that of which the plaintiffs complain is, in my opinion, actionable where it causes damage. The decisions in cases like *Hogarth* v. *Jackson* (5) and *Young* v. *Hitchens* (6), on the one hand, and *Keeble* (*Keble*) v. *Hickeringill* (7) and *Carrington* v. *Taylor* (8), on the other, were cited in the argument upon this part of the case. It is worth while, perhaps, to refer also to dicta of the learned judges in *Young* v. *Hitchens* (6) and of other judges in *Skinner* v. *Chapman* (9) on the question whether in a properly framed action damages may be recoverable for wilful prevention of the completion of an enterprise capable of producing profit. I know no reason for supposing it to be other than wrongful to obstruct a salvor in the course of his enterprise so as to prevent his carrying it on even if the obstruction is practised by one who is entitled himself to be a salvor.

Upon leave granted personally in the course of the hearing the plaintiffs added words to their statement of claim which somewhat elaborated their allegation in respect of molestation. Whereupon amended defences were delivered, and on behalf of one defendant it was then contended that, if wrongs were committed, they were personal torts of the defendant Landi, in respect of which no liability could attach to his partners. I am inclined to think the amendment does not introduce any new cause of action, but this is not material. The whole matter had been raised and tried out before I suggested it. As to the acts in question, they are, as I find, done in the course of the enterprise of which the defendants entrusted the management to Count Landi to the utmost of his power, and in assertion of the supposed right of the defendants, and so, for the purposes of their enterprise, the defendants therefore are collectively liable to the plaintiffs.

As to the relief claimed by the plaintiffs I have felt some difficulty. A possessory right is of a limited, and perhaps transitory, kind, and I am not minded to make a declaration which might be misconstrued as evidence of some other than a possessory right. An injunction is properly claimed when there is the threat or danger of repetition of the wrongs complained of, especially when they affect material interests, though it is to be strictly limited so as not to enlarge the rights of the one party or to infringe the rights of the other. The defendants' interference with the plaintiffs, however, was high-handed and deliberate, and, unless restrained, they may repeat it. I propose, therefore, to restrain the defendants, their servants or agents, until further order of the court from doing any acts at or near the wreck of the *Tubantia*, whereby the plaintiffs may be prevented from or hindered in carrying on salvage operations thereon. My judgment to this effect must be with costs against the defendants. There is a claim for damages and some evidence of damage in loss of time of divers. If the plaintiffs desire a reference they must have it, reserving the question of costs.

Solicitors: *J. D. Langton & Passmore*; *William A. Crump & Son*; *Botterell & Roche*.

[*Reported by* Geoffrey Hutchinson, Esq., *Barrister-at-Law*.]

A

WILLIAMSON *v.* PALLANT

[King's Bench Division (Swift and Acton, JJ.), April 1, 1924]

[Reported [1924] 2 K.B. 173; 93 L.J.K.B. 726; 131 L.T. 474; 22 L.G.R. 416]

B

Rent Restriction—Possession—Matters to be considered—Every circumstance affecting interest of landlord or tenant—Pecuniary loss to tenant—Loss of goodwill of business—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 5 (1) (*d*).

In considering whether it is "reasonable to make" an order for possession C of a dwelling-house against a tenant entitled to the protection of the Rent Restrictions Acts a judge ought to take into account every circumstance that affects the interest of either the landlord or the tenant in the premises, including any financial hardship which would be inflicted on the tenant through his losing the goodwill of a business if the order for possession were made.

Notes. The provisions formerly contained in s. 5 (1) (d) of the Act of 1920 are D now contained in sub-para. (g) of the First Schedule to the Rent and Mortgage Interest (Restrictions) Act, 1933.

Followed: *Shrimpton* v. *Rabbits*, post, p. 694. Referred to: *Middlesex County Council* v. *Hall*, [1929] 2 K.B. 110.

As to the reasonableness of making an order for possession, see 23 Halsbury's Laws (3rd Edn.) 814, para. 1593; and for cases see 31 Digest (Repl.) 696, 697. For E the Rent and Mortgage Interest (Restrictions) Acts, 1920–1939, see 13 Halsbury's Statutes (2nd Edn.) 981.

Appeal from Bristol County Court.

The plaintiff, Mrs. Williamson, sought to recover possession of a dwelling-house, No. 68 Greenbank Road, Bristol, of which she was the landlord. She claimed F possession under s. 5, sub-s. (1) (d), of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, as amended by s. 4 of the Rent and Mortgage Interest Restrictions Act, 1923, alleging that the dwelling-house was reasonably required by her for occupation as a residence for herself.

The landlord resided with her husband and son at No. 53 Greenbank Road, of which she was also the owner. This house contained three bedrooms, two living-G rooms and a kitchen. The defendant, George Pallant, became the tenant of No. 68 in 1916, and in 1917 he obtained from the landlord a five years' lease of the house. After the expiration of that lease in 1922, the tenant continued to reside there, paying a weekly rent of 12s. 9d. No. 68 Greenbank Road contained four bedrooms, a shop, one living-room, one stockroom and a scullery. At the back of the house there were stables and a yard. The tenant's wife carried on a H general grocery business, and the son carried on a greengrocery business on the premises; a coal round was also carried on. When the tenant and his family went to live at No. 68 Greenbank Road in 1916, they took over a practically worthless business. Since then they had worked up a very good business, which was the main source of their livelihood, as the tenant, who was a semi-invalid, did not earn more than £1 a week. In 1921 the landlord's husband became an absolute I invalid and had to give up work. The landlord's main source of income thereafter was the rent of No. 68 Greenbank Road and of another house in the same road, which she owned. The landlord desired to obtain possession of No. 68 so that she might occupy it as a residence for herself and also carry on a grocery business there, for which the premises were adapted. The tenant objected to give up the premises on the ground that he would suffer serious financial loss, as his living would be gone if he were turned out of the shop owing to the difficulty of obtaining a shop elsewhere.

Section 5 (1) (d) of the Increase of Rent and Mortgage Interest (Restrictions)

Act, 1920, as amended by s. 4 of the Rent and Mortgage Interest Restrictions Act, 1923, provided that "no order or judgment for the recovery of possession of any dwelling-house to which this Act applies, or for the ejectment of a tenant therefrom, shall be made or given unless . . . (d) the dwelling-house is reasonably required by the landlord for occupation as a residence for himself . . . and . . . the court considers it reasonable to make such order or give such judgment."

The county court judge found that the landlord bona fide and reasonably desired to obtain possession of No. 68 Greenbank Road for a residence for herself. In deciding whether it was reasonable to make the order for possession, he held that he could not take into consideration the financial hardship which would be inflicted on the tenant if he were compelled to quit the house. He accordingly made an order for possession to be given on June 24, 1924.

The tenant appealed.

Croom-Johnson for the tenant.
E. H. C. Wethered for the landlord.

SWIFT, J.—The plaintiff landlord, Mrs. Elizabeth Alice Williamson, sought in the county court of Gloucestershire holden at Bristol, to recover possession of certain premises, No. 68 Greenbank Road, Bristol, of which the defendant, George Pallant, was the tenant. The landlord claimed possession under s. 5 (1), cl. (d), of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, as substituted by s. 4 of the Rent and Mortgage Interest Restrictions Act, 1923, alleging that the dwelling-house was reasonably required by her "for occupation as a residence" for herself. The learned county court judge found on the facts as they were presented to him that the house was "reasonably required" by the landlord for occupation as a residence for herself, but the section under which the application for an order for possession was made provides that even if one or more of the conditions upon which the order for possession may be made exists, still, an order for possession shall not be made unless the court considers it reasonable to make such order or give such judgment. The question that arises in this case is, assuming that one or more of the conditions exist on which the order for possession might be made, what ought the learned county court judge to take into consideration in determining whether it is reasonable to make an order for possession or to give a judgment to the like effect?

My view about the matter is that he must consider and give proper weight—but no more than proper weight—to every circumstance which affects the tenant of either the landlord or the tenant in the particular premises which are the subject-matter of the action. I say nothing at all with regard to what weight might be given to any particular circumstance, but it seems to me that any fact which has any bearing on the question whether or not he should make the order, ought to be considered. I confess I can hardly conceive of a circumstance which affects the relationship of the tenant to the premises which is not a proper circumstance for the county court judge to consider. In this particular case, the tenant of these premises was carrying on there, with the help of his wife and son a greengrocery business and a coal business, and it was urged by the wife in her evidence and by the solicitor appearing for the tenant before the learned county court judge that it would be a great hardship on the tenant and his family if they were sent away from the premises where they had carried on for a considerable time a business which had got a valuable goodwill.

I entirely agree with the argument of counsel for the landlord that the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, and the Rent and Mortgage Interest Restrictions Act, 1923, must not be converted into a means of establishing a value for a goodwill; but, on the other hand, I cannot see how it can be said that the fact that there will be financial hardship on the tenant if he has to leave the premises, is not a circumstance affecting his interest in the premises which ought to be considered by the learned judge in determining whether or not it is reasonable to make an order for possession. It is admitted that if the

A tenant has satisfied the judge or can give evidence that injury to his health might result from an order for possession being made, or that some pecuniary loss might directly flow from his being turned out, the county court judge is entitled to consider those things in making up his mind whether, on the whole, it is reasonable to make an order, but it is said that he must not consider the financial loss which might result from the loss of the goodwill of the business. I do not for B a moment say what weight ought to be given to such a consideration, or in what form that weight ought to express itself. It may very well be that, as in this case, it would simply express itself by giving the tenant a little longer time than he otherwise would have had, as it is suggested that the county court judge did in this case, in order that he may make arrangements to transfer his business to some other place, or in some way or other, to alleviate for himself the hardship C which immediate ejectment might cause. But whatever weight is to be given to the facts when they have been considered and in whatever form that is to be expressed by the order of the court, it seems to me to be plain that it is a circumstance which the learned county court judge is at liberty to consider, and indeed ought to consider.

In this particular case the learned county court judge, who has given a most D careful judgment, which has been reduced into writing and which has been approved by him, says:

> "I am asked to give effect to a factor which I think is irrelevant, namely, the financial hardship which would be inflicted on the tenant if she be compelled to quit the house. If I were entitled to consider this factor I think probably my judgment would be different. But I think I ought not to consider it."

E There, I think, the learned judge, in refusing to consider that factor, went wrong in law. There is nothing in the Rent Restrictions Acts which says that any particular factor is to be excluded from consideration by the county court judge in determining whether or not it is reasonable to make the order for possession. In my opinion, the learned county court judge must take into account all the F circumstances affecting both the interest of the tenant as well as the interest of the landlord in the premises, including the circumstance of the financial hardship which might be inflicted on the one party or upon the other. In this case he has expressly stated that he did not do that. The case must, therefore, go back to the county court judge, but not with any suggestion from us that in the result he must make any different order from that which he has made. It may be that G counsel for the landlord is perfectly right, and that in making the order for possession on June 24, which he did make, he really was taking into consideration this question and was giving proper, full and legitimate effect to it. That I do not know. However, he said in terms that he was not. It may be that when he does give it consideration, he may come to the conclusion that it ought to have no weight at all, or very little weight. It may be that he will come to the conclusion H that it should be given such weight that it would not be reasonable to make any order at all, or it may be that he will think when he considers the matter, "Although I did not expressly state that I was not considering it and although I thought that in law I was not entitled to, I do believe I did, by postponing the operation of the order until June 24, in fact, give effect to a scheme to mitigate the hardship which I thought was being done to the person whom my order was going to dis- I possess." I think the matter must go back for the learned judge to rehear and to consider the whole of the circumstances affecting the interests of these parties in relation to the house and among other things to consider any financial hardship, of which evidence is given which might be caused to the tenant from an order for possession being made.

ACTON, J.—I agree. *Appeal allowed.*

Solicitors: *E. J. Watson*, Bristol; *Malkin & Co.*, for *R. E. Pullen*, Bristol.

[*Reported by* T. W. MORGAN, Esq., *Barrister-at-Law.*]

A

SEDDON *v.* COMMERCIAL SALT CO., LTD., AND OTHERS

[COURT OF APPEAL (Sir Ernest Pollock, M.R., Warrington and Scrutton, L.JJ.), November 10, 1924]

[Reported [1925] Ch. 187; 94 L.J.Ch. 225; 132 L.T. 437; 69 Sol. Jo. 159] B

Discovery—Action for forfeiture of lease—Assignment without consent—Lessee and two alleged assignees defendants—Denial by one alleged assignee of any interest in premises—Discovery against that defendant.

Where, in any action, an issue is raised solely for the purpose of obtaining judgment for the forfeiture of land the court will not make an order for discovery with regard to that issue. C

The assignee of the reversion to a lease containing a covenant against assignment without consent and a power of re-entry for breach of that covenant claimed possession of the demised premises against the lessee and two other defendants, who were alleged to be in possession by agreement with the lessee, on the ground that the lessee was in breach of the covenant. One defendant, a firm, denied that it was in possession of the premises or had any interest therein. D

Held: the plaintiff's claim against that defendant firm could only succeed if there had been a forfeiture of the lease, together with forfeiture of any derivative rights obtained under the assignment; the plaintiff's claim against that defendant was for forfeiture; and, therefore, discovery must be refused. E

Rule in *Earl of Mexborough* v. *Whitwood U.D.C.* (1), [1897] 2 Q.B. 111, applied.

Earl of Powis v. *Negus* (2), [1923] 1 Ch. 186, overruled.

Notes. As to proceedings in which discovery will not be granted, see 12 HALSBURY'S LAWS (3rd Edn.) 4; and for cases see 18 DIGEST (Repl.) 15–19. F

Cases referred to:

(1) *Earl of Mexborough* v. *Whitwood U.D.C.*, [1897] 2 Q.B. 111; 66 L.J.Q.B. 637; 76 L.T. 765; 45 W.R. 564; 13 T.L.R. 443, C.A.; 18 Digest (Repl.) 18, *130.*

(2) *Earl of Powis* v. *Negus*, [1923] 1 Ch. 186; 92 L.J.Ch. 295; 128 L.T. 733; 39 T.L.R. 141; 18 Digest (Repl.) 18, *131.* G

(3) *Smith* v. *Read* (1737), 1 Atk. 526; West temp. Hard. 16; 2 Eq. Cas. Abr. 378; 26 E.R 332, L.C.; 18 Digest (Repl.) 139, *1251.*

Appeal from an order for discovery made by RUSSELL, J., against the defendant firm, Palmer, Mann & Co. The two other defendants were the Commercial Salt Co., the lessees, and Palmer, Mann & Co., Ltd.

By an underlease dated Aug. 6, 1913, the L. Salt Works were demised to the H defendants, the Commercial Salt Co., Ltd., for twenty-one years less one day. The Commercial Salt Co., Ltd., thereby covenanted not to assign, transfer, underlet or part with the possession of the premises without the consent in writing of the lessor, and the underlease contained the usual proviso for re-entry on breach of any of the covenants. The plaintiff, as assignee of the reversion, brought this action against the defendants, the Commercial Salt Co., Ltd., Palmer, Mann & Co., and I Palmer, Mann & Co., Ltd., for possession of the premises demised on the ground that the Commercial Salt Co., Ltd., had committed a breach of the covenant not to assign without the consent of the plaintiff as lessor by parting with possession of the premises to the defendant firm, Palmer, Mann & Co., and/or the defendants, Palmer, Mann & Co., Ltd., without such consent, and that since March, 1922, the defendant firm and/or the defendants, Palmer, Mann & Co., Ltd., had been and still were in possession of the premises. In the joint defence of the defendant firm and the defendant company, they denied that the L. Salt Works had ever been

transferred, underlet or the possession thereof parted with by the Commercial Salt Co., Ltd., to those defendants, or either of them, and alleged that the Commercial Salt Co., Ltd., had been at all material times in possession of the premises, but the defendants, Palmer, Mann & Co., Ltd., alleged that they had an interest in the premises as holders of the debentures of the Commercial Salt Co., Ltd., which contained a floating charge on the undertaking of the Commercial Salt Co., Ltd. On an application to RUSSELL, J., by the plaintiff for discovery against the defendant firm, Palmer, Mann & Co., who denied that they had been or were in possession of the L. Salt Works or had any interest whatever in them, RUSSELL, J., held that, though in accordance with the decision in *Earl of Mexborough* v. *Whitwood U.D.C.* (1), the court would not grant discovery in aid of a claim for forfeiture of a lease, as the defendant firm denied any interest in the premises and did not claim to be in possession by virtue of any derivative title under the lease, the action as against them not being one for forfeiture, an order for discovery, following the decision in *Earl of Powis* v. *Negus* (2), could and would be made against the defendant firm.

W. A. Greene, *K.C.*, and *C. W. Turner* for the defendants.

C. A. Bennett, *K.C.*, and *H. M. Giveen* for the plaintiff.

SIR ERNEST POLLOCK, M.R.—This is an appeal from a decision of RUSSELL, J., of Oct. 17 of this year ordering discovery as against the defendants who appeal. The case is, to my mind, of the simplest kind. The claim of the plaintiff is as assignee of the reversion made upon a lease dated Aug. 6, 1913, which contained a covenant that the lessees would not assign, transfer, underlet or part with possession of the demised premises or any part thereof without the previous consent in writing of the lessor. That lease, primâ facie, runs for twenty-one years from June 24, 1913, less one day—that is, until 1934. The plaintiff was the assignee of the reversion, and he claims now to be entitled to re-enter upon the premises, and he claims possession of the premises and damages and mesne profits against all these three defendants, the Commercial Salt Co., Palmer, Mann & Co., and Palmer, Mann & Co., Ltd. He does not differentiate at all the nature of his claim against any of them; he seeks to have possession of the premises. So long as that lease is outstanding he, as assignee of the reversion, does not appear to have upon his statement of claim any claim or right to possession of the premises, but he says that as a matter of fact there has been a forfeiture of that lease because there has been a transfer or underlease or parting with possession of the premises without the permission and consent of the lessor, and in his particulars he says that the transfer, underletting and parting with possession is the letting into possession of the second defendants, or alternatively, the third defendants. It appears to me quite clear that the plaintiff's claim therefore is that in consequence of the breach of the covenant contained in the lease there has been a forfeiture whereby a right to re-enter has accrued to him, and which has given him the right to possession as against all these three defendants. That being so, it appears that his claim against not only the first, but as against the second and third defendants is for a forfeiture.

The rule about discovery is clearly laid down in *Earl of Mexborough* v. *Whitwood U.D.C.* (1). In that case, summarising a well-known rule obtaining both in common law as well as in equity, LORD ESHER says this ([1897] 2 Q.B. at p. 117):

> "Where in any action an issue is raised solely for the purpose of obtaining judgment for a forfeiture of land the court will not with regard to that issue make any order either for discovery of documents or for the administration of interrogatories. There may be an action where that is one of the issues and there are other independent issues, and the court may with regard to those other issues make an order for discovery of documents and interrogatories, but on the issue relating to forfeiture I think the court will not make such an order when, as in the present case, the sole issue raised is whether there has been

a forfeiture, I think no order can be made in favour of the plaintiff either for discovery of documents or for the administration of interrogatories."

In other words, it will not assist by granting an order for discovery. The antiquity of that rule has been brought to our notice by counsel for the defendants who has called our attention to the fact that in the days of LORD HARDWICKE in the case that he cited, *Smith* v. *Read* (3), it was pointed out that the rule does not apply to cases in which a man must suffer if he makes the discovery, but where he may be subject to a penalty, or to a forfeiture, and the width of the rule, I think, is well laid down in the judgments which appear in the *Earl of Mexborough's Case* (1). I do not wish to repeat them because they are set out at large there.

In the present case RUSSELL, J., followed *Earl of Powis* v. *Negus* (2), in which SARGANT, J., allowed a subpoena duces tecum. But SARGANT, J., held that the rule laid down in the *Earl of Mexborough's Case* (1) was a good and binding rule, and he did not purport in any way to question it at all. All that happened was that, from the pleadings and issues there raised, he did not hold that in that particular case there was a forfeiture or penalties involved in the particular issue, and he found himself able to make an order for a subpoena duces tecum. The case cannot be used as in any way impinging upon or cutting down or altering or varying the rule laid down in the *Earl of Mexborough's Case* (1). All that we have to consider here, therefore, is whether or not in the present case there is a claim for forfeiture which falls within the rule laid down in the *Earl of Mexborough's Case* (1). For the reasons which I have given I think the present case clearly falls within that rule, and therefore that *Earl of Powis* v. *Negus* (2) does not apply, and that no order for discovery ought to be made in accordance with the rule. Therefore, RUSSELL, J.'s order must be discharged and the appeal allowed with costs.

WARRINGTON, L.J.—I am of the same opinion. There is a very well-known rule that where in any action an issue is raised solely for the purpose of obtaining judgment for the forfeiture of land the court will not with regard to that issue make any order either for the discovery of documents or for the administration of interrogatories. In the present case RUSSELL, J., has made an order for discovery of documents against one of three defendants to an action for possession of land, and the question is whether in making that order RUSSELL, J., was departing from the rule to which I have referred. In making the order as he did the learned judge purported to follow as binding him a decision of SARGANT, J., in *Earl of Powis* v. *Negus* (2).

In my opinion, in this case there is one issue and one issue only as between the plaintiff and all the defendants, and that is whether the lease, subject to which the plaintiff himself alleges that he takes his title to possession of the land, is still existing or has been determined by the exercise by the plaintiff of his right to re-enter. As regards the first defendants, the Commercial Salt Co., of course the issue is direct; there is no question about that being an issue of forfeiture or no forfeiture. It is exactly the same with regard to the other defendants, because the plaintiff alleges that the other defendants are in possession under an act of the first defendants, the lessees, which gives rise to his right to determine the lease; therefore, it is as much a claim to forfeiture against these defendants as it is against the original lessees. It seems to me, as I have said already, that there is one issue and one issue only as between the plaintiff and all the defendants: is the plaintiff entitled to re-enter and determine the lease? So far as the view I have expressed is concerned, it is impossible for the decision in *Earl of Powis* v. *Negus* (2) to stand with the decision in the present case, and with all respect to SARGANT, J., I confess to some difficulty in understanding how he arrived in that case at the conclusion at which he did that there was no claim for forfeiture against the defendants, who were then in possession. Referring to the pleadings he says, and I think his judgment depends upon this: "It appears to me that their defence was a mere denial of the allegation that they are in possession." With all respect

to the learned judge, I do not understand that. In that case as in the present the possession of these defendants, as alleged by the plaintiff, was under an act of the lessee, resulting in conferring upon the plaintiff the right to determine the lease, and it seems to me in that case as in this the claim with all respect was really against those defendants for forfeiture as much as it was against the original lessee. In my opinion the order of RUSSELL, J., founded on *Earl of Powis* v. *Negus* (2) was wrong and must be discharged.

SCRUTTON, L.J.—This is an appeal against an order made by RUSSELL, J., in an action for possession. His order is against the defendants, and orders them to discover documents. The objection made to it is that the claim is one for forfeiture, and in an action for forfeiture the court does not grant discovery to help the person claiming forfeiture, and RUSSELL, J., without expressing an opinion of his own, has treated himself as bound by a decision of SARGANT, J., in *Earl of Powis* v. *Negus* (2), allowing an order for discovery in such a case.

The common law abhors penalties and leans against forfeitures. We are bound by the decision of this court in *Earl of Mexborough* v. *Whitwood U.D.C.* (1), to the effect that in an action for forfeiture and breach of covenant the court will not grant discovery, and I personally do not find it necessary to go through the cases cited to us by counsel for the defendants to convince us that the order of the Court of Appeal was right. That being the rule, one looks at this action to see what it was, and I find that the plaintiff alleges himself to be an assignee of a reversion of a term expiring in 1934, and he claims possession. So far he puts himself out of court because he shows that he has no immediate right to possession of the premises that he is claiming. He therefore goes on to complete his case by alleging that the term on which his reversion is expectant contained a covenant against assigning without the consent of the landlord and a power of re-entry if that covenant were broken. He then alleges that of the three defendants against whom he is bringing the action one has assigned in breach of that covenant, and the other two have entered under the agreement and are in possession. That claim appears to me one which can only be effective if it involves forfeiture of the term on which this reversion is expectant for breach of a covenant, together with forfeiture of any derivative rights obtained from that assignment; and it would appear, therefore, unless there is some reason to the contrary, clearly to come within the rule that the courts which lean against forfeitures will not grant procedure to assist the person claiming forfeiture and will therefore not grant discovery to assist that claim.

When I look at the decision of SARGANT, J., in *Earl of Powis* v. *Negus* (2), which RUSSELL, J., followed, I find the last two lines of the headnote are:

> "Because the two defendant companies did not claim to be in possession by virtue of any derivative title under the lease, so that the action against them was not for forfeiture."

That particular line of argument I am unable to follow. I do not see how it alters what the claim is, which appears on the statement of claim, to say what sort of defences the defendants raised to it. The claim remains what it is on the claim: "I claim that I had a right to possession in 1934 which has become a right to possession in 1924 because the holder of the term has broken the covenant upon which he holds the term, and I have issued a writ which is equivalent to re-entry, and therefore the term is now mine and the right of the defendants is forfeited." That really constitutes the whole of my criticism of the judgment of SARGANT, J., because the headnote is founded upon his phrase that the defendants expressly deny something, and, therefore, it appears to him that the action against them is not one for forfeiture at all. What the action against them is is determined by the statement of claim, and the statement of claim appears to me to be obviously based upon a forfeiture of the term which the claim alleges. For these reasons I agree with my learned brother Warrington; I do not think the decision of the *Earl of*

Powis v. *Negus* (2) can stand. I think it is wrongly decided, and, therefore, that this order which was based upon it must also go and the appeal must be allowed. A

Appeal allowed.

Solicitors: *Clapham, Fraser & Williams*; *Bulcraig & Davis.*

[*Reported by* G. P. Langworthy, Esq., *Barrister-at-Law.*]

B

Re WHITE. KNIGHT *v.* BRIGGS C

[Chancery Division (Russell, J.), December 14, 1924]

[Reported [1925] Ch. 179; 94 L.J.Ch. 211; 132 L.T. 481; 69 Sol. Jo. 213]

Will—Incorporation of existing document by reference—Codicil settling bequest "as in former will"—Former will identifiable by parol evidence—Admissibility of evidence. D

On Jan. 23, 1924, a testator executed, with the formalities required for a will, instructions to his solicitor to prepare a codicil, but died before the codicil could be prepared, leaving his last will dated Nov. 29, 1922. The instructions, which were admitted to probate as a codicil to the 1922 will, were as follows: "Instructions for codicil to the will of X. Settle bequest to sister, Mrs. B., as in a former will, but so as to give her only a protected life interest equivalent to what is known as an alimentary provision according to Scottish law." The solicitor gave evidence that the testator had executed several former wills, but only one, dated Oct. 29, 1920, which the solicitor had, containing a settled bequest in favour of Mrs. B. By the 1922 will the testator had directed three-twentieths of his residuary estate to be held on trust for Mrs. B., but the trusts there declared were different from those of the settled bequest in favour of Mrs. B. in the 1920 will. E F

Held: (i) the instructions of Jan. 23, 1924, were a disposition by reference which purported to include another document, namely "a former will"; that document could be identified with certainty as an existing document, i.e., the 1920 will; and parol evidence was admissible to identify it: *Allen* v. *Maddock* (1) (1858), 11 Moo.P.C.C. 427, applied; *University College of North Wales* v. *Taylor* (2), [1908] P. 140, explained and distinguished; (ii) the bequest of residue to Mrs. B. was to be construed as if the testator had executed a codicil prepared by the solicitor in accordance with the 1924 instructions, and so this bequest was to be held on the trusts declared in the 1920 will. G

Notes. As to codicils, see 34 Halsbury's Laws (2nd Edn.) 97 et seq.; as to the incorporation of documents in a will by reference, see ibid., 167. For cases see 44 Digest 394. H

Cases referred to:

(1) *Allen* v. *Maddock* (1858), 11 Moo.P.C.C. 427; 31 L.T.O.S. 359; 6 W.R. 825; 14 E.R. 757, P.C.; 44 Digest 243, *698.*

(2) *University College of North Wales* v. *Taylor*, [1908] P. 140; 77 L.J.P. 20; 98 L.T. 472; 24 T.L.R. 29; 52 Sol. Jo. 44, C.A.; 44 Digest 241, *675.* I

Also referred to in argument:

Re Campbell's Trusts, Public Trustee v. *Campbell*, [1922] 1 Ch. 551; 91 L.J.Ch. 433; 127 L.T. 236; 43 Digest 602, *495.*

Re Fitzgerald, Surman v. *Fitzgerald*, [1904] 1 Ch. 573; 73 L.J.Ch. 436; 90 L.T. 266; 52 W.R. 432; 20 T.L.R. 332; 48 Sol. Jo. 349, C.A.; 11 Digest (Repl.) 365, *334.*

A *Smart* v. *Prujean* (1801), 6 Ves. 560; 31 E.R. 1195, L.C.; 44 Digest 238, *645*.
Trew v. *Perpetual Trustee Co.*, [1895] A.C. 264; 64 L.J.P.C. 49; 72 L.T. 241; 43 W.R. 636; 11 T.L.R. 259; 11 R. 423, P.C.; 43 Digest 607, *525*.

Adjourned Summons.

The facts are stated in the headnote and the judgment.

B *J. V. Nesbitt* for the trustees.
Rawlence, *Morton*, *Beebee*, *Cecil Turner*, and *Farwell* for other parties interested.

RUSSELL, J.—This summons raises a puzzling question, namely, who are the persons beneficially interested in the three-twentieths of the residuary estate of the testator, which, by his will dated Nov. 29, 1922, he directed to be held in trust for his sister, Mrs. Briggs. A codicil dated Jan. 23, 1924, has been admitted C to probate. The testator died four days later. The codicil is in the following terms:

> "Instructions for codicil to the will of Robert Cecil White. Settle bequest to sister, Mrs. Briggs, as in a former will; but so as to give her only a protected life interest equivalent to what is known as an alimentary provision according D to Scotch law."

The circumstances in which it came into existence, and in which it was signed and witnessed by the testator's solicitor and doctor are detailed in the solicitor's affidavit as follows: "On Jan. 23, 1924, I received a message from the said testator's medical attendant, Dr. Miller, that the said testator was very ill and wished to see me. I accordingly went to the said testator's place of residence E and saw him in bed. The said testator was so ill that he could only speak with great difficulty, and had to be held by Dr. Miller and revived with restoratives during the few moments in which I was conversing with him. I cannot say that the language of the said codicil represents the exact words used by the testator. The said codicil is in my handwriting and was hurriedly written down by me in the said testator's presence. I wrote down the said codicil after inquiring of the F testator what he desired me to do. The said codicil is in the form of instructions and was written by me with a view to the preparation of a more formal codicil. At the time when I wrote down the said codicil I fully anticipated that the said testator would recover from his said illness as I knew he had recovered from other illnesses of a similar nature, and I had previously been told by Dr. Miller that he expected the said testator to recover. When I wrote down the said G codicil I had a recollection that one and one only of the two wills which I had prepared for the said testator prior to the said will of Nov. 29, 1922, contained provisions under which the property thereby given to the defendant, Mysie Evelyn Briggs, was settled and that the said two wills were in the possession of my firm; but I could not remember the precise terms or the precise date of the prior will in question. I asked the said testator to sign the said codicil in case he should H die before I had an opportunity of putting the same into a proper shape by referring to the said testator's previous testamentary dispositions which I had not with me at the time. Before the said codicil was signed by the said testator I read it through to him and the said codicil was witnessed by the said testator's doctor and myself." The testator died before the formal codicil could be prepared and executed.

I The first question to consider is the construction of the document signed on Jan. 23, 1924. It does not in terms purport to make a disposition of property. It only purports to be instructions to someone to prepare a document containing a disposition of property in accordance with those instructions. But it must be construed as an instrument disposing of property. How? In my opinion it must be construed as a direction by the testator that the property bequeathed by the will to Mrs. Briggs was to go and be enjoyed as it would have gone and been enjoyed if he had executed a codicil prepared in pursuance of the instructions then given to settle it as in a former will. That is a disposition by reference which

purports to incorporate another document, and a document obviously already existing, namely, a former will. If that document is capable of being identified, evidence is admissible for the purpose of identification; and if the document is identified, the disposition is defined and complete. It is at this point that the main difficulty arises. It is said that the words "a former will" would equally apply to any former will of the testator, which contained a settlement of a bequest to Mrs. Briggs, that there might be several former wills each containing different trusts for such a settled bequest, and that it is impossible to say how many former wills, in addition to those actually known to have existed, had been executed by the testator. Indeed, it is truly said and the evidence shows that the testator had made divers testamentary dispositions with the assistance of divers legal advisers in different parts of the globe. Nevertheless, if the document which is called "a former will" can be identified, all uncertainty disappears. Can it be identified? In my opinion it can. The bequest is to go as if the testator had executed a codicil prepared in pursuance of the instructions then given. I am entitled to know to whom the instructions were given, and the answer is, Mr. Knight. Therefore the bequest is to go as if the testator had executed a codicil prepared by Mr. Knight in pursuance of the instructions then given to Mr. Knight. I am next entitled to know whether there was a document in existence properly described as a "former will" by reference to which Mr. Knight, acting on those instructions, could prepare a codicil to carry out those instructions. The answer on the evidence is, Yes. There was such a document, namely, a will of Oct. 29, 1920, containing a settled bequest in favour of Mrs. Briggs and others which had been prepared by and was then in the custody of Mr. Knight.

I am next entitled to know whether there was any other document in existence properly described as "a former will" by reference to which Mr. Knight (acting on those instructions) could prepare a codicil to carry out those instructions. The answer on the evidence is, No. There was only one such document, namely, the will of Oct. 29, 1920. Before Mr. Knight could have prepared a codicil to carry out his instructions by reference to any other former will, if any such existed, he would have required fresh or additional instructions. That the instructions given were final and complete is shown by the fact that the testator executed them as a testamentary disposition. In these circumstances the document "a former will" is not only capable of identification, but, in my opinion, has been identified by properly admissible evidence. Had there been more than one former will containing a settled bequest to Mrs. Briggs by reference to which Mr. Knight could, without further instructions, have prepared the codicil, the position no doubt would have been different; but the circumstances properly proved to exist in the present case leave no doubt in my mind as to the instrument referred to by the testator. To quote the language of the Privy Council in *Allen* v. *Maddock* (1):

> "The result of the authorities both before and since the late Act, appears to be, that when there is a reference in a duly executed testamentary instrument to another testamentary instrument by such terms as to make it capable of identification, it is necessarily a subject for parol evidence, and that when the parol evidence sufficiently proves that, in the existing circumstances, there is no doubt as to the instrument, it is no objection to it that, by possibility, circumstances might have existed in which the instrument referred to could not have been identified."

It was said that the decision of the Court of Appeal in the *University College of North Wales* v. *Taylor* (2) was an authority that no evidence was admissible in the present case to identify the document. I do not agree. All that was decided in that case was that in order to admit evidence to identify a document referred to in a will, the reference must be to an existing document, and that evidence is not admissible if the will on construction may refer to a future document.

The result down to this point is that I hold that the words "a former will" mean the will of Oct. 29, 1920. No difficulty arises by reason of the reference to an

A alimentary provision according to Scottish law which it was said was void in English law. Those words are used by the testator as merely descriptive of a protected life interest. Another way of reaching the same result would be to construe the codicil upon the footing that the instructions to Mr. Knight are for him to settle the bequest as he (Mr. Knight) had settled it in a former will of the testator. If this be a reasonable construction, and, in my opinion, it is, the former B will is clearly identifiable and identified by the admissible evidence. A further question next arises. By the will of Oct. 29, 1920, cl. 4, the testator bequeathed to his trustees a sum of £3,000 for the benefit of Mrs. Briggs during her life for her separate use without power of anticipation unless and until certain events should happen. After the determination of her life interest during her life there was during the remainder of her life a discretionary trust in favour of various C persons (including Mrs. Briggs) the income so far as not applied under the discretionary trust to be held upon such trusts as would be applicable thereto if Mrs. Briggs were dead. After her death the £3,000 was to "fall into and form part of my residuary estate and go accordingly." The trusts declared of the residuary estate by cl. 5 were for the benefit of the testator's brother, Arthur Silva White, his wife and children. It was argued that the effect of the codicil of Jan. 23, D 1924, was to dispose of Mrs. Briggs' three-twentieths after her death upon the trusts of the testator's residuary estate as declared by his last will and not upon the trusts declared of residue under the will of Oct. 29, 1920. The result of this would be, it was said, that upon the death of Mrs. Briggs her three-twentieths would devolve in seventeenths upon the residuary legatees (other than Mrs. Briggs) in the proportions mentioned, Arthur Silva White's share being settled in the same E way as his original three-twentieths. I cannot accede to this contention. In my opinion, what the testator has said is that Mrs. Briggs' three-twentieths are to be settled upon the trusts declared of her bequest in the former will, that is to say, that upon her death they are to devolve upon the trusts declared in cl. 5 of the will of Oct. 29, 1920.

In the result I declare that upon the true construction of the will and codicil F the three-twentieths share of residue by the will directed to be held upon trust for Mrs. Briggs, ought to be held by the plaintiff during the lifetime of Mrs. Briggs upon the same trusts and subject to the same powers and provisions as are declared and contained by and in cl. 4 of the will of Oct. 29, 1920, of and concerning the sum of £3,000 therein mentioned, and after her death upon the same trusts and subject to the same powers and provisions as are declared and contained G by and in cl. 5 of the same will of, and concerning the property therein described as "my residuary estate." The costs of all parties will be taxed and paid out of the testator's residuary estate.

Solicitors: *Sole, Sawbridge & Co.*; *Cutler & Allingham.*

[*Reported by* J. L. DENISON, Esq., *Barrister-at-Law.*]

A

MICHAEL ABRAHAMS, SONS & CO. *v.* BUCKLEY

[KING'S BENCH DIVISION (McCardie, J.), March 3, 24, 1924]

[Reported [1924] 1 K.B. 903; 93 L.J.K.B. 603; 131 L.T. 412; 68 Sol. Jo. 596]

B

Solicitor—Costs—Wife's costs—Liability of husband—Divorce proceedings—Need for solicitor to prove that he acted reasonably and diligently—Need to prove husband's guilt.

The defendant's wife consulted the plaintiffs, a firm of solicitors, with a view to her instituting divorce proceedings against the husband. She told them that the defendant had been guilty of cruelty and adultery and instructed C them orally to take steps to obtain the necessary evidence for divorce proceedings. They believed that the wife was truthful and trustworthy, and employed inquiry agents to watch the defendant. A petition for divorce was drafted, but the divorce proceedings were discontinued. Later, the parties considered the terms of a deed of separation, but a formal deed was never executed by the parties. The wife had no property of her own, but she D received the income of the marriage settlement fund out of which she educated and maintained the child of the marriage, and she was under a moral obligation to support near relatives. When she consulted the plaintiffs her financial state was critical. The plaintiffs were not paid for the professional services which they rendered to the wife, and so they brought an action against the husband on a bill of costs in respect of those services. E

Held: to entitle a solicitor to recover costs from the husband in a case like the present he must prove that he acted on reasonable grounds, had made adequate inquiries, and showed proper diligence and full care; it was not necessary for him to prove that the husband was guilty of cruelty or had committed adultery and so he did not have to show that the wife had procured F a decree in her favour; the plaintiffs had acted reasonably, and, therefore, they were entitled to recover the costs from the defendant.

Dictum of MATHEW, J., in *Taylor* v. *Hailstone* (1) (1882), 52 L.J.K.B. 101, and TURNER, L.J., in *Re Hooper* (2) (1864), 2 De G.J. & Sm. 91, disapproved.

Quære whether, if the wife had been of independent means, the husband would still be liable to pay the costs. G

Notes. Cf. *Durnford* v. *Baker* (20), ante, p. 309, and *H. S. Wright and Webb* v. *Annandale*, [1930] All E.R.Rep. 409, where it was held that, although the solicitor had acted reasonably, he could not recover costs from the husband if the wife had been guilty of even one act of adultery albeit unknown to the solicitor.

Distinguished: *Durnford* v. *Baker* (20), ante, p. 309. Considered: *J. N. Nabarro & Sons* v. *Kennedy*, [1954] 2 All E.R. 605. H

As to implied authority of wife to pledge husband's credit for costs, see 19 HALSBURY'S LAWS (3rd Edn.) 867–869; and for cases see 27 DIGEST (Repl.) 197–200.

Cases referred to:

(1) *Taylor* v. *Hailstone* (1882), 52 L.J.Q.B. 101; 47 L.T. 440; 27 Digest (Repl.) 199, *1584*. I

(2) *Re Hooper, Baylis* v. *Watkins* (1864), 2 De G.J. & Sm. 91; 33 L.J.Ch. 300; 9 L.T. 741; 10 Jur.N.S. 114; 12 W.R. 324; 46 E.R. 309, L.JJ.; 27 Digest (Repl.) 198, *1577*.

(3) *Robertson* v. *Robertson and Favagrossa* (1881), 6 P.D. 119; 51 L.J.P. 5; 45 L.T. 237; 29 W.R. 880, C.A.; 27 Digest (Repl.) 570, *5258*.

(4) *Kemp-Welch* v. *Kemp-Welch and Crymes*, [1910] P. 233; 79 L.J.P. 92; 102 L.T. 787; 26 T.L.R. 464, C.A.; 27 Digest (Repl.) 534, *4795*.

(5) *Shepherd* v. *Mackoul* (1813), 3 Camp. 326, N.P.; 27 Digest (Repl.) 200, *1595*.

(6) *Grindell* v. *Godmand* (1836), 5 Ad. & El. 755; 2 Har. & W. 339; 1 Nev. & P.K.B. 168; 6 L.J.K.B. 31; 111 E.R. 1351; 27 Digest (Repl.) 201, *1596*.

(7) *Brown* v. *Ackroyd* (1856), 5 E. & B. 819; 25 L.J.Q.B. 193; 26 L.T.O.S. 215; 2 Jur.N.S. 283; 4 W.R. 229; 119 E.R. 686; 27 Digest (Repl.) 197, *1568*.

(8) *Turner* v. *Rookes* (1839), 10 Ad. & El. 47; 2 Per. & Dav. 294; 8 L.J.Q.B. 211; 113 E.R. 18; 27 Digest (Repl.) 201, *1597*.

(9) *Rice* v. *Shepherd* (1862), 12 C.B.N.S. 332; 6 L.T. 432; 142 E.R. 1171; 27 Digest (Repl.) 200, *1587*.

(10) *Wilson* v. *Ford* (1868), L.R. 3 Exch. 63; 37 L.J.Ex. 60; 17 L.T. 605; 16 W.R. 482; 27 Digest (Repl.) 198, *1572*.

(11) *Ottaway* v. *Hamilton* (1878), 3 C.P.D. 393; 47 L.J.Q.B. 725; 38 L.T. 925; 42 J.P. 660; 26 W.R. 783, C.A.; 27 Digest (Repl.) 198, *1575*.

(12) *Stocken* v. *Pattrick* (1873), 29 L.T. 507; 27 Digest (Repl.) 198, *1569*.

(13) *Flower* v. *Flower* (1873), L.R. 3 P. & D. 132; 42 L.J.P. & M. 45; 29 L.T. 253; 21 W.R. 776; 27 Digest (Repl.) 567, *5203*.

(14) *Franklin* v. *Franklin and Minshall*, [1921] P. 407; 90 L.J.P. 306; 126 L.T. 110; 37 T.L.R. 894; 27 Digest (Repl.) 509, *4522*.

(15) *Otway* v. *Otway*, *Otway* v. *Otway and Hoffer* (1888), 13 P.D. 141; 57 L.J.P. 81; 59 L.T. 153; 4 T.L.R. 523, 534, C.A.; 27 Digest (Repl.) 439, *3689*.

(16) *Ex parte Moore* (1845), De G. 173; sub nom. *Re Westrupp*, *Ex parte Moore*, 14 L.J.Bcy. 19; 4 Notes of Cases Supp. 1; 5 L.T.O.S. 313; 9 Jur. 604, Ct. of R.; 27 Digest (Repl.) 197, *1566*.

(17) *Cale* v. *James*, [1897] 1 Q.B. 418; 66 L.J.Q.B. 249; 76 L.T. 119; 61 J.P. 230; 45 W.R. 317; 13 T.L.R. 169, D.C.; 27 Digest (Repl.) 200, *1589*.

(18) *Cobbett* v. *Wood*, [1908] 2 K.B. 420; 77 L.J.K.B. 878; 99 L.T. 482; 24 T.L.R. 615; 52 Sol. Jo. 517, C.A.; 42 Digest 153, *1530*.

(19) *Ladd* v. *Lynn* (1837), 2 M. & W. 265; Murp. & H. 27; 6 L.J.Ex. 73; 1 Jur. 42; 150 E.R. 755; 27 Digest (Repl.) 201, *1600*.

(20) *Durnford* v. *Baker*, ante, p. 309; [1924] 2 K.B. 587; 93 L.J.K.B. 866; 132 L.T. 35; 40 T.L.R. 757; 68 Sol. Jo. 790, C.A.; 27 Digest (Repl.) 199, *1579*.

Action tried by McCardie, J.

The plaintiffs, who were a firm of solicitors, claimed a sum of £125 from the defendant on a bill of costs for work done and money expended as solicitors for the defendant's wife.

On Mar. 25, 1920, the defendant's wife, who was at the time nominally living with the defendant, consulted Mr. Harry Abrahams, of the plaintiffs' firm, with reference to her matrimonial affairs. She alleged that the defendant had misconducted himself and had been guilty of cruelty towards her. She gave oral instructions to the plaintiffs to take steps to obtain the necessary evidence for divorce proceedings. Mr. Abrahams decided that she had been truthful and trustworthy about what she had told him and employed inquiry agents to watch the defendant. In September the plaintiffs received reports from the inquiry agents. A petition for divorce was drafted, but divorce proceedings were eventually discontinued. In October, 1920, the parties met and considered the terms of a deed of separation. On this and a later date it was alleged that the defendant promised to pay his wife's present and future costs in the matter to the plaintiffs. The defendant's wife had no property of her own, but the defendant paid her various allowances. The formal deed of separation was never executed by the parties. The plaintiffs contended that in the circumstances the defendant was liable to pay the bill of costs on the ground that the services rendered to his wife were in the nature of necessaries. The defendant disputed liability and denied that he had agreed to pay the bill of costs. He also denied his wife's allegations and said that there was no necessity for incurring the costs. He further pleaded that his wife had a reasonable allowance.

H. M. Giveen for the plaintiffs.
Malcolm Hilbery for the defendant.

Cur. adv. vult. A

Mar. 24. **McCARDIE, J.**, read the following judgment.—The plaintiffs, who are solicitors, claim from the defendant, Mr. Abel Buckley, a sum of about £125 for work done and moneys expended in circumstances I will briefly state. In March, 1920, the defendant's wife called on the plaintiffs for professional advice. She saw Mr. Harry Abrahams. He took from her a full statement of her allegations B of cruelty and adultery against her husband. Mr. Abrahams has had a wide and long professional experience of matrimonial litigation and disputes. He questioned Mrs. Buckley closely. He tested the details. He formed the view that she was telling him the truth. Mr. Abrahams decided that it was necessary, inter alia, to secure adequate proof of the adultery alleged. He at once instructed a firm of inquiry agents to observe and report. I have read their reports. In April, 1920, C Mrs. Buckley fell seriously ill and matters were suspended for some time. At the beginning of September, 1920, Mr. Abrahams saw Mrs. Buckley again, and thenceforward interviews were frequent. Many inquiries were made. The inquiry agents were instructed to resume their work, and their further reports are before me. They contain evidence which I need not specify. Counsel was then instructed to prepare a petition for divorce against Mr. Buckley. He did so. I have read D the draft. It contains definite charges of adultery on several dates and a number of allegations of cruelty against the husband. I abstain from indicating the details of those allegations. The husband learnt that divorce proceedings were contemplated. Negotiations ensued between the plaintiffs (on behalf of Mrs. Buckley) and a well-known firm of solicitors (on behalf of Mr. Buckley) for a deed of separation, whereby publicity of a divorce petition might be avoided. I need E not describe the course of negotiations. A draft agreement was signed by both husband and wife in November, 1920, subject to the preparation by the respective solicitors of a formal deed. That formal deed has never been signed owing to disputes on detail. The husband, however, paid various instalments of the separation allowance. The parties are still apart. Litigation is proceeding between them which does not touch this case. Such are the broad facts. The plaintiffs' F bill of costs is in respect of the matters I have outlined. I need add a few matters only.

When Mrs. Buckley first called on the plaintiffs she was nominally living with her husband. She had not then left him, but husband and wife were on terms of enmity. Mrs. Buckley has no property of her own. Her husband, however, allowed her to receive the income of a certain marriage settlement fund. It G amounted to about £340 a year. Out of this, however, she had to maintain and educate the child of the marriage, and she had also, as a moral obligation, to support certain relatives. Her husband was supposed to have an income of some thousands a year. He lived beyond it. He was pressed for debt. His wife had sold many of her jewels to meet her husband's obligations. She received no fixed, or indeed any, allowance for dress and the like. Her monetary position when she H asked the advice of the plaintiffs was critical. I need say no more about her financial state. I am satisfied that the plaintiffs looked to the husband and not to the wife for their costs in spite of the fact that by the help of friends or otherwise she paid them two sums of £20 and £30 on account. At the trial before me the wife stated on oath that her allegations against the husband were true. He denied them. He disputed the alleged adultery. Neither side proffered me the full I testimony which would be necessary ere I should finally decide whether in fact the defendant was guilty of adultery, and as to the cruelty the evidence was given in the broadest way. I do not expressly determine the questions of adultery or cruelty. Neither side asked me to do so. I am, however, fully satisfied, first, that ample ground existed for asking the Divorce Court to determine whether the charges against the husband of adultery and cruelty were well founded; secondly, that the plaintiffs acted with full care, proper diligence, and adequate inquiry. They acted on reasonable grounds. They were justified in accepting the state-

A ments of the wife as a basis for the course they took. She did not act, I am satisfied, from mere irritability or passing anger or distorted mind. The plaintiffs, I hold, had reasonable ground for believing, and did believe, that the wife was entitled to seek a decree in the Divorce Court. I observed with closeness both the husband and wife when in the witness-box. So far as they disagree, I prefer the evidence of the wife.

B In the circumstances as I have stated them can the plaintiffs recover against the husband? Counsel for the defendant submitted strongly that the plaintiffs must fail. Counsel for the plaintiffs contended, with equal vigour, that the plaintiffs were entitled to succeed. I need not formulate their able arguments. It is curious that the points at issue should be in doubt at the present day. I have considered the decisions cited by counsel. I have read other decisions. I am C bound to say that the authorities seem to be in a state of some confusion. There are cases which appear to be adverse to the plaintiffs. I mention one case at once. It is *Taylor* v. *Hailstone* (1). There the plaintiff solicitor, who had acted for the wife in certain proceedings for a judicial separation, failed in his claim for costs against the husband. The suit for judicial separation never came to trial. It was compromised. Mathew, J., said in his judgment (47 L.T. at p. 441):

D

> "Unless the necessity for the proceedings is made out in point of fact, the husband cannot be liable."

By this I understand the learned judge to rule that unless the wife's allegation be shown to be true, to the satisfaction of the court, the solicitor cannot recover. I feel, however, that the words I have just quoted may be regarded as obiter dictum E only, for I observe that the learned judge later found that the plaintiff solicitor had no reasonable ground for believing that the defendant's wife was entitled to a judicial separation. There is another case which I should also mention at once. It is in *Re Hooper* (2). There Turner, L.J., apparently expressed a view like to that stated by Mathew, J., in *Taylor* v. *Hailstone* (1), though Knight Bruce, L.J., abstained from an opinion on the point. The words of Turner, L.J., were, how- F ever, again dicta only, for the court found as a fact that the wife had been frivolous in her assertions, and that the solicitors had failed in proper care and inquiry and had no reasonable ground for accepting the assertions of the wife. If the dicta I have cited from the two cases mentioned are correct, it would seem that the plaintiffs here must fail, and I cannot avoid the observation that several relevant decisions were not cited to Mathew, J., in *Taylor* v. *Hailstone* (1), and that several G authorities were not before the court in *Re Hooper* (2).

Half the bulk and much of the confusion of English case law springs from the fact that many decisions are given without adequate reference to the particular authorities which bear on the point at issue. If those authorities are before the court, then a decision, be it right or wrong, is, at all events, given with knowledge of the appropriate cases. If not before the court, then obscurity and inconsistency H take a new birth. I venture now to mention the decisions as briefly as possible, and to deal shortly with the origin and illustrations of the rules which, in my view, govern a husband's liability for the legal costs incurred by the wife in such circumstances as the present. It must be remembered that the right of the wife to commence matrimonial proceedings against the husband is co-existent with her right to defend such proceedings if brought by the husband against her. This I being so, let me at once refer to *Robertson* v. *Robertson and Favagrossa* (3), heard before Jessel, M.R., Brett and Cotton, L.JJ. There the wife's solicitor recovered against the husband the costs incurred in defending the wife, although she had been found guilty of adultery and a decree nisi had been made against her. Jessel, M.R., said (6 P.D. at p. 122):

> "Now on principle it is plain that the whole foundation of the rule depends on the liability of the husband to pay the necessary and fair costs of the wife's defence. I take it that the rule is founded on the old English law, which gave the whole personal property of the wife to the husband, and gave him also the

income of her real estate; so that in the absence of a settlement (which, as we all know, is a comparatively modern introduction) she was absolutely penniless, and, therefore, the ecclesiastical court not only provided for the costs of her defence, but also gave her alimony pendente lite so as to provide for her maintenance. Of course, the husband may say: 'It is a hardship upon me to have to pay the costs of my wife's false defence to a charge of adultery, or the costs of a false counter-charge against myself of adultery or cruelty,' No doubt it is a hardship, but what would the wife have to say in answer? Suppose she had brought him a sum of £10,000, or £20,000, or £50,000, would she not have a right to say: 'You have taken all my property from me, and am I to be left defenceless and not able to meet your false charge of adultery'? Of course, it is manifest that there must be money provided for the wife to defend herself, and who is to take up the defence? Only a solicitor, who must look for payment, not to the wife, who has nothing, but to the husband; and therefore it was quite right to secure him that payment by getting money paid into court, and finally by payment of the proper costs incurred when the suit was heard."

These words of JESSEL, M.R., give, I think, the basic explanation of an apparent anomaly. They were approved by the Court of Appeal in *Kemp-Welch* v. *Kemp-Welch* (4). The comment is sometimes made, and may be made by some, that *Robertson* v. *Robertson* (3) indicates only the practice of the former ecclesiastical divorce courts. But the answer to this is that the ecclesiastical courts acted, to a wide extent, on a principle akin to the somewhat narrower principle of the common law. That common law principle imposes liability on a husband, under special circumstances, for necessaries supplied to a wife. Many authorities on this point are given in LEAKE ON CONTRACTS (7th Edn.), pp. 420 et seq. I do not here propose to touch on the question of necessaries at common law, save in so far as it bears on the questions in this action.

The earliest common law case to which I call attention is *Shepherd* v. *Mackoul* (5). There the wife had been violently turned out of doors by the husband. She exhibited articles of the peace against him. It was held that the wife's attorney could recover his reasonable costs against the husband. LORD ELLENBOROUGH said (3 Camp. at p. 327):

"If she was turned out of doors in the manner stated, she carried along with her a credit for whatever her preservation and safety required. She had a right to appeal to the law for protection, and she must have the means of appealing effectually. She might, therefore, charge her husband for the necessary expense of this proceeding, as much as for necessary food or raiment."

Those words seem to be just. A married woman should have a fair chance of protecting her welfare.

The principle stated by LORD ELLENBOROUGH has been strikingly applied in many later cases. Protection of the wife, however, and not the punishment of the husband, is the important matter. Hence in *Grindell* v. *Godmand* (6) it was held that the costs of indicting the husband for assault could not be recovered. Per LORD CAMPBELL, C.J., in *Brown* v. *Ackroyd* (7). In *Turner* v. *Rookes* (8) it was again held that the wife's solicitor could recover the costs of exhibiting articles of the peace against the husband who had used violence. It was so held in spite of the fact that the wife and husband had been separated for seven years, she living upon a maintenance of £112 per annum, secured to her deed by the husband. As LORD DENMAN, C.J., said (10 Ad. & El. at p. 48):

"I do not see that the separate maintenance has anything to do with the question. She has that for other purposes; this cannot have been contemplated in making the allowance."

It is to be noticed that in the three cases I have—*Shepherd* v. *Mackoul* (5), *Grindell* v. *Godmand* (6), *Turner* v. *Rookes* (8)—the wife had in fact proved the

A wrongful conduct of her husband. It will be seen, however, that this question of actual and conclusive proof of misconduct ceases, as appears from the cases I shall mention, to be deemed an essential element for a cause of action by the wife's solicitor against the husband for costs.

In *Rice* v. *Shepherd* (9) the solicitor sued for costs upon a retainer by the defendant's wife on a petition filed by her in the Divorce Court for a judicial B separation on the ground of cruelty and adultery, in which the proceedings had been stayed. At the trial before Willes, J., the plaintiff got his judgment. Mr. Denman, Q.C., moved the court to enter judgment for the defendant, but on it appearing that the petition alleged acts, which, if proved, would make out a case of cruelty against the husband, the court (consisting of Erle, C.J., Willes, J., and other judges) refused the motion. The case is important. No proof appears C to have been given of actual cruelty or adultery. Erle, C.J., said (12 C.B.N.S. at p. 333):

> "No doubt such costs come under the description of a necessary. The wife pledges her husband's credit at the beginning of the suit, and I see nothing in the practice of the Divorce Court to take away the wife's common law rights."

D Willes, J., said (ibid. at p. 333):

> "As to the mode of making the husband pay in the Divorce Court, that is only one of the numerous methods of giving a remedy. The action at common law is not taken away."

Rice v. *Shepherd* (9) followed, I think, in substance, the principle of the somewhat E earlier case of *Brown* v. *Ackroyd* (7), where the wife had presented a suit for separation on the ground of alleged cruelty. She died before the suit was heard. Lord Campbell, C.J., said (5 E. & B. at p. 827):

> "The rule, therefore, is that the Proctor must show that there was reasonable cause for instituting the proceedings; if more was required it would be merely illusory to say that the wife had the power to pledge her husband's credit."

F The court, however, held on the facts that there was no reasonable cause, and hence the claim of the solicitor failed.

Wilson v. *Ford* (10) next calls for mention. There the husband actually deserted his wife. She consulted solicitors. They commenced a suit for restitution of conjugal rights. Ere it could be heard the husband died, and so no decree was G pronounced. It was held that the wife's solicitors could recover the costs against the husband's executors, although, as Channell, B., said: "What would have been the termination of the suit we cannot tell." The solicitors, I point out, recovered (i) the preliminary and incidental costs of the suit for restitution, (ii) costs of obtaining counsel's opinion in an antinuptial settlement, and (iii) costs for professional advice as to dealing with tradesmen and as to preventing a distress on H furniture of the husband in the house the wife occupied. In *Ottaway* v. *Hamilton* (11) the wife actually obtained a decree against the husband for adultery and cruelty. The costs as between party and party had been taxed and paid. The wife's solicitors then sued the husband for what I may call solicitor and client costs. Those costs fell under four main heads, namely, (i) costs of taking counsel's opinion and of correspondence with the wife, (ii) costs arising out of a proposal I for the compromise of the divorce suit, (iii) payments made to detectives and others in obtaining information relating to the acts of adultery alleged to have been committed by the defendant in divers places, (iv) certain other costs. Both Denman, J., and the Court of Appeal held that the plaintiff could recover under each of the heads I have mentioned. The ratio seems reasonably clear from the judgments, namely, that the costs were "necessaries," and that the divorce practice did not affect common law rights. It seems to me to be clear also that the test adopted was whether the suit had been reasonably instituted. This, and not the success of the suit, is the test, I think, for, as Bramwell, L.J., pointed out, the

husband might die before decree pronounced. THESIGER, L.J., said (3 C.P.D. at p. 403): A

"I agree with the other members of the court that the items claimed seem to have been properly charged against the defendant in respect of a suit, which is proved by the result to have been reasonably instituted."

In the somewhat earlier case of *Stocken* v. *Pattrick* (12) the wife complained of her husband's cruelty and adultery, and consulted her solicitors. They made due inquiries and, having satisfied themselves that there were good grounds for instituting divorce proceedings, filed a petition for dissolution of marriage. Before the hearing, however, the husband and wife came to an arrangement, and a deed of separation was executed, whereby the husband secured the wife a yearly sum. An action by the solicitors against the husband for the costs incurred by the wife from the time she consulted them onwards was held good. KELLY, C.B., said (29 L.T. at p. 508): B C

"The wife has just as much right by means of an attorney to institute a suit for divorce, or judicial separation, upon the ground of adultery and cruelty, as she has to go into debt and prevail on anybody to give her food and raiment if her husband has deserted her and left her without the means of support." D

It is to be noted that in *Stocken* v. *Pattrick* (12) the jury found that the husband had in fact been guilty of cruelty, but it is also to be added that they had found that the divorce proceedings were not needed in order to procure the deed of separation. The latter finding, however, was regarded by the court as immaterial. It was further ruled by the court that the fact that the wife had a separate and sufficient sum for maintenance was no defence to the action. The test cannot therefore be, I think, whether the wife be finally successful or not. E

In *Robertson* v. *Robertson and Favagrossa* (3), JESSEL, M.R., said (6 P.D. at p. 122):

"Now, as was observed by the learned judge in the case of *Flower* v. *Flower* (13), it is not the solicitor's fault if the wife be wrong. If he himself conducts the litigation properly, if he fairly investigates the charges and sees a reasonable foundation for a defence, he is not to lose his costs and a fair remuneration, because he is not successful." F

I agree that JESSEL, M.R., was there speaking of defence. But COTTON, L.J., said later on in the same case:

"When the wife has to take proceedings against the husband, or he against her, all her property being in him, she ought to be provided, at his expense, with the means of bringing her case before the court, and whether she is successful or not, in my opinion, the rule is to this effect, that the costs properly incurred in bringing her suit before the court or in defending the attack made upon her, ought to be paid by her husband." G

Such are the words of COTTON, L.J., and I may here venture to refer to my judgment in the divorce case of *Franklin* v. *Franklin and Minshall* (14) as to the duty of a solicitor with respect to the defence of a wife charged with adultery. See also *Otway* v. *Otway* (15). I may mention that in *Ex parte Moore* (16) the wife's proctor was allowed to prove, in the husband's bankruptcy, for the wife's costs of defending a suit for divorce which, owing to the insolvency of the husband, had been discontinued. But the question of defence may well raise other considerations. I should point out here, in *Cale* v. *James* (17) a divisional court decided, on the wording of the statute, that the rules indicated in the cases I have cited do not apply to applications made under the Summary Jurisdiction (Married Women) Act, 1895. I need not here analyse that decision or indicate the reasons for doubting its correctness as to the effect of the Act of 1895. I ought to point out also that in *Cobbett* v. *Wood* (18) the Court of Appeal stated it to be an open question whether the wife's solicitors could sue the husband for the wife's costs when the petition for judicial separation had been actually heard and dismissed. The rele- H I

A vant decisions do not seem to have been before the court. It should be remembered that a vital witness may die the day before the hearing. In the case now before me the points at issue in *Cale* v. *James* (17) and *Cobbett* v. *Wood* (18) do not arise at all.

I now summarise my conclusions upon the law applicable to the case, where, as here, the wife commences the matrimonial proceedings or their preliminaries. B First, I am of opinion, with all respect to those distinguished judges, that the dictum of Mathew, J., in *Taylor* v. *Hailstone* (1) and the dictum of Turner, L.J., in *Re Hooper* (2) are erroneous and opposed to the body of authority. It is not, in my view, necessary for the plaintiffs to here prove that the defendant was in fact guilty of cruelty or in fact committed adultery. Secondly, it follows, therefore, that it is not essential, in a case like the present, to show that the wife had C actually procured a decree in her favour. Thirdly, it is, however, essential, in such a case as that now before me, for the solicitor to clearly prove that he acted on reasonable grounds, that he made adequate inquiries, and that he showed proper diligence and full care. Those are the rules which I propose to apply here. I may add that the old case of *Ladd* v. *Lynn* (19), in which Parke, B., apparently said that a deed of separation could not be called a necessary for a wife, must now be D deemed inconsistent with later authorities. A further point was argued before me, namely, that if the wife here was held to have separate estate, it follows that the plaintiffs' action must fail. Undoubtedly in former days the fact that a wife possessed separate estate or a separate maintenance, was held not to affect the solicitor's right to costs against a husband. See, for example, *Turner* v. *Rookes* (8) and *Stocken* v. *Pattrick* (12). In 16 Halsbury's Laws (1st Edn.), p. 429, it is E assumed that the old rule still prevails. This may very well be so, and see Lush on Husband and Wife (3rd Edn.), pp. 427, 428, a legal rule may often survive the reason for its existence, and married men nowadays may have to suffer more hardships than married women. But in cases where the wife has substantial means, or where there are special circumstances, it may be that the effect of the Married Women's Property Acts will some day have to be considered. See Lush on F Husband and Wife (3rd Edn.), pp. 432–433. I do not decide here the point of law, for I am satisfied on the facts that the wife has no independent separate estate at all. She had not (as I earlier said) even a fixed allowance, and the income her husband permitted her to receive from a marriage settlement fund was consumed by her family obligations. For the reasons given, I hold that the plaintiffs, upon the rules of law I have ventured to state, are entitled to recover on the facts G I have mentioned earlier. There is, however, a further point I briefly mention. The plaintiffs alleged that the defendant, in the autumn of 1920, had definitely agreed by word of mouth with the plaintiffs in the presence of the wife, to pay the wife's costs. I have weighed the evidence, and I need only say that I accept the testimony of Mr. Abrahams and the wife against the defendant's evidence—I need not decide the question as to whether this promise was confirmed later. The two H professional gentlemen concerned differed in their recollection on the point. Since writing this judgment I have this morning seen a brief note in the Weekly Notes, 1924, p. 110, of *Durnford* v. *Baker* (20), tried before Rowlatt, J., a few days ago. I greatly hope that the views I have just ventured to express do not conflict with those of my learned and experienced colleague. In *Durnford* v. *Baker* (20) the solicitor failed on the ground that the wife, who had started a divorce suit, was I discovered to have herself committed adultery, whereupon the petition was not proceeded with, but was dismissed ultimately for want of prosecution. But, even so, it may well be, with all respect, that the right of a solicitor in such a case may call for further consideration in the light of many decisions in the Divorce Court, as well as of common law principles and cases. In the action now before me, there is no suggestion of misconduct against Mrs. Buckley. In giving judgment for the plaintiffs I desire to say that in view of the possibilities which exist that a wife may sometimes seek to impose burdens of costs on her husband, either by frivolous charges or imaginary grievances, or by the indulgence of mere resentment,

it seems to me essential that cases like the present should be closely scrutinised, and that no judgment should be given in a plaintiff's favour unless he proves, inter alia, a full compliance with the third rule I have stated.

The plaintiffs' bill will be subject to taxation. I give judgment for the plaintiffs with costs.

Judgment for plaintiffs.

Solicitors: *Michael Abrahams, Sons & Co.*; *Valpy, Peckham & Chaplin.*

[*Reported by* T. W. Morgan, Esq., *Barrister-at-Law.*]

LONDON AND LANCASHIRE FIRE INSURANCE CO., LTD. *v.* BOLANDS, LTD.

[House of Lords (Viscount Finlay, Lord Atkinson, Lord Sumner, Lord Blanesburgh and Lord Darling), May 1, 1924]

[Reported [1924] A.C. 836; 93 L.J.P.C. 230; 131 L.T. 354; 40 T.L.R. 603; 68 Sol. Jo. 629]

Insurance—Theft—Exception—Loss happening in consequence of riots—"Riot"—Robbery by four armed men.

The respondents, who owned a bakery, took out a policy of insurance with the appellants whereby the appellants agreed to indemnify the respondents against loss by burglary, housebreaking, and theft of cash in the cashier's office in the bakery. The policy contained the following proviso: "This insurance does not cover loss directly or indirectly caused by or happening through or in consequence of: (a) invasions, hostilities, acts of foreign enemy, riots, strikes, civil commotions, rebellions, insurrections, military or usurped power or martial law or the burning of property by the order of any public authority. . . ." During the currency of the policy four armed men entered the respondents' bakery while it was daylight, held up the employees with revolvers and threats of violence, and robbed the safe of £1,250 in cash. On a claim by the respondents in respect of the loss the appellants denied liability on the ground that the robbery was a riot within the meaning of the proviso.

Held: the circumstances constituted a riot in the legal sense; the fact that the riot was the theft itself under another name and was not merely collateral to it did not prevent the proviso from applying; and, therefore, the loss suffered by the respondents fell within the proviso and their claim failed.

Motor Union Insurance Co., Ltd. v. *Boggan* (1) (1923), 130 L.T. 588, considered.

Notes. Referred to: *Pesquerias Secaderos de Bacalao de España S.A.* v. *Beer*, [1949] 1 All E.R. 845 n.; *R.* v. *Sharp*, [1957] 1 All E.R. 577.

Case referred to:

(1) *Boggan* v. *Motor Union Insurance Co., Ltd.*, [1922] 2 I.R. 184; affirmed 56 I.L.T. 173; reversed 130 L.T. 588; 67 Sol. Jo. 656; [1923] 2 I.R. 136, H.L.; 29 Digest 418, *3267*.

Appeal from an order of the High Court of Appeal for Ireland dated Nov. 27, 1922, which confirmed an order of the Court of Appeal in Southern Ireland affirming an order of the King's Bench Division of the High Court of Justice in Southern Ireland.

By a policy of insurance dated Feb. 25, 1920, the appellants agreed to indemnify

the respondents against loss by burglary, housebreaking and theft of cash in the cashier's office of the assureds' bakery, known as "The City of Dublin Bakery." The policy contained among others the following proviso:

> "This insurance does not cover loss directly or indirectly caused by, happening through or in consequence of (a) invasions, hostilities, acts of foreign enemy, riots, strikes, civil commotions, rebellions, insurrections, military or usurped power, or martial law, or the burning of property by order of any public authority; (b) incendiarism directly or indirectly connected with any of the circumstances or causes above mentioned in (a), and in the event of any claim arising hereunder for loss of the cash as herein described, the assured shall, if so required, and as a condition precedent to any liability of the company hereon, prove that the loss did not in any way arise under or through any of the above excepted circumstances or causes."

The policy also contained an arbitration clause. On June 25, 1921, at 9.45 p.m., four armed men entered the respondents' premises, held up with revolvers the employees there present, and took possession of and subsequently departed with cash amounting to £1,250 8s. 2d. The respondents made a claim against the appellants in respect of the loss. The appellants denied liability, relying on the above proviso.

The dispute having been referred to arbitration, it was proved that at 9.45 p.m. on Saturday, June 25, 1921, the respondents' watchman, John Kilmurray, heard a knock at the side door of the respondents' said premises, and thinking that the stableman, Thomas Nolan, was knocking for admission, unlocked the gate. Four men (none of whom were disguised) entered, pushed Kilmurray in, ordered him to go down the yard, and searched him. One of them directed Kilmurray to put up his hands, and kept him in that position until they all left. The others rushed into the office, shouted "Hands up," and covered with revolvers the cashier, Mr. James J. Miley, and five other employees present. The money which Hugh Gaynor, a vanman, who had just come in, had ready for the cashier on the counter of the office window was taken by one of the men who had levelled his revolver through the office window at the cashier, and that the money which another vanman, Gerald Murray, who had arrived a short time before Hugh Gaynor, was counting for payment to the cashier was also taken. One of the armed men asked the cashier to point out the safe, saying: "Have the contents of this (revolver) or give me the keys of the safe." The cashier pointed out the safe, which was open. Two of the robbers went to the safe and took what money they found there, but overlooked the larger banknotes and a quantity of Treasury notes. The robbery occupied about ten minutes, and the employees present were warned not to leave the premises for a quarter of an hour. The robbers were not disguised, and the cashier is sure he could identify two of them. When the cashier described the men to the police they expressed the opinion that they are the same men who, on the previous Saturday night, took a lot of money from the office of another company of the same trade. After the vanman Gaynor had been searched he succeeded, when attention was withdrawn from him, in making his way to the back of the premises, climbed over the back wall and shouted "Robbers." A man with a revolver came up and ordered him to be silent. He grappled with this man and knocked him down, shouting at the same time for help, and the stableman, Thomas Nolan, came up and assisted Gaynor to hold the man down, but another armed man ran up, covering them with a revolver, and ordered them to release the man whom they had overcome, which they were obliged to do. Further evidence was given by the cashier, James Joseph Miley, that there was no disturbance about the premises or in the street on the day of the robbery or the day before, and that nothing of a similar sort had occurred in the previous week, except a robbery on the previous Saturday at a bakery at Ballsbridge, which is not in the immediate neighbourhood of the respondents' bakery. There was no riot or disturbance about the place.

The arbitrators found that on the evidence the respondents proved sufficiently that the loss did not in any way arise under or through civil commotion, but being of opinion that the facts in regard to the circumstances in which the money was stolen constituted a riot within the legal definition of the word, by their award, stated, at the request of the parties, in the form of a Special Case, found and awarded as follows:

"We find and award that the loss was caused by or happened through or in consequence of a riot within the meaning of the said policy, and that the claimants are not entitled to recover any sum of money from the respondents in respect of the said loss.

The question for the court is:

Whether upon the facts herein stated we are justified in so finding?

If the court should be of opinion that we are not justified in so finding, then we find and award that the claimants are entitled to recover against the respondents the sum of £1,250 8s. 2d."

The King's Bench Division of the High Court of Justice in Southern Ireland (MOLONY, C.J., and GORDON, J.) answered the question reserved for the decision of the court in the negative, and ordered that the respondents be at liberty to sign final judgment for the sum of £1,250 8s. 2d. That decision was affirmed by the Court of Appeal in Southern Ireland (the Lord Chief Justice, RONAN and O'CONNOR, L.JJ.), and afterwards by the High Court of Appeal in Ireland.

The insurance company appealed.

S. L. Brown, K.C., and *James A. Murnaghan* (of the Irish Bar) and *Herbert D. Samuels* (of the English Bar) for the appellants.

Fitzgibbon, K.C., and *T. G. Marnan* (both of the Irish Bar) for the respondents.

LORD FINLAY.—This is a Case stated by arbitrators for the opinion of the court, and it now comes before your Lordships by way of appeal. The action was brought upon a policy of insurance, which is expressed to be a policy against loss by burglary, housebreaking, and theft of certain cash mentioned in the policy, being £5,000 in cash in the cashier's office of the assureds' bakery known as the City of Dublin Bakery. Then follows the proviso:

"Provided that this insurance does not cover loss directly or indirectly caused by, happening through, or in consequence of (a) invasions, hostilities, acts of foreign enemy, riots, strikes, civil commotions, rebellions, insurrections, military or usurped power, or martial law, or the burning of property by order of any public authority; (b) incendiarism directly or indirectly connected with any of the circumstances or causes above mentioned in (a)."

The circumstances in which this loss occurred are compendiously stated in the Case by the arbitrators. They say that the watchman of the premises heard a knock at the side door; he opened it; four men entered, none of whom were disguised, pushed in the watchman and ordered him to go down the yard. There they searched him, and one of them directed him to put up his hands, and kept him in that position until the robbers left. The others rushed into the office, shouted "Hands up!" covering all who were present with revolvers. Then the names of the persons present are given. They asked—that is, the men who had entered—where the telephone was and cut it. The cashier, seeing a hand presenting a revolver at him from outside his office window, had left the cash office enclosure, but at the door of the outer office was held up by one of the armed men, who ordered him to put up his hands and stand further up the room.

"Then money was taken away by one of the men and certain other money which was being counted up. One of the armed men came to where the cashier had been directed to stand, and asked him to point out the safe, saying, 'Have the contents of this (revolver), or give me the keys of the safe.' The cashier pointed out the safe, which was open. It had been locked before the late vanmen already named arrived, but had been opened to put away the

A cash received from them. Two of the robbers went to the safe and took what money they found there, but overlooked the larger banknotes and a quantity of Treasury notes. The robbery occupied about ten minutes, and the employees present were warned not to leave the premises for a quarter of an hour. As already mentioned, the men were not disguised, and the cashier is sure he could identify two of them."

B The circumstances, as there stated, seem to me to constitute what in the legal sense of the term would be a riot; whether one looks at the acts that were done and threatened, or at the number of persons present, or the whole surroundings, one is forced to the same conclusion, that it would be perfectly impossible to say, that all the essentials for the constitution of the offence of riot at law, did not exist. There was a riot beyond all question. Now it is said that the exception in the C policy for loss by riot does not apply to this case, because the riot was, in truth, the theft itself under another name. The theft was conducted by a number of persons with considerable violence and threats of greater violence, and it is contended that where a riot is, in truth, the offence of theft itself owing to the manner in which it is carried out, the exception does not apply. For the purpose of answering the question that arises on that, one must look at the words of the D policy: "Provided that this insurance does not cover loss, directly or indirectly caused by or happening through or in consequence of"—I take the first three heads mentioned—"Invasions, Hostilities, Acts of Foreign Enemy." These are mentioned for the purpose of excluding all idea that anything done in the way of taking away money by foreign enemies, or in the case of anything that might be described as an invasion, in the way of hostilities generally, would be a theft E within the meaning of the policy. Well, that is perfectly true, and it is also true that these words are introduced for the purpose of excluding thefts which might take place in the confusion incidental to any of the things which are there enumerated under the three heads which I have just referred to—"Invasions, Hostilities, Acts of Foreign Enemy"—if they are "directly or indirectly caused by, or happen through, or in consequence of," any of these things.

F Then we come to the head of "Riots." I will pass that by for the moment, returning to it when I have run through the other heads. Then "Strikes." Strikes are mentioned, I presume, because, unfortunately, strikes are sometimes attended by a good deal of disorder, and it might happen that theft of money took place in the course of some disorders which originated out of a strike. "Civil Commotions"—that we are not at liberty to deal with in this case, in my opinion, G because the case is stated in a very special manner. The point was taken by the appellants:

> "The appellants denied liability on the grounds of riot and civil commotion; as to the latter ground, we find that on the evidence the claimants proved sufficiently that the loss did not in any way arise under or through civil H commotion, but being of opinion that the facts as set out in para. 3 hereof in regard to the circumstances in which the money was stolen constituted a riot within the legal definition of the word, We find [that is, the arbitrators find] and award that the loss was caused by or happened through or in consequence of a riot within the meaning of the said policy and that the claimants are not entitled to recover any sum of money from the appellants I in respect of the said loss. The question for the court is: Whether upon the facts herein stated we are justified in so finding."

That I take to mean this: The question for the court is whether, in point of law, the arbitrators could come to the conclusion at which they arrived, as to the effect of the clause, so far as "riot" is concerned. I do not read the reference to the court in the case as extending at all to the question of civil commotion—that the arbitrators deal with; they saw their way to deciding it right off, and they did not state any Case with regard to the effect of the words "civil commotion," and it is quite impossible for us, in the absence of any reference to the court, whether

in point of law, the finding of the arbitrators could be supported, and in the absence of any power to the court, and to your Lordships' House, to draw inferences of fact, to say whether in their opinion, the arbitrators were right or wrong in the conclusion of fact which they came to, with regard to the question of civil commotion; that is entirely beyond the province assigned to your Lordships upon this appeal, on which we have to deal only with the question stated, and that is the question with regard to the word "riot." I have gone into that, as my reason for not saying anything further about "civil commotion" as one of the heads in the proviso in the policy. Then it goes on:

> "Rebellions, Insurrections, Military or Usurped Power or Martial Law, or the burning of property by order of any Public Authority, (b) incendiarism directly or indirectly connected with any of the circumstances or causes above mentioned in (a)."

I need not again go through the considerations to which I have adverted in dealing with the earlier heads in this paragraph; they equally apply to the heads which I have just referred to in the later part of the paragraph.

In these circumstances the question which is put to the court, and with which your Lordships have on appeal to deal, is whether upon the facts herein stated the arbitrators were justified in finding

> "that the loss was caused by or happened through or in consequence of a riot within the meaning of the said policy and that the claimants are not entitled to recover any sum of money from the appellants in respect of the said loss."

I certainly am not prepared to find that the arbitrators were not justified in coming to that conclusion; on the contrary, I think that they were right. We have been told that the word "riot" here should not be read in its legal sense. In the course of the argument, I asked several times, if we were not to take the legal sense, what then was the sense in which the word was to be read? I confess I have not heard any satisfactory answer to this question, put either by myself or by other members of your Lordships' House who have taken part in the hearing, and, so far from thinking, or saying, that the arbitrators were wrong, I am bound to say that I think they were perfectly right. I do not see how it can be read satisfactorily in any other way.

Reference has been made to a very pointed passage in the judgment delivered in *Boggan* v. *Motor Union Insurance Co., Ltd.* (1) by RONAN, L.J. The lord justice says this ([1922] 2 I.R. at p. 189):

> "In dealing with this case we must consider whether the robbery occurred during a riot, or whether we must take cl. 2 and exception (c) together, and read cl. 2 as 'loss or damage by burglary, housebreaking, or theft, except where such burglary, housebreaking, or theft constitutes a riot in law.' That seems to me to be inconsistent with the policy as a whole. The meaning of the policy seems to be that if, while a riot is in progress, or if there has been a riot, and in consequence of it, a theft takes place, the company is free, but the mere fact that the crime of theft itself contains elements of riot at law does not exclude the right of the insured under the policy. In that case every robbery for which on indictment the accused could technically be convicted also for riot would be outside the policy."

I confess that I am quite unable to accept the view which the lord justice seems to indicate in that passage as being that to which he inclined. This policy was drawn up at a time when it seems to have been apprehended that there might be disturbances of various kinds in the country in which the cash, the subject of insurance, was situated; and then it provides against the inclusion in the policy of loss by theft occurring during, or in consequence of, various things, one of them being riot. As I have said, that there was a riot here in the circumstances in which this money was taken I think it is perfectly impossible to doubt. Force was used, and it is clear that those who were conducting the operation felt that

A they had force behind them and that they could control the situation—and that amounted to a riot. Why are we to say that the proviso does not apply? It seems to me that it does. Why should it apply only if the riot is a collateral event during which the theft takes place, and not apply to a riot one of the objects of which, at all events, was the actual committing of the theft? I cannot so cut down the language of the policy. I read it as applying to the circumstances of B the present case, and it seems to me that the only conclusion at which we can satisfactorily arrive is that the arbitrators were right in the view which they took as to the construction of the policy and the facts relating to this robbery.

LORD ATKINSON.—I concur, and I have only a word to add. I think that during part of the argument, one would have supposed that the words "riot" and C "burglary" were mutually inconsistent terms altogether. There is no doubt that a riot may be committed in the course of a burglary, or a burglary may be committed in the course of a riot, or a riot may be indulged in for the very purpose of committing a burglary. Now it would appear to me clear, that the loss of this money on this particular night was either caused directly or indirectly or happened through or in consequence of what was done by these people on June 25. It D would appear to me that if the word "riot" is to be taken in its ordinary sense, what they did in bringing about the loss amounted to a riot. The arbitrators have construed the policy, and they have held that the word "riot," where it occurs in it, means a riot in the ordinary sense, and they have found that the evidence given before them entirely supports and sustains that conclusion. Indeed, counsel for the respondents himself admitted that the people who were engaged in this E attack on this house could have been indicted and convicted on that evidence of a riot, taking the word in its ordinary sense. Therefore, if this appeal is not to succeed, one must conclude, that the word "riot" as used in this proviso, has a sense differing from its ordinary sense, because it is admitted by counsel for the respondents that, if it is to be interpreted in its ordinary sense, the finding of the arbitrators cannot be disturbed. During the progress of the argument, I think F all the different members of your Lordships' House on different occasions have endeavoured to find out what is the sense in which it is to be read, if it is not the ordinary sense. What is the kind of diluted sense in which this word is to be read if not the ordinary sense? We have not been shown from either the nature of the document or the context in which the word is used, or from any other reason or source, why it is to receive any but the ordinary meaning. I think it G must receive the ordinary meaning. It has received the ordinary meaning at the hands of the arbitrators. I think that their decision was admittedly upheld by the evidence given before them. I think they came to a right conclusion, and that their finding cannot be disturbed, and that this appeal must accordingly succeed.

LORD SUMNER.—I agree. What was said in your Lordships' House in H *Boggan's Case* (1) by two at least of the noble and learned Lords, apparently with the concurrence of others present, would in itself present considerable difficulties in the way of anyone who sought to distinguish that case from the present case. I should certainly have hesitated long before setting myself to that task, but, without relying exclusively upon that decision, I think that on a consideration of the words of the contract now in question, the result must be the same, and that I the appeal ought to succeed.

There has been in this case, quite clearly, a loss by theft of the cash insured and described. Everything, therefore, turns upon the proviso relied upon by the appellants as excluding the loss in question from losses which are covered by the policy. The material words are these: "Provided that this insurance does not cover loss" (that is to say, the loss of the cash described) by theft "directly or indirectly caused by" a riot. Can it be said that this loss was not, either directly or indirectly, caused by a riot? I think it cannot. Can it be said that when the learned arbitrators, who were in agreement on this question, have found and

awarded that the loss was caused by a riot on the facts found and stated by them, they were wrong? I answer, No.

I do not question that the contention which has been urged on behalf of the respondents is not one which, so far as it goes, is borne out by the language of the proviso. That proviso, no doubt, does include cases where the theft is facilitated by an antecedent or a simultaneous occurrence, such as is enumerated here; but it is not enough to say that it includes such cases. It is necessary to show that it is confined to them and that I see no warrant for doing. It is true that the uninstructed layman probably does not think under the word "riot," of even such a scene, as is described in the Case Stated. How he would describe it I know not, but he probably thinks of something, if not more picturesque, at any rate more noisy. But there is no warrant here for saying that when the proviso uses a word which is emphatically a term of art, it is to be confined, in the interpretation of the policy, to circumstances which are only within the popular notions on the subject and are not within the technical meaning of the word. That clearly must be so with regard to martial law; that, I think, must be so with regard to acts of foreign enemies; and I see no reason at all why the word "riot" should not include its technical meaning as clearly as burglary or housebreaking do.

Furthermore, the incidents, out of which this loss occurred, comply, in my view, with those very tests which were put forward to us as being essential to constitute a riot within the proviso. In broad daylight, a gang of armed men, having obtained entrance into the premises by a trick, cow, if not terrorise, a superior number of persons, rushing into the place and shouting to them to hold up their hands, and threatening them with death if they fail to do what they are called upon to do. I should have thought that if the criminals had had more hardihood and had had the courage to fire, as apparently they had not, when two men of considerable nerve resisted them, though unarmed, not only the noise, but the resulting disturbance generally might have extended very far. It appears to me that it was a scene of tumult, and certainly a scene of disturbance of the public peace, which a layman as well as a lawyer might well, on consideration of those aspects of it, have called a riot. So it seems to have struck the learned arbitrators. Nor was it, indeed, contested that had the case been tried by a jury there was a case to go to the jury upon the application of the policy, even in the sense of the word "riot," contended for by the respondents. It is also quite true that some of these enumerated and excepted matters are such as not directly to cause a theft, though they may do so indirectly. That is true, I take it, of strikes and burning of property by order of a public authority, but it is also true on the other hand, that a direct cause of theft may be found among the enumerated matters, not merely in the word "riot," but also in "acts of foreign enemy," also in the words "military or usurped power," and, I imagine, also in the words "civil commotion." Therefore, when one has a clause which is adapted to cover two classes of causes, one a class which can only operate indirectly, and another, a class which can operate both directly and indirectly, the reason fails for suggesting that the proviso is really intended only to refer to circumstances which, as it was well put, are the circumstances in which the theft insured against was committed, and are not relative to the nature of quality of the theft itself. I think, therefore, upon consideration of the construction of the proviso, that it must be read against the assured.

Then it is suggested that there is some ambiguity about the proviso, and that in those circumstances, under the various well-known authorities on the principle of reading words contra proferentes, we ought to construe this proviso, which is in favour of the insurance company, adverse to them. That, however, is a principle which depends on there being some ambiguity, that is to say, some choice of an expression by those who are responsible for putting forward a clause which leaves one unable to decide which of two meanings is the right one. In the present case, it is a question only of construction. There may be some diffi-

A culty; there may be even some difference of opinion about the construction, but it is a question which is quite capable of being solved by the ordinary rules of grammar, and it appears to me that there is no ground for saying that there is such ambiguity as would warrant us in reading the clause otherwise than in accordance with its express terms. I, therefore, concur in the notion which is about to be proposed from the Woolsack.

B

LORD BLANESBURGH.—During the course of the argument, I was personally very much impressed with the view taken of such a proviso as is found in this policy, by RONAN, L.J., in the passage from his judgment in *Boggan* v. *Motor Union Insurance Co., Ltd.* (1), which has been read by LORD FINLAY. I am constrained, however, to come to the conclusion that the answer to that view of C the proviso has just been stated by LORD SUMNER, and, accordingly, although not without some hesitation, I concur in the view which suggests itself as correct to the other members of your Lordships' House.

LORD DARLING.—I merely desire to say that I agree in the conclusion which has been reached by the noble and learned Lords who have spoken.

Appeal allowed.

D

Solicitors: *W. C. Crocker*, for *Hoey & Denning*, Dublin; *Dyson, Bell & Co.*, for *D. & T. Fitzgerald*, Dublin.

[*Reported by* W. C. SANDFORD, ESQ., *Barrister-at-Law.*]

E

Re PITCHFORD. Ex parte OFFICIAL RECEIVER *v.* HALL

F

[CHANCERY DIVISION (Astbury and P. O. Lawrence, JJ.), May 7, 1924]

[Reported [1924] 2 Ch. 260; 93 L.J.Ch. 541; 131 L.T. 669; [1924] B. & C.R. 118]

Bankruptcy—Proof—Costs—Action begun by creditor against debtor before bankruptcy—Action stayed—No order as to costs—Bankruptcy Act, 1914 (4 & 5 G *Geo.* 5, *c.* 59), *s.* 30 (8).

In 1920 H. commenced an action against P. in the High Court to recover a sum for commission. In July, 1921, a receiving order was made against P. and he was adjudicated bankrupt. In February, 1922, H. obtained an order to stay the action with liberty to restore, but no application was made as to costs. In March, 1922, H. put in a proof in the bankruptcy for the amount of H his claim, and that proof was admitted. In September, 1923, H. put in an additional proof for his costs of the action, which was rejected by the trustee.

Held: as no order as to the costs had been made before the receiving order and at that date it had not been ascertained whether any costs would be payable at all, the debtor was under no obligation or liability in respect of the costs; H. was attempting to prove for a debt which had not and never I had any existence; and he could not prove for it.

Notes. As to debts provable in bankruptcy, see 2 HALSBURY'S LAWS (3rd Edn.) 464 et seq.; and for cases see 4 DIGEST (Repl.) 276 et seq. For Bankruptcy Act, 1914, see 2 HALSBURY'S STATUTES (2nd Edn.) 321.

Cases referred to:

(1) *Re British Gold Fields of West Africa, Ltd.*, [1899] 2 Ch. 7; 68 L.J.Ch. 412; 80 L.T. 638; 47 W.R. 552; 15 T.L.R. 363; 43 Sol. Jo. 494; 6 Mans. 334, C.A.; 4 Digest 316, *2955.*

(2) *Re A Debtor* (*No. 68 of 1911*), [1911] 2 K.B. 652; 80 L.J.K.B. 1224; 104 L.T. 905; 18 Mans. 311, C.A.; 4 Digest 320, *2993*. A

Also referred to in argument:

Re Newman, Ex parte Brooke (1876), 3 Ch.D. 494; 25 W.R. 261, C.A.; 4 Digest 317, *2958*.

Re Smith, Ex parte Edwards (1886), 3 Morr, 179, D.C.; 4 Digest 317, *2967*. B

Appeal from Shrewsbury County Court.

On Oct. 25, 1920, J. H. Hall commenced an action in the King's Bench Division against G. Pitchford to recover £650 alleged to be due for commission. The action was entered for trial on June 20, 1921. On July 19, 1921, a receiving order was made against Pitchford in the Shrewsbury County Court, and he was subsequently adjudicated bankrupt. On Feb. 5, 1922, Hall obtained an order in the King's C Bench Division staying his action with liberty to restore. No application was made by Hall as to the costs of the action. On Mar. 6, 1922, Hall put in a proof in the bankruptcy of Pitchford for the £650 claimed in his action and the proof was admitted. On Sept. 29, 1923, Hall put in an additional proof for his costs in the action, which had not been taxed. On Oct. 31 the trustee rejected the additional proof on the ground that at the date of the receiving order there had D been no judgment for costs. Hall appealed to the county court, and on Feb. 11, 1924, the county court judge allowed the appeal and admitted the proof. The trustee appealed to the Divisional Court.

By the Bankruptcy Act, 1914, s. 30:

"(1) Demands in the nature of unliquidated damages arising otherwise than by reason of a contract, promise, or breach of trust shall not be provable in E bankruptcy. . . . (3) Save as aforesaid, all debts and liabilities, present or future, certain or contingent, to which the debtor is subject at the date of the receiving order, or to which he may become subject before his discharge by reason of any obligation incurred before the date of the receiving order, shall be deemed to be debts provable in bankruptcy. . . . (8) 'Liability' shall, for the purpose of this Act, include . . . (b) any obligation or possibility of an F obligation to pay money or money's worth on the breach of any express or implied covenant, contract, agreement, or undertaking . . . (c) generally, any express or implied engagement, agreement, or undertaking, to pay, or capable of resulting in the payment of, money or money's worth; whether the payment is, as respects amount, fixed or unliquidated; as respects time, present or future, certain or dependent on one contingency or on two or more con- G tingencies; as to mode of valuation, capable of being ascertained by fixed rules or as matter of opinion."

E. W. Hansell for the trustee.

Tindale Davis for the creditor, Hall.

ASTBURY, J., stated the facts and continued: The county court judge gave H judgment in some detail and held that untaxed costs of an action, as to which no order had been made, were provable as an addition to the sum claimed in the action. The plaintiff never got judgment for anything at all, and this is an attempt to prove for a debt which has no existence and never had any existence. Counsel for the creditor contends that these costs were a contingent liability, provable in bankruptcy under s. 30 of the Bankruptcy Act, 1914. He says that this was an I obligation to pay money on the breach of a covenant and is within s. 30 (8). But here there was no judgment for the costs nor any debt in respect of them, and the bankrupt never incurred any obligation to pay them.

Two cases have been cited as applying to this point—*Re British Gold Fields of West Africa, Ltd.* (1) and *Re A Debtor* (2). In the first case a number of shareholders in a company had applied to have their names removed from the register, and for repayment of the amounts they had respectively paid for their shares. Two of these applications were heard, and succeeded, the company being ordered

to pay the costs. The other applications had stood over till these were disposed of, and before the other applications could be heard the company was ordered to be wound-up. The other applicants applied in the winding-up for leave to proceed with their applications, or for liberty to prove for the amounts sought to be recovered and their costs. Their claims to be removed from the register were not disputed and orders for rectification and payment were made, but the liquidator refused to allow them to prove for their costs. The Court of Appeal ordered the costs to be taxed and gave the applicants liberty to prove for such taxed costs. LINDLEY, M.R., in giving the judgment of the whole court, dealt with cases of actions against a man who becomes bankrupt. He says:

> "If an action is brought against a person who afterwards becomes bankrupt for the recovery of a sum of money, and the action is successful, the costs are regarded as an addition to the sum recovered, and to be provable if that is provable, but not otherwise."

I read this as meaning costs in respect of which an order has been made. Later, he says:

> "On the other hand, if no verdict is given against him, and no order is made for payment of costs until after he becomes bankrupt, they are not provable."

I do not think that that case has any application to the present case. The register having been rectified, the costs followed as a matter of course.

In *Re A Debtor* (2) an order for a new trial provided that the costs of the first trial should abide the result of the new trial. The plaintiff became bankrupt, but his bankruptcy was annulled before the new trial took place. The new trial resulted in favour of the defendant and the plaintiff was ordered to pay the costs of the first trial, which had been taxed, and the costs of the second trial, to be taxed. The defendant served on the plaintiff a bankruptcy notice in respect of the first trial, but the plaintiff disputed the validity of the notice on the ground that it related to a debt provable in his late bankruptcy. It was held that at the date of the bankruptcy the plaintiff was not subject to a contingent liability by reason of any obligation incurred before the date of the bankruptcy. The present case is much stronger than that case. Though there had been no order there that the costs should be paid, there was an order that the costs of the first trial should be dealt with according to the result of the second trial. It is similar to an order on a motion that the costs of the motion should be costs in the action. COZENS-HARDY, M.R., says:

> "I ask myself, at the date of the bankruptcy, what order was there that the bankrupt should pay these costs? I find none. . . . There is no order against either party in such form that he shall pay the costs. It is just as much a contingency as any other contingency in the action, but it is not a contingency in the sense of being a contingent liability which gives rise to a provable debt within the meaning of the Bankruptcy Act."

BUCKLEY, L.J., says:

> "The question is whether the debtor was subject to a contingent liability 'by reason of any obligation incurred before the date of the receiving order.' I am unable to find here that the debtor was under any obligation at the date of the prior bankruptcy. An obligation may arise in any one of various ways. It may arise by contract. It will arise if a judge makes an order against him. But in the latter case until judgment there is no obligation. . . . There is no order to pay costs. There is an order that it shall be remitted to a tribunal subsequently to determine whether the costs shall or shall not be paid. That is not an obligation."

In the present case there is no order of any kind dealing with Hall's claim or costs. Having chosen to obtain an order to stay the action it was hopeless for him to come to a court which had no jurisdiction to deal with these costs and to apply to prove for them. The appeal must be allowed.

P. O. LAWRENCE, J.—It has been urged that, as Hall's claim is in respect of a contract, the costs are incidental to and ought to be added to his debt, which has been admitted to proof. I am not going to consider whether the costs were a contingent liability or only a possibility, or whether, if the action had been proceeded with, and an order for payment of costs made after the bankruptcy, the costs could have been proved for. Hall himself applied to stay the action and did not then ask for an order for costs. It is admitted that the county court had no jurisdiction to make an order for payment of costs, or to ascertain their amount. It is difficult to see how costs which had not been ordered to be paid, and could not be ascertained, could be admitted to proof. Counsel for the creditor has relied on *Re British Gold Fields of West Africa, Ltd.* (1) and the dictum in that case as to the costs being an addition to the claims. The judge there must have meant that, if costs have been ordered to be paid, they will be added to the amount of the claim. In my judgment, that case has no bearing upon the present one. The circumstances were wholly different, as there the obligation to pay costs existed before the date of the receiving order, while here at that date it had not been ascertained whether any costs would be payable or not. As regards *Re A Debtor* (2), counsel relies on the fact that there it was the case of an unsuccessful plaintiff, but BUCKLEY, L.J., deals quite generally with the circumstances of an "obligation." It appears from what he says that it is by no means certain that costs are necessarily an addition to a claim unless an order is made for their payment. I am satisfied to base my judgment on the ground that the course which the creditor took in staying the action precluded him from proving for these costs. I agree that the appeal should be allowed.

Solicitors: *Solicitor to the Board of Trade*; *Haslam & Sanders*, for *Tinley Dale & Bell*, South Shields.

[*Reported by* E. K. CORRIE, ESQ., *Barrister-at-Law.*]

WILLIAMS *v.* BRITANNIC MERTHYR STEAM COAL CO., LTD.

[KING'S BENCH DIVISION (Rowlatt and Branson, JJ.), June 2, 1924]

[Reported [1924] 2 K.B. 334; 93 L.J.K.B. 983; 131 L.T. 825; 40 T.L.R. 687; 68 Sol. Jo. 795; 22 L.G.R. 626]

Rent Restriction—Increase of rent—Defective notice—Amendment—Limitation of period during which increased rent recoverable by landlord—No notice to quit given—Power to cure by amendment—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 14 (1)—*Rent and Mortgage Interest Restrictions Act*, 1923 (13 & 14 *Geo.* 5, *c.* 32), *s.* 6 (1), *s.* 8 (1).

Section 6 (1) and s. 8 (1) of the Rent and Mortgage Interest Restrictions Act, 1923, are to be read together and with s. 14 (1) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, and, therefore, where the court, under s. 6 (1), has amended a notice of increase of rent which was given to the tenant more than six months before the date of the order of amendment the landlord is not entitled to the increased rent from the date of the amended notice, but is entitled only to such of the increased rent as accrued within the period of six months before the date of the amendment. Where a notice to quit has not been served on a tenant to whom notice of increase of rent is given the defect can be remedied by amendment under s. 6 (1) of the Act of 1923.

Notes. The provisions of s. 6 (1) and s. 8 (1) of the Act of 1923 have been applied to notices of increase under the Rent Act, 1957, by s. 26 of and Sched. VI, para. 2, to that Act.

As to increase of rent under the Rent Acts, see 23 HALSBURY'S LAWS (3rd Edn.) 775–778, 783–786, 792–794; and for cases see 31 DIGEST (Repl.) 677 et seq. For Rent Restriction Acts, 1920 and 1923, and Rent Act, 1957, see 13 HALSBURY'S STATUTES (2nd Edn.) 981, 1033, and ibid., vol. 37, p. 550.

Appeal from Pontypridd County Court.

The plaintiff was the tenant of the defendants of a dwelling-house, of which the standard rent was 7s. a week. The dwelling-house was, therefore, one to which the Rent and Mortgage Restrictions Acts, 1920 to 1923, applied. Four notices of increase of rent had been served on the tenant by the landlords, dated Feb. 4, 1920, Sept. 29, 1920, July 11, 1921, and Aug. 26, 1922. No notice to quit had been served on the tenant except in the case of the fourth notice of intention to increase the rent. Apart from that, all the notices of intention to increase the rent were invalid by reason of errors and omissions. The tenant brought an action to recover from the landlords rent which he had overpaid under the notices of intention to increase the rent which had been served on him. The county court judge held that all the notices of increase of rent were bad as they did not comply with the statutory form. He refused to amend the first notice, but amended the other three notices under s. 6 (1) of the Rent and Mortgage Interest Restrictions Act, 1923. He held that the effect of the amendment of the notices was that all payments of increased rent already made by the tenant under the notices in question could be retained by the landlords. The tenant appealed on the grounds (i) that by virtue of sub-s. (1) of s. 8 of the Act of 1923 the amended notices would only entitle the landlord to retain the amount paid in respect of a rental period ending six months before the order making the amendment; and (ii) that the absence of a notice to quit could not be cured by amendment, since s. 1 (1) of the Rent Restrictions (Notices of Increase) Act, 1923 [repealed by Rent Act, 1957], only applied to notices in conformity with s. 3 (2) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 [repealed as to England and Wales by Rent Act, 1957], at the time of service.

R. M. Montgomery, K.C., and *A. T. James* for the tenant.
Bernard Campion, K.C., and *R. Gwyn Rees* for the landlords.

ROWLATT, J.—In this case notices of increase of rent were served by the landlords which were insufficient because they did not contain, or were not accompanied by, notices to quit. The learned county court judge amended the notices and questions have arisen as to the effect of those amendments. The county court judge held that all moneys paid under the notices, which have now been made good by amendment, can be retained by the landlord, but the tenant contends that all that can be retained by the landlord are payments made in respect of a rental period which ended six months before the date of the order because by s. 8 (1) of the Rent and Mortgage Interest Restrictions Act, 1923, those payments were all the payments which the landlord could recover. By the Increase of Rent, &c. (Restrictions) Act, 1920, s. 1, it is provided, to put it shortly, that increases of rent above the standard rent are irrecoverable from the tenant, and s. 14 gives the right to a tenant, who has paid rent which would have been irrecoverable by the landlord, to recover it. By the Rent and Mortgage Interest Restrictions Act, 1923, power was given to amend notices of increase of rent under the Rent Acts. By s. 6 of the Act of 1923 amendment made the notices good as notices, and if the matter had stopped there it would have made them good to all intents and purposes, so that the full rent could have been recovered by the landlord and nothing could have been recovered back by the tenant. But s. 8 (1) limited the effect of the amendment in regard to the landlord's right to recover by making the increased rent irrecoverable in respect of any rental period which ended more than six months before the date of the order for amendment. Such rent, therefore,

remains under the statute irrecoverable, and, being irrecoverable under the statute, it seems to me to fall within the words of s. 1 and s. 14 of the Act of 1920, and so, if paid, can be recovered back by the tenant. Section 8 (2) of the Rent and Mortgage Interest Restrictions Act, 1923, does not affect this case because that introduces limitations in regard to the right of the tenant to recover overpaid rent, which cut right across the ground I am at present considering. That subsection says:

> "Any sum paid by a tenant or mortgagor which, under sub-s. (1) of s. 14 of the [Act of 1920], is recoverable by the tenant or mortgagor shall be recoverable at any time within six months from the date of payment but not afterwards, or in the case of a payment made before the passing of this Act, at any time within six months from the passing of this Act but not afterwards."

That does not affect this case except so far as it throws a little light upon it by showing that recoverability by the tenant is still to be by reference to the legislation contained in sub-s. (1) of s. 14 of the Act of 1920. The argument of counsel for the landlords—and I think the learned county court judge took that view—was that money rightly paid, even although rightly paid by virtue of an amendment to a notice made ex post facto, did not come within the term "recoverability" at all, because it had passed into payment. I think that is a very narrow reading of the Act. Section 8 (1) of the Act of 1920 speaks of "rent payable," and says:

> "No increase of rent which becomes payable by reason of an amendment of a notice of increase made by order of the county court under this Act shall be recoverable in respect of any rental period which ended more than six months before the date of the order."

I think that puts the tenant right upon this point.

Counsel for the tenant argued that the tenant is able to recover everything right up to date because the powers of amendment do not go to the point of enabling the judge to amend a notice which is bad for want of a notice to quit. Having regard to the history of this matter, I think that is much too narrow a view for us to adopt. Everybody knows that this legislation was designed to meet one of the great pitfalls which had been discovered in the Act, namely, that a notice was invalid because there had been no notice to quit given. The Act of 1923 provided that any error or omission could be rectified by the judge. I think that must be held to extend to the error or omission of not incorporating the notice to quit with the notice.

Therefore, the tenant succeeds on this first point, but fails on the second.

BRANSON, J.—I agree. Two points have been taken on behalf of the tenant. It is said, on the first point, that the power of amendment given to the learned county court judge by s. 6 (1) of the Rent and Mortgage Interest Restrictions Act, 1923, does not extend to his making the amendment date back to the original date of the notice, but that the powers of s. 6 (1) must be read subject to the limitation imposed by s. 8 (1) of the statute. The effect of it, according to the argument, is that, although the notices which were originally served in this case—which were invalid notices—have now been made valid, they have only been made valid subject to the limitation contained in s. 8 (1), and, therefore, that the amount which the landlord is entitled to retain are the amounts which he has been paid in respect of a rental period which ended six months before the date of the order. It is clear that there were other sums paid by the tenant which, at the time when they were paid, were irrecoverable by the landlord under the Act of 1920. The notices which had been given were not in conformity with sub-s. (2) of s. 3 of the Act of 1920. Therefore the increases were not permitted increases, and, consequently, the sums which the tenant paid in response to demands made in pursuance of those notices were not recoverable from him, but were sums which, by sub-s. (1) of s. 14 of the Act of 1920, the tenant could recover. That was the position when the Act of 1923 was passed—the sums which the tenant is seeking to recover in

these proceedings were sums which he could have recovered because they were irrecoverable from him by his landlord. The effect of the Act of 1923 must be gathered, in my view, from the whole Act, and cannot be got at by applying first one section and then another. One cannot apply the powers of s. 6 (1) first and then say that one has now got a new state of affairs upon which s. 8 (1) is to operate. I think one must read s. 6 and s. 8 together. The effect of that is to limit the power of the learned county court judge in regard to making sums recoverable, which were previously irrecoverable, by the landlord, to the period named in sub-s. (1) of that section. The result is that sums paid in respect of dates before that period were irrecoverable when paid and remained irrecoverable by the landlord, and, by virtue of sub-s. (1) of s. 14 of the Act of 1920, may be recovered by the tenant from the landlord.

The second point taken by counsel for the tenant was that at least two of the notices given in this case were given without there being any notice given to terminate the tenancy. It was said that s. 1 of the Rent Restrictions (Notices of Increase) Act, 1923, applies only to a notice given in conformity with sub-s. (2) of s. 3 of the Act of 1920, and that the powers of amendment which are given in the Act of 1923, though they may be used to validate a notice which was invalid, do not make it a notice in conformity with sub-s. (2) of s. 3 of the Act of 1920, and, therefore, do not make it a notice to which the Rent Restrictions (Notices of Increase) Act, 1923, can apply. That, however, seems to me to be putting too narrow an effect upon the powers of the Act of 1923. On his second point, therefore, I think the tenant is wrong, although I agree that he is right on his first.

Appeal allowed.

Solicitors: *Billing & Co.*, for *J. Jones, Pugh & Davey*, Pontypridd; *Bell, Brodrick & Co.*, for *Kensholes & Prosser*, Aberdare.

[*Reported by* T. W. MORGAN, ESQ., *Barrister-at-Law.*]

Re A SOLICITOR

[KING'S BENCH DIVISION (Avory, Horridge and Sankey, JJ.), March 3, 1924]

[Reported [1924] 1 K.B. 699; 93 L.J.K.B. 478; 131 L.T. 136; 40 T.L.R. 420]

Solicitor—Practice—Order suspending solicitor from practice—Publication of notice—Jurisdiction of court to stay publication of notice pending appeal—Solicitors Act, 1919 (9 & 10 *Geo.* 5, *c.* 56), *s.* 7 (2).

The court has inherent jurisdiction to stay, pending appeal, the publication in the "London Gazette" of the notice required by s. 7 (2) of the Solicitors Act, 1919, of an order made by the committee of the Law Society suspending a solicitor from practice.

Notes. Section 7 of the Solicitors Act, 1919, has been replaced by the Solicitors Act, 1957, s. 49 (3).

Not followed: *Re A Solicitor*, [1944] 2 All E.R. 432.

As to applications to the disciplinary committee, see 31 HALSBURY'S LAWS (2nd Edn.) 300 et seq.; and for cases see 42 DIGEST 406 et seq. For the Solicitors Act, 1957, s. 49, see 37 HALSBURY'S STATUTES (2nd Edn.) 1094.

Application for a stay, pending an appeal, of the publication in the "London Gazette" of notice of an order by the committee of the Law Society suspending

the applicant from practice as a solicitor for two years. The order of suspension was made on Feb. 29, 1924, and in the ordinary course notice would have been published in the "London Gazette" on Mar. 4, 1924.

The Solicitors Act, 1919, s. 7 (2), provides:

> "In the case of every order made by the committee . . . whereby any solicitor is ordered to be struck off the Roll of Solicitors or is suspended from practice, the Registrar shall forthwith upon the filing of such order cause a notice stating the effect of the operative part of such order to be published in the 'London Gazette.' "

Cartwright Sharp for the applicant.
S. O. Henn Collins for the Registrar of Solicitors.

AVORY, J.—It is to be regretted that, as notice of this application was served only this morning, the Law Society has not had an opportunity of considering fully the question of the jurisdiction of the court to grant a stay. But it is impossible for the court to do justice in the matter without creating a precedent, which may or may not be followed in the future when further argument may be heard on it. On the assumption, which I think we are entitled to make, that there is some ground for the applicant's appeal, the court must have inherent jurisdiction to make an order which will avert the possible mischief arising if the registrar proceeds forthwith to cause a notice stating the effect of the operative part of the order of the committee to be published in the "London Gazette," as provided by s. 7 (2) of the Solicitors Act, 1919. In the ordinary course, the notice would be published to-morrow, and, if it is published, irreparable harm may be done to the applicant, and this harm cannot be remedied by any order made by the court on the hearing of the appeal. An application such as this ought, whenever possible, to be made in the first instance to the Law Society's Committee which made the order of suspension; but, if the committee refuses to grant a stay or to make any order preventing mischief from being done in the meantime, the applicant may apply to this court. We understand that the applicant had no proper opportunity of making this application to the committee, and, under those circumstances, we ought to direct the registrar to refrain from publishing the notice in the "London Gazette" until the appeal is heard.

HORRIDGE, J.—I agree.

SANKEY, J.—I agree.

Solicitor: *E. R. Cook.*

[*Reported by* J. F. Walker, Esq., *Barrister-at-Law.*]

A

WHITBREAD & CO. *v.* STAINES RURAL DISTRICT COUNCIL

[Chancery Division (Romer, J.), October 27, 28, 1924]

[Reported [1925] Ch. 89; 94 L.J.Ch. 127; 132 L.T. 302; 41 T.L.R. 46; 69 Sol. Jo. 177; 23 L.G.R. 1]

B *Public Health—Cesspool—Undertaking by local authority to cleanse—Right to discontinue cleansing—Public Health Act*, 1875 (38 & 39 *Vict.*, *c.* 55), *s.* 42, *s.* 43, *s.* 44.

In 1903 the defendant council, exercising their powers under s. 42 of the Public Health Act, 1875, undertook the task of cleansing cesspools in the part of their district in which the plaintiffs' premises were situate. In 1917, there C being a shortage of labour and of plant and materials owing to the war of 1914–18, the council passed a resolution rescinding the resolution of 1903 and from that time ceased to cleanse the cesspools. The plaintiffs sought a declaration that the defendant council were bound to continue to cleanse the cesspools into which their premises drained.

D **Held:** s. 42 of the Act of 1875 was an enabling section, and, therefore, the council, having undertaken the work of cleansing cesspools within the meaning of s. 42, were at liberty at any time thereafter to cease to undertake such work.

Notes. The Public Health Act, 1875, ss. 42–44, have been repealed by the Public Health Act, 1936, s. 346 and Sched. III, Part I. For ss. 42–44 of the 1875 Act, see s. 72 of the 1936 Act.

E As to scavenging and cleansing houses and streets outside London, see 26 Halsbury's Laws (2nd Edn.) 425 et seq.; and for cases see 38 Digest 234 et seq. For the Public Health Act, 1936, s. 72, see 19 Halsbury's Statutes (2nd Edn.) 366.

Case referred to:

(1) *Leck* v. *Epsom R.D.C.*, [1922] 1 K.B. 383; 91 L.J.K.B. 321; 126 L.T. 528; F 86 J.P. 56; 38 T.L.R. 275; 66 Sol. Jo. 439; 20 L.G.R. 173, D.C.; 38 Digest 237, *660*.

Also referred to in argument:

Pasmore v. *Oswaldthistle Urban Council*, [1898] A.C. 387; 67 L.J.Q.B. 635; 78 L.T. 569; 62 J.P. 628; 14 T.L.R. 368, H.L.; 38 Digest 154, *38*.

Baron v. *Portslade Urban Council*, [1900] 2 Q.B. 588; 69 L.J.Q.B. 899; 83 L.T. G 363; 64 J.P. 675; 48 W.R. 641; 16 T.L.R. 523, C.A.; 38 Digest 153, *27*.

Pegg and Jones, Ltd. v. *Derby Corporation*, [1909] 2 K.B. 511; 78 L.J.K.B. 909; 101 L.T. 237; 73 J.P. 413; 7 L.G.R. 922, D.C.; 38 Digest 237, *666*.

Witness Action.

In 1903 the defendant council undertook, in pursuance of the Public Health Act, H 1875, s. 42, the cleansing of cesspools for the part of their district situated in the parish of Ashford. The plaintiffs were owners of six houses in Ashford. On June 26, 1917, the council passed the following resolution:

"That having regard to the shortage of labour, plant and materials due to the war, all former resolutions with regard to cleansing of cesspools throughout the whole or any part of the district be rescinded, and that the surveyor be I empowered to arrange with individual householders for the use of the council's engines, materials and apparatus for this purpose, provided that no part of the cost thereof shall fall upon the rates of the district or any contributory place therein."

By an advertisement in the local press, notice of that resolution was given to the inhabitants of the parish of Ashford with an intimation that the resolution would take effect at midnight, Sept. 30, 1917. This action was brought by the plaintiffs for a declaration that the defendant council, having undertaken the cleansing of certain cesspools in their district, were bound at their own cost to cleanse the

cesspools into which were drained the property of the plaintiffs, at such times and intervals as might be reasonably necessary, and for an order on the defendants to cleanse the cesspools.

Section 42 of the Public Health Act, 1875, provided:

"Every local authority may, and when required by order of the Local Government Board shall, themselves undertake or contract for . . . the cleansing of . . . cesspools; either for the whole or any part of their district. . . ."

Section 43 provided:

"If a local authority who have themselves undertaken or contracted for . . . the cleansing of . . . cesspools fail, without reasonable excuse, after notice in writing from the occupier of any house within their district, requiring them to . . . cleanse any . . . cesspool belonging to such house . . . to cause the same to be . . . cleansed . . . within seven days, shall be liable to . . . a penalty. . . ."

Section 44 provided:

"Where the local authority do not themselves undertake or contract for . . . the cleansing . . . of cesspools . . . they may make byelaws imposing the duty of such cleansing . . . on the occupier of any such premises."

Macmorran, K.C., and *E. J. Naldrett* for the plaintiffs.
T. R. Hughes, K.C., and *R. A. Glen* for the defendant council.

ROMER, J.—This case raises a short though somewhat important point under s. 42, s. 43 and s. 44 of the Public Health Act, 1875—a point on which there is apparently, no direct authority. The point arises in this way. The defendant council, in May, 1903, came to the conclusion that they would undertake the task of cleansing cesspools for that part of the district that is situated in the parish of Ashford. They had power to do so under s. 42. Due notice of their determination was given by them in the local press. From that time onward and down to September, 1917, the cleansing of cesspools in that part of their district was carried out by the defendant council. On June 26, 1917, the defendant council passed the following resolution. [His Lordship read the resolution, and referred to the advertisement in the local newspaper, and continued:] The point which I have to determine is whether the defendant council, having undertaken the task of cleansing the cesspools in 1903, could in 1917 absolve themselves by resolution from the duty of cleansing the cesspools further.

The determination of the question depends on the true construction of three sections of the Act of 1875. [His Lordship read s. 42.] Now, in my opinion, the word "undertake" in that section does not refer to any undertaking or promise given by a local authority to any other body of persons to do any work of the kind specified in the section, but refers merely to the performance of that work. Except in the case where an order of the Local Government Board is obtained, the section is nothing more than an enabling section authorising the local authority to do themselves, or through contractors appointed by them, certain work which, but for the section, the local authority would have no power to do at all. That being so, I cannot so far see any reason for coming to the conclusion that the council of the local authority, when once it has determined to do any of the work, is bound to do it in perpetuity, and that it has no right at a subsequent date to discontinue to do so if it so thinks fit. It is true that the section does not contain such words as "from time to time," but, in an enabling section like this, I think these words are necessarily implied. It could hardly be contended, for instance, that the power to make byelaws conferred by s. 43 is one that has to be exercised once and for all time.

But now I have to deal with s. 43. [His Lordship read the section.] It is said by the plaintiffs that the defendant council, having undertaken the task of cleansing the cesspools in 1903, are, therefore, a local authority "who have themselves undertaken . . ." the cleansing of cesspools, and, accordingly, that there is

A an obligation imposed on the defendant council by this section which lasts for ever, and which cannot be got rid of. The section does not expressly impose any obligation to do any of the work referred to in the section, but it would seem to impose an obligation by implication, because it makes the authority liable to a penalty in certain events for failure to do the work. For myself, however, I think that the section does not mean what the plaintiffs say it means. I think the B section is only intended to apply where the local authority are undertaking in their district, or part of their district, as the case may be, the work which, in the case of some particular house, has not, in fact, been done, and that the local authority is not brought within the section merely because at some past date it had undertaken similar work if it is not undertaking that work at the time in question. I think it must be ascertained whether, at the time of failure to do the work in the C particular case, the local authority are, or are not, still undertaking the work in their district, or part of their district, as the case may be. That this is so is, I think, confirmed by s. 44, which would seem to be intended to apply, so far as the cleansing of cesspools is concerned, to all cases not covered by the preceding section, and in s. 44 the words are, "Where the local authority do not themselves undertake a contract for . . . the cleansing of cesspools." In my opinion, s. 43 D applies only to cases where the local authority do undertake the work at the time in question.

For these reasons, on giving the best consideration I can, it appears to me that there is nothing in any one of these sections preventing a local authority which has once undertaken the task of cleansing cesspools from subsequently relieving themselves of the obligation. I think that this view is in accordance with the E opinion expressed by AVORY, J., in his judgment in *Leck* v. *Epsom R.D.C.* (1). In that case, the local authority had for some years before May 26, 1920, in fact cleansed cesspools in their district and, as pointed out by MCCARDIE, J., in his judgment, they might, therefore, be said to have undertaken that work within the meaning of s. 42 of the Act, it not being necessary for the authority to pass an express resolution to do the work if in practice they had so acted as to show that F they had resolved to do it. But by a resolution dated April 28, 1920, it had been resolved that any resolution or resolutions adopting s. 42 of the Act so far as related to the cleansing of cesspools should be rescinded, and that any resolution or resolutions imposing any obligations or duty on the authority in respect of the cleansing of cesspools in the district should be also rescinded. On Aug. 4, 1920, G a notice was given to the plaintiff in the case that the authority could only empty cesspools once in every three months, and the plaintiff having subsequently to that date required the authority to empty his cesspool before the expiration of three months since it was last emptied, and the authority having failed to comply with his requirement, the question to be decided was whether the authority were liable for the penalty imposed by s. 43. The decision of the Divisional Court was to H the effect that, whether in the circumstances the authority had or had not undertaken the work, it had a reasonable excuse within s. 43 for not having complied with the plaintiff's requirement. The point that I have to decide did not, therefore, arise. In the course of his judgment, however, AVORY, J., expressed himself as follows ([1922] 1 K.B. at p. 390):

I "The appellant's complaint was made under s. 43, and to establish it it was necessary to say that the respondents had themselves undertaken the cleansing of cesspools. In the circumstances of the case I think it is open to argument whether the respondents had undertaken the cleansing of cesspools. It is clear that after the passing of the resolution of April 28, 1920, they were not such a local authority, because they then resolved not to undertake the duty, and the result was that thereafter it became the duty of every occupier to cleanse his cesspool. Then on Aug. 4, 1920, the respondents' surveyor, with their authority as we must assume, sent out a notice that in the future they would empty cesspools every three months, and if they were requested to do so

oftener the cost of doing the work must be paid by occupiers. I quite appreciate Mr. Macmorran's argument that a local authority which undertakes the duty of cleansing cesspools must undertake the whole duty; they have no right to undertake the duty with limitations upon it. I am not satisfied that on Aug. 4, 1920, the respondents, by their notice, were undertaking the duty within the meaning of the statute of cleansing cesspools. It is not necessary, however, to decide this."

From this passage I understand AVORY, J., to have been of opinion that, even if before April 28, 1920, the defendants were an authority who had undertaken the cleansing of cesspools, yet after that date they were no longer such an authority. He seems, therefore, to have been of opinion that a local authority who has once undertaken the work within the meaning of s. 42 is at liberty at any time thereafter to cease to undertake such work. This is the view that I have myself formed and I am, accordingly, of opinion that the action fails.

Solicitors: *Martineau & Reid*; *Peter Thomas & Clark*, for *Horne, Engall & Freeman*, Staines.

[*Reported by* GEOFFREY P. LANGWORTHY, ESQ., *Barrister-at-Law*.]

Re NATIONAL UNION OF SHIPS' STEWARDS, COOKS, BUTCHERS AND BAKERS

[CHANCERY DIVISION (Tomlin, J., July 26, 30, 31, 1924]

[Reported [1925] Ch. 20; 94 L.J.Ch. 37; 132 L.T. 628; 40 T.L.R. 871]

Trade Union—Registration—Need for union to be actually in existence and not merely proposed—Trade Union Act, 1871 (34 & 35 *Vict.*, *c.* 31), *s.* 6, *s.* 13.

For a trade union to be capable of being registered under the Trade Union Acts, 1871 and 1913, it must have come into existence before the date of the application to register and not be at that date merely a proposed trade union. Accordingly, where two applications were made for the registration of trade unions under the same name and it appeared that the application made first in time related only to a proposed and not to an existing union, an order was made for registration in respect of the latter application, which referred to an existing union, with a certain modification of name to avoid confusion with a union of the same name recently defunct.

Notes. As to registration of trade unions, see 32 HALSBURY'S LAWS (2nd Edn.) 484 et seq.; and for cases see 43 DIGEST 97, 98. For Trade Union Acts, 1871 and 1913, see 25 HALSBURY'S STATUTES (2nd Edn.) 1244, 1270.

Case referred to in argument:

Luby v. *Warwickshire Miners' Association*, [1912] 2 Ch. 371; 81 L.J.Ch. 741; 107 L.T. 452; 28 T.L.R. 509; 56 Sol. Jo. 670; 43 Digest 98, *1034*.

Originating Summons.

Before February, 1922, the appellants were officials of the National Union of Ships' Stewards, Cooks, Butchers, and Bakers, and on Feb. 1, 1922, that union amalgamated with another trade union, the British Seafarers' Union, to form the Amalgamated Marine Workers' Union. The appellants continued for a time to act as officials of the Amalgamated Union, but during April, 1922, they were expelled from the Amalgamated Union in circumstances which led to litigation not material for the purpose of this report. In the early part of 1924 the appellants

A set about forming a new union to which they gave the old name of the National Union of Ships' Stewards, Cooks, Butchers, and Bakers, and on April 23, 1924, they applied for the registration of the new union to the Registrar of Friendly Societies, who informed them, by letter dated April 30, 1924, that there was already at his office an application for the registration of a union under the same name which had been made by the persons who were now respondents to the B present summons, and that unless the appellants took appropriate legal proceedings he would register the combination in respect of which the respondents had made application. In these circumstances the appellants and their trade union took out this originating summons by way of appeal from the registrar's decision to which the sponsors of the other trade union and that union were made respondents. They asked that, notwithstanding the decision of the registrar refusing to register the C appellant union, he might be directed not to register the combination for which the respondents had made application for registration as such combination was not a bona fide trade union, but a combination formed solely for the purpose of interfering with the registration of the appellant union, while the appellant union was a bona fide trade union entitled to the use of the name and entitled to registration thereunder. Having regard to the nature of the issue raised, TOMLIN, J., directed D that the case ought not to be dealt with on affidavit evidence only, and at the hearing the appellant Hales and the respondent Wade were called. After hearing the evidence, the effect of which appears from the judgment, he came to the conclusion that there was no ground for the allegation of want of bona fides. The question was then argued whether on the evidence the respondent union was an existing union at the date of the application to register it, and if not, whether it E was capable of registration under the Trade Union Acts.

Roxburgh for the appellants.
Plummer for the respondents.

TOMLIN, J.—This is an appeal under s. 2 (4) of the Trade Union Act, 1913, from a refusal by the registrar to register an alleged trade union called the National F Union of Ships' Stewards, Cooks, Butchers, and Bakers. The refusal is based on the existence of a prior application to register another alleged union by the same name. The appellants are the former of these two alleged unions and the seven applicants for its registration, and the respondents are the latter of the two alleged unions and the seven applicants for its registration.

The material sections of the relevant statutes are as follows. By s. 6 of the G Trade Union Act, 1871, it is enacted:

> "Any seven or more members of a trade union may by subscribing their names to the rules of the union, and otherwise complying with the provisions of this Act with respect to registry, register such trade union under this Act, provided that if any one of the purposes of such trade union be unlawful such registration shall be void."

H By s. 13 of the Act it is provided, so far as the same is material to refer to:

> "With respect to the registry, under this Act, of a trade union, and of the rules thereof, the following provisions shall have effect: (1) An application to register the trade union and printed copies of the rules, together with a list of the names of the officers, shall be sent to the registrar under this Act; (2) The I registrar, upon being satisfied that the trade union has complied with the regulations respecting registry in force under this Act, shall register such trade union and such rules; (3) No trade union shall be registered under a name identical with that by which any other existing trade union has been registered, or so nearly resembling such name as to be likely to deceive the members or the public. . . ."

It will be observed that a trade union is not to be registered under a name identical with that of any existing trade union, and it is material also to notice the provisions of s. 13 (4) relating to the case where a trade union applying for registration "has

been in operation for more than a year before the date of such application." Subsection (6) provides for the making of regulations respecting registration and these have in fact been made. Regulation 2 of the Trade Union Act Rules, 1913, provides:

> "The registrar shall not register a trade union under a name identical with that of any other existing trade union known to him, whether registered or not registered, or so nearly resembling such name as to be likely to deceive the members or the public."

This prohibition, therefore, goes beyond the prohibition in s. 13 (3). Regulation 3 provides that

> "upon an application for the registration of a trade union which is already in operation, the registrar, if he has reason to believe that the applicants have not been duly authorised by such trade union to make the same, may for the purpose of ascertaining the fact, require from the applicants such evidence as may seem to him necessary."

The application for registration is, by reg. 4, to be made on Form A subjoined to the regulations, and cl. 4 of the form is as follows: "This [name of trade union] was established on the day of "; and cl. 4 contains a statement by those who make the application: "We have been duly authorised by the trade union to make this application on its behalf, such authorisation consisting of ." There is, however, a note appended to this clause: "This will only be necessary where the trade union has been in operation before the date of the application." The only other material provision is s. 2 of the Trade Union Act, 1913. In sub-s. (1) there is this definition of a trade union:

> "The expression 'trade union' for the purposes of the Trade Union Acts, 1871 to 1906, and this Act, means any combination, whether temporary or permanent, the principal objects of which are under its constitution statutory objects: provided that any combination which is for the time being registered as a trade union shall be deemed to be a trade union as defined by this Act so long as it continues to be so registered."

The short history of the facts in this case is as follows. Prior to February, 1922, there were two trade unions in existence—first, a union of the name now sought to be registered, the National Union of Ships' Stewards, Cooks, Butchers, and Bakers, and, secondly, the British Seafarers' Union. In February, 1922, these two unions amalgamated under the name of the Amalgamated Marine Workers' Union. Since February, 1922, therefore, up to the early part of this year there has been only the one amalgamated union. The appellants, the sponsors of the appellant union, were officials of the old National Union, and upon the amalgamation taking place they became officials of the Amalgamated Union. At some date before the early part of this year they were expelled from the Amalgamated Union and litigation ensued. I understand that in that litigation the appellants had a measure of success and were held to have been wrongly dismissed. That did not, however, necessarily involve their reinstatement, and since their dismissal they have remained unconnected with the Amalgamated Union. In the early part of this year they found, or were able to create, among members of the Amalgamated Union a measure of dissatisfaction with it, and they induced some of these men to join with them in forming a new union for those who came within the class of seafaring men connected with the catering department, with the result that early in March they formed a new union, to which they gave the old name of the National Union of Ships' Stewards, Cooks, Butchers, and Bakers.

The only thing I have to determine is whether the appellants have formed a union which they are in a position to register. I am not concerned with trade union politics or with how far bodies of this kind can be formed by irresponsible persons or with the wisdom of those that join them. I am satisfied that this union was formed in the early part of this year, and, if an exact date must be fixed for

A its birth, I should assign Mar. 3. I am satisfied, after seeing its books, that the union was formed about this time and that by the end of March about 200 members had been enrolled in the new union and had paid entrance fees and subscriptions. An application was made by this union early in April for its registration under the name of the old National Union, and the appellants then for the first time learned that there was already pending before the registrar an application by the respon-
B dents for the registration of another alleged trade union under the same name. That previous application having been made to the registrar, he informed the appellants that, unless steps were taken by them to have the matter dealt with by this court, he would grant registration in respect of the union on whose behalf the first in date of the two applications has been made. In these circumstances this original motion was launched, and when it first came before me my attention
C was drawn to the fact that the appellants were charging the respondents with a want of bona fides in applying to register a non-existing trade union. I directed that the matter should come before me at a later date, and that I should be given an opportunity of seeing witnesses for either side in the box. This has been done and I have now heard the evidence of Mr. Hales, on behalf of the appellants, and of Mr. Wade, on behalf of the respondents.

D The facts with regard to the respondents' so-called trade union are as follows. Its sponsors are seven men who followed the seafaring walk of life in connection with the catering department. They are men who with others of the same class have, for reasons that may be good or bad, felt dissatisfied with the activities of the Amalgamated Union, and it seems to have occurred to them that it would be a good thing to re-constitute a trade union for their own particular department.
E Accordingly, on Mar. 1, 1924, they met at the house of one of their number, and I have had produced to me a minute of that meeting which is described as a meeting of seamen from the catering department of ships. It was held at the house of one Skinner, who was one of this group of seamen, and after a discussion they made up their minds to form a new trade union, to be called the National Union of Ships' Stewards, Cooks, Butchers, and Bakers. On a subsequent date the same men met
F again at 4, Terrace Pier, Gravesend, and they then agreed that an application should be made for the registration of the new union, and that some of the persons present should sign a copy of rules for the new union, which consisted of the rules of the old National Union. Skinner undertook to see to everything in connection with the application for registration and to find the money to pay for any fee required upon the registration of the union. No. 4, Terrace Pier, is a cabin, hut,
G or shelter standing on the pier at Gravesend, the approach to which is through the toll-gate on the pier. It was really used as a shelter for watermen and others going about their lawful occasions on the pier. It seems in the past to have been used sometimes by trade unions connected with seafaring men for the purpose of collecting subscriptions from members. It was, no doubt, a convenient place to intercept the seamen coming ashore before they had reached a place where there
H were opportunities of disposing of any pay in their pockets. As a result of this meeting an application was put in to register the proposed union, the registered address of the union being given No. 4, Terrace Pier, Gravesend.

I wish to say at once that I believe the respondents were acting bona fide and honestly throughout. I think they knew nothing of the appellants' union, and bona fide wished to found one for themselves. There is, in my opinion, no ground
I for charging them with want of bona fides. If they fail in this case, it will only be because they have not complied with the statutory requirements, and there is, in my view, no ground for the charges of conspiracy that have been made. Wade gave his evidence very fairly, and he said that the respondents did not found a trade union, but that they intended to do so when they had got the proposed union registered. They enrolled no members and took no money. Wade said in terms that the union was not formed because they wanted to get registered before they took members.

These being the facts, the question arises whether, on the true construction of

the Act, it is possible to register a prospective trade union or only a trade union already in existence. If it is possible to register a prospective trade union, there is no reason why the respondents should not be registered, but if it is only an existing trade union that can be registered, then the only valid application for registration is that of the present appellants. When I come to examine the language of the actual Acts, I find some difficulty in saying what is a condition precedent to the existence of a trade union, or, in other words, what it is that brings a trade union into existence, inasmuch as the definition of a trade union in s. 2 (1) of the Trade Union Act, 1913, merely states that it means "any combination, whether temporary or permanent, the principal objects of which are under its constitution statutory objects." Therefore, it seems to me that it must be a question of fact on the particular facts of each case whether a trade union has come into existence; and so, finding, as I do, that the appellant union came into existence on Mar. 3, 1924, and that the respondent union has never yet come into existence, it remains for me to say whether under s. 6 and s. 13 of the Trade Union Act, 1871, there was any power to register a non-existent trade union.

I come to the conclusion on these sections that that union only can be registered which is in existence. Section 6 requires an application by "any seven or more members of a trade union," and not by seven or more persons proposing to become members of a trade union; and in providing that they must have subscribed "their names to the rules of the union," it seems to predicate the existence of a trade union possessing rules. And although there are phrases in some of the sections of the Act and in the regulations which seem to suggest the possibility of registering a prospective trade union, I do not think they are sufficient to establish anything contrary to what appears to me to be necessarily implied from s. 6 of the Act of 1871. I refer, for example, to cl. 14 of Form A and the note at the foot of it to the effect that it will only be necessary to fill in this clause "when the trade union has been in operation before the date of the application." I doubt, first, whether I ought to allow myself to be guided by any such note in construing the action of the Act; and, secondly, whether the words "in operation" do not mean something more than the initial activities necessary to form a trade union. It is to be observed that cl. 4 of the form requires a statement of the date upon which the trade union was "established." Therefore, upon the construction of s. 6 and s. 13 of the Act, I come to the conclusion that a trade union must be in existence before an attempt can successfully be made to register it. Having reached that conclusion, I think it follows that the appellants are entitled to have their union registered. But I have already pointed out that there may well be an objection to registering to-day a trade union in the same name as a trade union which ceased to exist in 1922, and I asked whether the applicants would be content to have their union registered with some indication of the date of its origin in the name and they agreed to this. Therefore, I will direct the registrar to register the appellant union in the name of the National Union (1924) of Ships' Stewards, Cooks, Butchers, and Bakers, upon his being satisfied that the union has duly altered its name to that authorised to be registered.

Solicitors: *Vizard, Oldham, Crowder & Cash*, for *J. F. Lynskey & Sons*, Liverpool; *White & Co.*

[*Reported by* L. Morgan May, Esq., *Barrister-at-Law.*]

A

BAYLEY *v.* WALKER

[KING'S BENCH DIVISION (Salter and MacKinnon, JJ.), December 12, 1924]

[Reported [1925] 1 K.B. 447; 94 L.J.K.B. 430; 132 L.T. 489; 41 T.L.R. 187; 23 L.G.R. 180]

B

Rent Restriction—Recovery of overpaid rent—Recovery within six months of date of payment—Recovery by deduction—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *& 11 Geo. 5, c. 17*), *s.* 14 (1)—*Rent and Mortgage Interest Restrictions Act*, 1923 (13 *& 14 Geo. 5, c. 32*), *s.* 8 (2).

The period of limitation [now two years: see s. 7 (6) of the Increase of Rent C and Mortgage Interest (Restrictions) Act, 1938] imposed by s. 8 (2) of the Rent and Mortgage Interest Restrictions Act, 1923, on the right of a tenant under s. 14 (1) of the Rent and Mortgage Interest (Restrictions) Act, 1920, to recover rent overpaid by him to the landlord applies to the recovery of the overpayment by deduction as well as by action.

Notes. As to recovery of overpayments, see 23 HALSBURY'S LAWS (3rd Edn.) D 794, 795; and for cases see 31 DIGEST (Repl.) 690–692. For Rent Restriction Acts, 1920, 1923, and 1938, see 13 HALSBURY'S STATUTES (2nd Edn.) 981, 1033, 1068.

Cases referred to:

(1) *Lewis* v. *McKay*, [1924] 2 K.B. 136; 93 L.J.K.B. 840; 131 L.T. 504; 40 T.L.R. 579; 68 Sol. Jo. 739; 22 L.G.R. 476, D.C.; 31 Digest (Repl.) 691, E *7820*.

(2) *Diment* v. *Roberts*, ante, p. 558; [1925] 1 K.B. 9; 93 L.J.K.B. 1038; 132 L.T. 235; 40 T.L.R. 861; 68 Sol. Jo. 842; 22 L.G.R. 742, C.A.; 31 Digest (Repl.) 691, *7821*.

Appeal by the landlord from Windsor County Court.

The facts appear from the headnote and the judgment of SALTER, J.

F *W. G. Earengey* for the landlord.

W. S. M. Knight for the tenant.

SALTER, J.—In this case the landlord brought an action for the possession of a house, and the question was whether the rent was in arrear at the material time. The county court judge held that it was not, and gave judgment for the tenant. G The facts were that the tenant had paid to the landlord considerable sums for rent which were in excess of the amounts the landlord was entitled to obtain. That excess was recoverable by the tenant, under s. 14 (1) of the Rent and Mortgage Interest (Restrictions) Act, 1920. He made a number of deductions, and on Jan. 31, 1924, he was paying no rent, there remaining at that date a considerable sum overpaid by him. The question this court has to decide is whether the H tenant had a right to continue to make deductions after Jan. 31, 1924. The matter turns on the construction of s. 14 (1) of the Act of 1920 and s. 8 (2) of the Rent and Mortgage Interest Restrictions Act, 1923. Section 14 (1) of the 1920 Act enacted:

> "Where any sum has, whether before or after the passing of this Act, been I paid on account of any rent . . . being a sum which is by virtue of this Act, or any Act repealed by this Act, irrecoverable by the landlord . . . the sum so paid shall be recoverable from the landlord . . . who received the payment . . . by the tenant . . . by whom it was paid, and any such sum, and any other sum which under this Act is recoverable by a tenant from a landlord or payable or repayable by a landlord to a tenant, may, without prejudice to any other method of recovery, be deducted by the tenant . . . from any rent . . . payable by him to the landlord. . . ."

That section gave a general right of recovery, where rent had been overpaid, either

by action or deduction without imposing a limit of time. A modification was made by s. 8 (2) of the 1923 Act, which stated:

"Any sum paid by a tenant . . . which, under s. 14 (1) of the [Act of 1920], is recoverable by the tenant . . . shall be recoverable at any time within six months from the date of payment but not afterwards, or in the case of a payment made before the passing of this Act, at any time within six months of the passing of this Act but not afterwards."

The payments in this case were made before the passing of the Act, and the time limit of six months expired on Jan. 31, 1924. In my opinion, the effect of those two sections is that the general right of recovery for rent overpaid given by s. 14 (1) of the 1920 Act, whether by action or deduction, was limited in time by the Act of 1923. Up to that date the tenant might have issued a summons for the amount owing and recovered by action, or he could have recovered by deduction: but after that date recovery by either method was barred. In *Lewis* v. *McKay* (1) the question was whether it was sufficient that proceedings should be commenced within the period allowed. SWIFT, J., held that the commencement of proceedings was sufficient, but he was obviously of opinion that the Act of 1923 limited the time within which recovery could be made, whether by action or by deduction. In *Diment* v. *Roberts* (2) the present point was not actually decided, but it is obvious that ATKIN, L.J., assumed that the right of recovery by deduction as well as by action was barred. I think that the decision of the county court judge, that, when a tenant adopts the method of recovery by deduction and the first deduction takes place within six months of the passing of the 1923 Act, the tenant can continue to deduct what he would be entitled to under s. 14 (1) of the Act of 1920, was wrong in law. This appeal must be allowed and the case sent back for decision on other points.

MACKINNON, J.—I agree.

Appeal allowed.

Solicitors: *Bower, Cotton & Bower*, for *T. W. Stuchbery*, Maidenhead; *E. M. Tringham*, for *Barrett & Thomson*, Slough.

[*Reported by* T. R. FITZWALTER BUTLER, ESQ., *Barrister-at-Law.*]

Re SEARLE, HOARE & CO. Ex parte THE TRUSTEE *v.* LLOYD

[CHANCERY DIVISION (P. O. Lawrence, J.), June 2, 1924]

[Reported [1924] 2 Ch. 325; 93 L.J.Ch. 571; 68 Sol. Jo. 755; [1924] B. & C.R. 114]

Bankruptcy—Proof—Admission of proof—Overpayment—Right of trustee to set off amount of overpaid dividend against future dividend.

A proof for £1,171 2s. 6d. having been admitted in a bankruptcy, a dividend was declared of 2s. 6d. in the £ and the creditor received a first dividend of £146 7s. 10d. in respect of the £1,171 2s. 6d. The trustee in bankruptcy, having discovered that there had been a mistake and that the creditor should only have had his proof admitted for £880 5s. 8d., moved the court to order the proof to be reduced to £880 5s. 8d. The court ordered the reduction to be made, it not being disputed that that was the right amount. On the question whether the trustee would be entitled to retain out of any future

dividends declared so much as would repay him the amount by which the creditor had been overpaid on the first dividend,

Held: the principle of equity that a beneficiary who had been overpaid was not entitled to receive any further payment out of the trust fund until the payments to the other beneficiaries were levelled up to the amount received by the overpaid beneficiary applied, and, therefore, the trustee was entitled to set off the amount of the dividend overpaid to the creditor against any future dividends payable to him.

Re Tait, Ex parte Harper (1) (1882), 21 Ch.D. 537, considered.

Notes. Applied: *Farnworth* v. *Manchester Corpn.*, [1929] 1 K.B. 533.

As to expunging of proof of debts in a bankruptcy, see 2 HALSBURY'S LAWS (3rd Edn.) 508; and for cases see 4 DIGEST 337 et seq.

Case referred to:

(1) *Re Tait, Ex parte Harper* (1882), 21 Ch.D. 537; 52 L.J.Ch. 117; 47 L.T. 421; 31 W.R. 152, C.A.; 4 Digest 338, *3172*.

Motion.

The facts are set out in the headnote.

G. Wightman Powers for the trustee in bankruptcy.

E. W. Hansell for the respondent creditor.

P. O. LAWRENCE, J.—This motion raises a short point which, in my opinion, presents no serious difficulty. The facts are as follows: [His Lordship stated the facts, and continued:] In these circumstances, it is not disputed that the respondent's proof must be reduced to £880 5s. 8d. Counsel for the respondent, however, contended that he is entitled to receive the full amount of any future dividends which may be declared in respect of his reduced proof without being under any obligation to return or to give credit for the sum overpaid to him, on July 19, 1922, in respect of his original proof, and *Re Tait, Ex parte Harper* (1) was cited in support of this contention. In that case, the question was whether the inspectors under a deed of inspectorship were entitled to have the proof of the creditor expunged. The Court of Appeal, on the assumption that the proof had in fact been admitted (a question on which the court expressed no opinion), held that the proof ought to be expunged, and JESSEL, M.R., in the course of his judgment, when dealing with the contention that the creditor might have altered his position on the faith of the proof having been admitted, said (21 Ch.D. at p. 541):

> "And no injustice can be done, because any dividends which have been already paid are allowed to be retained by the creditor, and the expunging affects only the right to receive future dividends."

Counsel for the respondent argued that from this statement it was to be implied that, where only a part of the proof was expunged, and in fact the proof was merely reduced, the creditor was entitled to receive the full amount of the future dividends on the reduced proof without having to give credit against such future dividends for any excess of dividends received in respect of the original proof. I do not think that this argument can be supported. In my judgment, there is nothing in that statement of JESSEL, M.R., which warrants the proposition that, where there is a common fund which is being administered for the equal benefit of all the creditors, a creditor who has been paid out of that fund more than was due to him is entitled to receive further moneys out of the fund without first giving credit for the overpayment. The mere fact that the trustee cannot recover either payments made to a person whose proof is subsequently expunged, or overpayments made to a creditor whose proof is subsequently reduced, does not, in my opinion, prevent the operation of the well-known principle of equity that a beneficiary who has been overpaid is not entitled to receive any further payment out of the trust fund until the payments to the other beneficiaries are levelled up to the amount received by the overpaid beneficiary—a principle which, in my opinion, is applicable to the facts

of the present case. In the result, I propose to make an order that the respondent's proof be reduced to £880 5s. 8d., and to declare that the trustee is entitled to set off the sum of £36 7s. 8d., being the amount overpaid, against any future dividends payable to the respondent. In the special circumstances, I think that the proper order to make as to the costs of this motion is that the trustee's costs (including his costs of the inquiry before the registrar) be paid out of the estate and that the respondent bear and pay his own costs.

Solicitors: *Phillips, Sons & Rollinson*; *Lloyd & Co.*

[*Reported by* GEOFFREY P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

R. *v.* HOME SECRETARY. Ex parte BRESSLER

[COURT OF APPEAL (Bankes, Warrington and Scrutton, L.JJ.), March 14, 1924]
[Reported 131 L.T. 386; 88 J.P. 89; 68 Sol. Jo. 646; 22 L.G.R. 460; 27 Cox, C.C. 655]

Alien—Deportation—Form of order—Need to state order conducive to public good —Aliens Order, 1920 (*S.R. & O.* 1920 *No.* 448), *art.* 12 (6) (*c*).

The making of an order for the deportation of an alien under art. 12 (6) (c) of the Aliens Order, 1920, lies within the discretion of the Home Secretary, but it is desirable that an order made under that article should state on the face of it that the Home Secretary deems it to be conducive to the public good to make the order.

Notes. The Aliens Order, 1920, has been replaced by the Aliens Order, 1953 (S.I. 1953, No. 1671), as amended. Article 12 (6) (c) of the 1920 Order has been replaced by art. 20 (2) (b) of the 1953 Order.

As to deportation of an alien, see 1 HALSBURY'S LAWS (3rd Edn.) 520 et seq.; and for cases see 2 DIGEST (Repl.) 190 et seq.

Cases referred to:

(1) *R.* v. *Home Secretary, Ex parte Duke of Chateau Thierry*, [1917] 1 K.B. 922; 86 L.J.K.B. 923; 116 L.T. 226; 81 J.P. 125; 33 T.L.R. 264; 61 Sol. Jo. 367; 15 L.G.R. 351, C.A.; 2 Digest (Repl.) 191, *145.*

(2) *R.* v. *Chiswick Police Station Superintendent, Ex parte Sacksteder*, [1918] 1 K.B. 578; 87 L.J.K.B. 608; 118 L.T. 160; 82 J.P. 137; 34 T.L.R. 279; 62 Sol. Jo. 363; 16 L.G.R. 335, C.A.; 2 Digest (Repl.) 192, *146.*

(3) *R.* v. *Leman Street Police Station Inspector, Ex parte Venicoff*, *R.* v. *Secretary of State for Home Affairs, Ex parte Venicoff*, [1920] 3 K.B. 72; 89 L.J.K.B. 1200; 23 L.T. 573; 84 J.P. 222; 36 T.L.R. 677, D.C.; 2 Digest (Repl.) 191, *144.*

(4) *R.* v. *Brixton Prison Governor, Ex parte Sarno*, [1916] 2 K.B. 742; 86 L.J.K.B. 62; 115 L.T. 608; 80 J.P. 389; 32 T.L.R. 717; 14 L.G.R. 1060; 2 Digest (Repl.) 191, *143.*

Appeal against an order of the Divisional Court, refusing to make absolute a rule nisi for habeas corpus.

The appellant was the wife of an alien against whom the Home Secretary had made a deportation order, under the Aliens Restriction Acts, 1914 and 1919, following a conviction of failing to register as an alien. The Home Secretary also made a deportation order against the appellant, who had not been convicted of any offence. The ground on which the Home Secretary purported to act was not stated

A in the order, but it appeared from the evidence that the Home Secretary had deemed it conducive to the public good to make the order.

By art. 12 (6) (c) of the Aliens Order, 1920, a deportation order against an alien may be made "If the Secretary of State deems it to be conducive to the public good to make a deportation order against the alien."

B *E. H. Coumbe* and *A. Anderson* for the appellant.

The Attorney-General (*Sir Patrick Hastings, K.C.*) and *Giveen* for the Home Secretary.

BANKES, L.J.—This appeal undoubtedly raises a question of very considerable public importance, but in reference to which I have no doubt whatever that the view taken by the Divisional Court was the right one. The appeal is against a C refusal of the Divisional Court to make absolute a rule nisi for a habeas corpus to bring up the body of the appellant, a woman of the name of Bressler, against whom an order had been made for deportation under the Aliens Restriction Acts, and orders made under those statutes.

The law in reference to the deportation of aliens is now contained in the Aliens Restriction Act, 1914, and the Aliens Restriction (Amendment) Act, 1919, as D extended by the Expiring Laws Continuance Act. The joint effect of the two statutes of 1914 and 1919 is that His Majesty may, by Order in Council, impose restrictions on aliens, and provision may be made by order for the deportation of aliens from the United Kingdom, the additional provision of s. 1 (2) of the Act of 1919 being that any order so made must be laid before each House of Parliament forthwith. Now a number of orders have been made. The original form of the E order was art. 12 (1) of the Aliens Restriction (Consolidation) Order, 1914, which provided:

> "A Secretary of State may order the deportation of any alien, and any alien with respect to whom such an order is made shall forthwith leave and thereafter remain out of the United Kingdom."

F That order was repeated in exactly the same form in the Aliens Restriction (Consolidation) Order, 1916, art. 12 (1). The effect of that order came before this court in *R.* v. *Home Secretary, Ex parte Duke of Chateau Thierry* (1), in which an attempt was made to obtain a rule for a writ of certiorari to quash an order made by the Home Secretary. In giving judgment in that case, SWINFEN EADY, L.J., says ([1917] 1 K.B. at p. 930):

G > "A Secretary of State is not required to justify in a court of law his reasons for making a deportation order in the case of an alien."

I said (ibid. at p. 935):

> "[The order] applies to all aliens, whether alien enemies or alien friends. It confers upon the Secretary of State an unlimited discretion. He may order the deportation of any alien. It is impossible for any court of law to interfere H with the exercise of that discretion, whether he exercises it because he considers the presence of an alien in this country undesirable on account of his character or antecedents or because he considers it undesirable that he should remain in this country when his services are required in time of war by an allied country of which he is either a subject or a citizen."

I So that in the form of the order as it then stood this court has already expressed its view that it was impossible to challenge in a court of law the discretion exercised by the Home Secretary in making an order.

The matter came before this court again in 1918 in *R.* v. *Superintendent of Chiswick Police Station, Ex parte Sacksteder* (2). There a question arose whether an arrest which had been made as a result of the deportation order was valid or otherwise. PICKFORD, L.J., in giving judgment, said this ([1918] 1 K.B. at p. 586):

> "It is not for me again to consider whether it would not have been better that in the order of 1916 there should have been some provision as to the form

in which the order should be made. There is none. It seems to me any direction, whether oral or written, if it be made by the Secretary of State, is sufficient to satisfy the order." A

Whether it was as a result of that expression of opinion by the lord justice or not I do not know, but, shortly after the decision in that case, and that expression of opinion, there was an alteration in the form of the order, and instead of running, as it did, under the order of 1914, giving the Home Secretary a general discretion B to make an order, the amended form of the order runs thus:

"A deportation may be made in any of the following cases . . . (c) If the Secretary of State deems it to be conducive to the public good to make a deportation order against the alien."

I am not saying for a moment that that alteration of form limits the discretion C of the Home Secretary, but it does indicate the grounds on which he is called on or is entitled to exercise it. It does not appear that, as a result of the alteration of the order, any alteration in the form of the order which is made has been made.

A similar question came before the court again in 1923 in *R.* v. *Leman Street Police Station Inspector, Ex parte Venicoff* (3), and the question there was whether under the order as amended in 1919 it was incumbent on the Home Secretary to D hold an inquiry before making an order. It is not material to go into the decision in that case. It is only material to notice that, although the form of the order had been altered by the date of the decision, the deportation order in fact made continued to be in the old form, and did not indicate on the face of the order that the Secretary of State had made the order because he deemed it to be conducive to the public good. The order in this case does not refer to the grounds on which E the Home Secretary acted, and in the absence of such grounds, as counsel for the Crown has just pointed out, it is competent for a person to go to a Divisional Court and apply for a rule nisi on the suggestion that the Home Secretary has acted on some insufficient ground, and that he has not stated the grounds on which he in fact acted. With submission, I suggest that in orders which are made in future it would be better to incorporate in the order itself the language used in art. 12 F (6) (c) of the order at present in existence in order that it may be indicated on the fact of the order as made, that the Home Secretary is purporting to act within the exact terms of the order giving him jurisdiction. I merely add that because it seems to me that this application would probably never originally have been made in the Divisional Court if the order had been in that form. It does not affect the jurisdiction of the court in the least, because it is plain that, once it appears that G the Home Secretary has purported to exercise the jurisdiction given him by that order, it is impossible for this court to attempt to interfere. For these reasons, I think that the appeal fails and must be dismissed with costs.

WARRINGTON, L.J.—I am of the same opinion. The question raised by the present appeal is as to the validity of an order for the deportation from the United Kingdom of the present appellant, who is an alien. The Act on which the present H procedure depends, and which is now in force, is the Aliens Restriction (Amendment) Act, 1919. That provides by s. 1 (1):

"The powers which under sub-s. (1) of s. 1 of the Aliens Restriction Act, 1914 (which Act, as amended by this Act, is hereinafter in this Act referred to as the principal Act), are exercisable with respect to aliens at any time when a I state of war exists between His Majesty and any foreign power, or when it appears that an occasion of imminent national danger or great emergency has arisen, shall, for a period of one year after the passing of this Act, be exercisable not only in those circumstances, but at any time."

The period during which that section was to be operative was originally for one year from the passing of the Act, but that has from time to time been continued by the Expiring Laws Continuation Act, and, accordingly, the Act now in force provides that the powers given by the Act of 1914 are to be exercisable not only

A in the circumstances specified in the original Act, but at any time. Protection, however, was afforded to aliens in general by the provision that any Order in Council made under that Act should be laid before Parliament, and might be annulled if an address for that purpose was presented to either House of Parliament. The Order in Council is that of Mar. 25, 1920, and the particular article is art. 12 (1), which provides:

B

> "The Secretary of State may, if he thinks fit, in any of the cases mentioned in this article make an order (in this order referred to as a deportation order) requiring an alien to leave and to remain thereafter out of the United Kingdom,"

and then the cases are enumerated in para. (6), and they include this: "If the C Secretary of State deems it to be conducive to the public good to make a deportation order against the alien." The question was raised before us, and it had previously been raised as to the validity of the Order in Council itself, the argument being that, while the Act provided for provision being made by an Order in Council for the deportation of aliens, that did not amount to authority to make an order which would authorise the deportation itself. That same argument was raised in D *R.* v. *Brixton Prison Governor, Ex parte Sarno* (4), and it was dealt with and negatived by LORD READING, C.J. The Order in Council, therefore, was, I think, validly made in accordance with the provisions of the statute. The next question is: Has the deportation order been made in accordance with the provisions of the Order in Council? In my opinion, it has. The Order in Council authorised the Home Secretary to make such an order if he deems it to be conducive to the public E good to make it. In *R.* v. *Leman Street Police Station Inspector, Ex parte Venicoff* (3), the question was raised whether that entitled the Home Secretary to make the order as a matter in his discretion, and LORD READING says ([1920] 3 K.B. at p. 78):

> "Turning now to the statute, art. 12, and the deportation order made under it, I have no doubt that it is not for us to pronounce whether the making of F the order is or is not conducive to the public good";

in other words, that that is a matter which was left by Parliament and by the Order in Council for the decision of the Home Secretary. The Home Secretary in the present case has, as appears by the affidavit which has been filed, taken the matter into consideration, and deems it to be conducive to the public good that this particular order should be made. There, in my opinion, is an end of the G matter. The Home Secretary had a discretion given him by the Order in Council, and it is proof that he has exercised it, but I agree with what has been said by BANKES, L.J., that it would be desirable in future to prevent any such question being raised that the order made under the Order in Council should, on the face of it, state that the Home Secretary, deeming it conducive to the public good, has made the order, so as to show that he has made the order under the particular H circumstances under which the Order in Council says that it may be made. I agree that the appeal fails.

SCRUTTON, L.J.—I agree.

Appeal dismissed.

Solicitors: *E. L. L. Fookes*; *Treasury Solicitor.*

I [*Reported by* W. C. SANDFORD, ESQ., *Barrister-at-Law.*]

A

INLAND REVENUE COMMISSIONERS *v.* GEORGE BURRELL
INLAND REVENUE COMMISSIONERS *v.* WILLIAM BURRELL

[COURT OF APPEAL (Sir Ernest Pollock, M.R., Atkin and Sargant, L.JJ.), March 17, 18, April 4, 1924]

B

[Reported [1924] 2 K.B. 52; 93 L.J.K.B. 709; 131 L.T. 727; 40 T.L.R. 562; 68 Sol. Jo. 594; 9 Tax Cas. 27]

Supertax—Company—Undistributed profits—Winding-up—Liability on division of surplus assets.

The taxpayer was a shareholder in a company which had been formed to own a single steamship. The articles of association provided that the company was C to be wound-up in the event of the ship being lost or sold. The ship was disposed of, and the company went into voluntary liquidation. Among the assets which came into the hands of the liquidator was a sum of money which represented profits made by the company in the final year of its existence and in previous years, but not distributed as dividends. The question raised by this appeal was whether the shareholder could be assessed to supertax in D respect of that portion of the company's assets distributed to him which represented these undivided profits on which income tax had been paid by the company.

Held: the distinction between surplus profits and capital disappeared when the liquidator assumed his duties, the liquidator having no power to divide the E profits as dividends on the shares; and, therefore, no part of the assets distributed by the liquidator was liable to supertax in the hands of the shareholder.

Dictum of SCRUTTON, L.J., in *I.R.Comrs.* v. *Blott* (1), [1920] 2 K.B. at p. 675, applied.

Decision of ROWLATT, J., [1923] 2 K.B. 478, affirmed. F

Notes. Considered: *I.R.Comrs.* v. *Fisher's Executors*, [1925] 1 K.B. 451. Distinguished: *Madras Income Tax Comrs.* v. *P.R.A.L. Muthukaruppan Chettiar* (1935), 79 Sol. Jo. 501. Considered: *I.R.Comrs.* v. *Pollock and Peel, Ltd.*, [1957] 2 All E.R. 485. Referred to: *I.R.Comrs.* v. *Fisher's Executors*, [1926] A.C. 395; *I.R. Comrs.* v. *Wright* (1926), 95 L.J.K.B. 982; *Drew & Sons, Ltd.* v. *I.R.Comrs.* (1932), 17 Tax Cas. 140; *Re Metcalfe & Sons, Ltd.*, [1933] Ch. 142; *Austins of* G *East Ham, Ltd.* v. *I.R.Comrs.*, [1937] 4 All E.R. 275; *Re Home Grown Sugar, Ltd.*, [1938] 1 All E.R. 85; *Penang and General Investment Trust, Ltd.* v. *I.R.Comrs.*, [1943] 1 All E.R. 514; *I.R.Comrs.* v. *F.P.H. Finance Trust, Ltd.* (*No. 2*), [1944] 1 All E.R. 194; *Commercial Securities, Ltd.* v. *I.R.Comrs.* (1953), 35 Tax Cas. 15.

As to distribution of accumulated income on liquidation, see 20 HALSBURY'S H LAWS (3rd Edn.) 416; and for cases see 28 DIGEST (Repl.) 343 et seq.

Cases referred to:

(1) *I.R.Comrs.* v. *Blott*, *I.R.Comrs.* v. *Greenwood*, [1920] 2 K.B. 657; 89 L.J.K.B. 677; 123 L.T. 516; 36 T.L.R. 575; 64 Sol. Jo. 548, C.A.; affirmed, [1921] 2 A.C. 171; 90 L.J.K.B. 1028; 125 L.T. 497; 37 T.L.R. I 762; 65 Sol. Jo. 642; 8 Tax Cas. 101, H.L.; 28 Digest (Repl.) 345, *1525*.

(2) *Re Bridgewater Navigation Co.*, [1891] 2 Ch. 317; 60 L.J.Ch. 415; 64 L.T. 576; 7 T.L.R. 360, C.A.; 10 Digest (Repl.) 1067, *7403*.

(3) *Bishop* v. *Smyrna and Cassaba Rail. Co.*, [1895] 2 Ch. 265; 64 L.J.Ch. 617; 72 L.T. 773; 43 W.R. 647; 11 T.L.R. 393; 39 Sol. Jo. 469; 2 Mans. 429; 13 R. 561; 10 Digest (Repl.) 1068, *7405*.

(4) *Re W. J. Hall & Co., Ltd.*, [1909] 1 Ch. 521; 78 L.J.Ch. 382; 100 L.T. 692; 16 Mans. 152; 10 Digest (Repl.) 1011, *6952*.

(5) *Bouch* v. *Sproule* (1887), 12 App. Cas. 385; 56 L.J.Ch. 1037; 57 L.T. 345; 36 W.R. 193, H.L.; 9 Digest (Repl.) 638, *4249*.

(6) *Re Crichton's Oil Co.*, [1902] 2 Ch. 86; 71 L.J.Ch. 531; 86 L.T. 787; 18 T.L.R. 556; 9 Mans. 402, C.A.; 10 Digest (Repl.) 1068, *7406*.

(7) *Re Armitage*, *Armitage* v. *Garnett*, [1893] 3 Ch. 337; 63 L.J.Ch. 110; 69 L.T. 619; 9 T.L.R. 630; 7 R. 290, C.A.; 40 Digest (Repl.) 728, *2176*.

(8) *Birch* v. *Cropper*, *Re Bridgewater Navigation Co., Ltd.* (1889), 14 App. Cas. 525; 59 L.J.Ch. 122; 61 L.T. 621; 38 W.R. 401; 5 T.L.R. 722; 1 Meg. 372, H.L.; 10 Digest (Repl.) 1065, *7391*.

(9) *Re Spanish Prospecting Co., Ltd.*, [1911] 1 Ch. 92; 80 L.J.Ch. 210; 103 L.T. 609; 27 T.L.R. 76; 55 Sol. Jo. 63; 18 Mans. 91, C.A.; 10 Digest (Repl.) 1063, *7381*.

(10) *Brooks* v. *I.R.Comrs.*, [1914] 1 K.B. 579; 83 L.J.K.B. 431; 110 L.T. 1; 30 T.L.R. 216, C.A.; affirmed sub nom. *I.R.Comrs.* v. *Brooks*, [1915] A.C. 478; 84 L.J.K.B. 404; 112 L.T. 523; 31 T.L.R. 89; 59 Sol. Jo. 160; sub nom. *Brooks* v. *I.R.Comrs.*, 7 Tax Cas. 236, H.L.; 28 Digest (Repl.) 331, *1463*.

(11) *Barnardo's Homes* v. *Income Tax Special Comrs.*, [1921] 2 A.C. 1; 90 L.J.K.B. 545; 125 L.T. 250; 37 T.L.R. 540; 65 Sol. Jo. 433; sub nom. *R.* v. *Income Tax Acts Special Purposes Comrs.*, *Ex parte Dr. Barnardo's Homes National Incorporated Association*, 7 Tax Cas. 646, H.L.; 28 Digest (Repl.) 322, *1419*.

Appeal by the Crown from a decision of Rowlatt, J., reported [1923] 2 K.B. 478, on the following Case which was stated under the Finance (1909–10) Act, 1910, s. 72 (6), and the Taxes Management Act, 1880, s. 59, by the Special Commissioners of Income Tax for the opinion of the King's Bench Division of the High Court of Justice.

1. At the meeting of the Special Commissioners of Income Tax held on July 26, 1920, for the purpose of hearing appeals, William Burrell (hereinafter called the respondent) appealed against additional assessments to supertax in the sums of £7,681, £113,684, and £401 for the years ending April 5, 1917, April 5, 1918, and April 5, 1919, respectively, made upon him under the provisions of the Finance (1909–10) Act, 1910, and subsequent enactments. The said additional assessments were made in respect of part of the sums distributed on liquidation by the twenty-three steamship companies hereinafter referred to and received by the respondent and his wife respectively.

2. The firm of Burrell & Son, of which the respondent was a partner, held shares, but not a controlling interest, in twenty-three companies, each of which was formed for the purpose of owning one particular ship. Mrs. Burrell, the wife of the respondent, also held shares in most of these companies in her own right.

3. Each of the companies had gone into liquidation in conformity with its articles of association when the ship which it owned was sold or lost. After any liabilities had been discharged, the assets of the company, including the profits earned from the commencement of the company's year up to the date of the cessation of business, and also any undistributed profits of past years that had been accumulated and invested and held as reserve funds, were distributed among the shareholders, and each shareholder accordingly received in the liquidation a certain fraction of the profits of the year in which business ceased, but which the company had not resolved to divide, and of the accumulated profits of past years invested and then held in reserve.

4. The facts in the case of each of the twenty-three companies were very similar, and the facts in the case of the "Strathleven" Steamship Co., Ltd. (hereinafter referred to as "Strathleven"), may be taken as typical of other companies.

5. Strathleven was incorporated in the year 1906 with a capital of £24,000 in two hundred and forty shares of £100 each, and owned, and could only own, one ship. On Sept. 7, 1915, the following special resolution was passed by the company

in conformity with art. 14 of its articles of association. It was confirmed on Sept. 22 and duly registered on that date. It resolved: A

"That out of the accumulated profits of the company a sum of £83 per share be paid off by way of reduction of capital pursuant to s. 40 of the Companies (Consolidation) Act, 1908."

Following on that special resolution, a memorandum was produced and registered with the registrar of companies under s. 40 (2) of that Act, and the company thereupon paid back out of accumulated profits £83 out of each £100 in reduction of the paid-up capital, leaving £17 per share paid up and leaving the unpaid capital increased by an amount similar to the amount returned. The total amount of capital so returned and liable to recall was £19,920. The company's paid-up capital was thereafter shown in its balance sheet as £4,080 and a special reserve of £19,920 being the capital liable to recall also appears in the balance sheet as a transfer from profit and loss account by special reserve account as a balancing entry. The £19,920 capital returned to shareholders was never recalled to any extent. B C

The ship was sold to the Australian Government on July 8, 1916, for the sum of £141,705 14s. 8d. (less commissions), being a sum in excess of the book value of the steamer as appearing in the company's balance sheet, and the company thereupon went into voluntary liquidation by resolution in the terms of art. 98 of its articles of association. D

The company's assets in due course were distributed in cash amongst its shareholders. The total amount distributed in the liquidation was £152,909 3s. 10d. Of this sum £140,941 3s. 9d. represented the balance of the purchase money received on the sale of the said steamer (less commissions thereon) after payment of the liquidator's fee (amounting to £764 10s. 11d.), and £11,968 0s. 1d. represented current and accumulated profits made up as follows: E

	£ s. d.	£ s. d.
Balance of accumulated profits and interest on investments of past years, part of which were cash and the remainder invested and standing in "reserve"	4,272 11 8	F
Trading profit of current year (less audit fees)	8,842 2 7	
Interest on investments and deposit receipts for current year	582 16 1	
		13,697 10 4 G
Less audit fees (final accounts) income tax on final accounts, staff bonus, printing and sundry charges		1,729 10 3
		£11,968 0 1 H

6. Between the years 1915 and 1916, twenty-two out of the said twenty-three steamship companies returned to their shareholders, in reduction of paid-up capital out of accumulated profits, sums amounting to £337,012 10s. Twenty-one out of the said twenty-two companies which so returned capital showed thereafter in their balance sheets by transfer from profit and loss account to special reserve account special reserves of amounts equivalent to the amounts of capital so returned. The total amount of such special reserves was £327,812 10s. The total amount of current and accumulated profits distributed by all the companies in their liquidation was £277,155 14s. 5d. To the said sum of £327,812 10s. (amount of special reserves) there had been added in respect of income tax the sum of £39,719 7s. 11d., making a total sum of £367,531 17s. 11d. To the said sum of £277,155 14s. 5d. (amount of current and accumulated profits) there had been added in respect of income tax the sum of £59,750 18s. 7d., making a total sum of £336,906 13s. The said two sums of £39,719 7s. 11d. and £59,750 18s. 7d., added I

A for income tax as aforesaid, made together a total sum of £99,470 6s. 6d. The said two sums of £367,531 17s. 11d. (gross amount of special reserves after addition of income tax) and £336,906 13s. (gross amount of current and accumulated profits after addition of income tax) made together a total sum of £704,438 10s. 11d.

The proportions of the said sum of £704,438 10s. 11d. receivable by the respondent and his wife in the years ended April 5, 1916, 1917, and 1918, according to B their respective shares of capital, were £7,497, £113,684, and £401 respectively.

7. It was contended on behalf of the respondent: (i) That it was the property of the company which the liquidator distributed among the shareholders, that such property did not include payments made by the companies to shareholders in reduction of paid-up capital under s. 40 of the Companies (Consolidation) Act, 1908, and never recalled, and that no distinction ought to be drawn or was drawn C in practice by liquidators between one portion of the distribution and another. (ii) That the liquidator had no power to distribute any portion of the assets as income. (iii) That the case was completely governed by the dictum of SCRUTTON, L.J., in *I.R.Comrs.* v. *Blott* (1) ([1920] 2 K.B. at p. 675), in which he dealt exactly with the present case. (iv) That decisions of the courts as to the proper method of distribution between different classes of shareholders of a company in D liquidation were not relevant to this case. (v) That no part of the distribution in the liquidation of the companies could be regarded as income in estimating the respondents' income for supertax purposes.

8. It was contended, inter alia, on behalf of the Crown: (i) That undistributed profits retained their character as profits in the liquidation of the company, and went as profits unless validly capitalised before the liquidation of the company. E (ii) That in *Re Bridgewater Navigation Co.* (2), *Bishop* v. *Smyrna and Cassaba Rail. Co.* (3), and *Re W. J. Hall & Co., Ltd.* (4) the court held that accumulated profits remained the profits of the persons to whom they belonged, and were so distributable and were not merged in the other assets of the company. (iii) That the remarks quoted from the judgment of SCRUTTON, L.J., in *I.R.Comrs.* v. *Blott* (1) were obiter dicta. (iv) That so much of the distribution of the companies as F represented undistributed profits was income for supertax purposes. (v) That the said special reserves were formed by the transfer of profits from profit and loss accounts to special reserve accounts as appeared from the balance sheets of the said companies, and that such special reserve fell to be distributed as profits in liquidation.

9. In the course of the argument reference was also made to the following cases: G *Bouch* v. *Sproule* (5), *Re Crichton's Oil Co.* (6), *Re Armitage*, *Armitage* v. *Garnett* (7), *Birch* v. *Cropper* (8).

10. Having taken time to consider their determination, the commissioners came to the conclusion that the passage cited from the judgment of SCRUTTON, L.J., in *I.R.Comrs.* v. *Blott* (1) governed this case, and that they were bound by it. They held, therefore, that that portion of the assets which represented undivided profits H did not form part of the income of the recipient for supertax purposes when distributed to the shareholders by the liquidator on the liquidation of the company. The respondent was therefore entitled to succeed in the appeal and they adjusted or discharged the assessments accordingly.

11. The point of law left by the Special Commissioners for the decision of the court was whether that portion of the assets of a company which represents undivided profit formed part of the income of the recipient for supertax purposes, I when distributed to the shareholders by the liquidator on the liquidation of the company.

ROWLATT, J., held that from the moment when liquidation began the distinction between capital and income disappeared and that which came into the liquidator's possession was neither capital nor income, but simply assets; and that any surplus distributed to shareholders could not be affected with supertax.

The Court of Appeal dealt with the case of George Burrell (the partner and brother of William Burrell) at the same time as that of William Burrell. The

facts in the two cases were identical except for variations in the figures relating to the assessments.

The Attorney-General (*Sir Patrick Hastings*, *K.C.*), *Clauson*, *K.C.*, and *Reginald Hills* for the Crown.

Sir John Simon, *K.C.*, and *Latter*, *K.C.*, for the taxpayers.

Cur. adv. vult.

April 4. **SIR ERNEST POLLOCK, M.R.**—These two cases were admitted to be, if not identical, in their facts so similar that they might be taken together, and therefore they were called on before us at the same time, and it was agreed that the judgment in the one case would cover the other. I am, therefore, giving the judgment in the case, the facts of which we actually heard—that was, *I.R.Comrs. v. George Burrell.*

This is an appeal by the Crown from a judgment of ROWLATT, J., dated May 9, 1923, on a Case stated by the Special Commissioners of Income Tax. George Burrell, the respondent, appealed against additional assessments to supertax in the sums of £954, £85,520, and £313 for the years ending April 5, 1917, 1918, 1919, respectively, made on him under the provisions of Finance (1909–10) Act, 1910, and subsequent enactments imposing the supertax. These additional assessments were made in respect of part of the sums distributed on liquidation by twenty-three steamship companies hereinafter referred to, and received by the respondent and his wife respectively. It is unnecessary to state further details, which are to be found set out in the statements attached to the Case.

The firm of Burrell & Son, of which the respondent is a partner, held shares, but not a controlling interest, in twenty-three companies, each of which was formed for the purpose of owning one particular ship. Mrs. Burrell, the wife of the respondent, also held shares in most of the companies in her own right. Each of the companies had gone into liquidation in conformity with its articles of association when the ship which it owned was sold or lost. After any liabilities had been discharged the assets of the company, including the profits earned from the commencement of the company's year up to the date of the cessation of business, and also any undistributed profits of past years, that had been accumulated and invested and held as reserve funds, were distributed among the shareholders, and each shareholder accordingly received in the liquidation a certain fraction of the profits of the year in which the business ceased, but which the company had not resolved to divide, and also of the accumulated profits in past years invested and held in reserve. The question to be decided is whether that portion of the assets of any one of the companies which represents undistributed profits, whether accumulated during past years or made during the broken year, forms part of the income of the recipient shareholder for supertax purposes, when distributed by the liquidator on the liquidation of the company.

It was contended on behalf of the Crown that undistributed profits retain their character as profits in the liquidation of the company and pass to the recipient as profits, unless validly capitalised before the liquidation of the company, and thus form part of the recipient's income for supertax purposes. The answer of the respondent was that the liquidator distributes the property of the company to the shareholders, and that no distinction ought to be drawn between one portion distributed and another, and that the liquidator could not, and did not, distribute any portion of the assets as income. Hence it followed that no part of the distribution in the liquidation of the companies could be regarded as income in estimating the respondent's income for supertax purposes.

There had been, pursuant to s. 40 of the Companies Act, 1908, a sum of £83 per share of £100 returned to each shareholder. The case before the commissioners and ROWLATT, J., included a claim by the Crown that the sum so returned was also taxable; but in this court the claim of the Crown was restricted to the demand that the two sums which I have referred to—viz., those representing accumulated and

undivided profits, and the profits made during the broken year—should be treated as income and were taxable.

The Attorney-General argued that the mere fact of voluntary liquidation does not alter the character of the sums that reach the hands of the shareholders, that the profits made in the course of business remain profits whether they are distributed as dividends or accumulated as a reserve fund; that income tax has been paid on them as being profits made by the company, and that although the quota due to each shareholder may have reached its ultimate destination in his hands not separated into its components parts, yet it is easy to ascertain and determine what part of such quota is made up of earned and undistributed profits as distinguished from capital returned. These arguments no doubt are entitled to weight, and we were referred to two cases which it was claimed supported them.

Re Bridgewater Navigation Co. (2) was a case in which the proper allocation as between the ordinary and preference shareholders of certain reserve funds, accumulated out of profits, fell to be decided. The rights of the shareholders depended on the articles of association. The question arose on the sale of the undertaking to the Manchester Ship Canal, and was whether certain reserve funds were to be treated as undrawn profits, and ought to be divided among the ordinary shareholders exclusively, or whether those reserve funds were to be treated as assets divisible among both preference and ordinary shareholders. Lindley, L.J., states the problem that arises when capital and profits belong to different persons, or to the same persons in different proportions, and the effect of capitalising profits is to change their ownership, and adds that an intention to do this must be shown before the conversion of profits into capital can be properly inferred. He relied on the speech of Lord Bramwell in *Bouch* v. *Sproule* (5) (12 A.C. at p. 405), that in "the case of an ordinary partnership, or an incorporated partnership, the undivided profits of any period" continue to be undivided profits unless something in the articles of partnership, or some agreement by *all* the partners, makes them capital. They do not become capital by effluxion of time or by their being used in the trading.

Next the Crown relied on *Re Spanish Prospecting Co., Ltd.* (9). There certain creditors were entitled to be paid their salary, which was cumulative, out of any succeeding profits. The question was whether a balance in the hands of the liquidator after payment of all other creditors in full, and all subscribed capital had been returned to the shareholders, was to be treated as undrawn profits out of which these creditors were entitled to be paid. It was held that they were so entitled, for this balance, when its origin was ascertained, was found to be profits.

These cases, however, do not, in my judgment, deal with, or govern, the problem that has to be solved in the present case, viz., whether the quota received by each shareholder is a part of his annual profits or gains, and so subject to supertax.

Supertax is imposed by s. 66 of the Finance (1909–10) Act, 1910, and has been continued with alterations, not important to the present question, to the dates of the assessments in the present case. There is charged by the above section in respect of the income of any individual which exceeds a certain amount,

> "an additional duty of income tax referred to as a supertax, and for the purposes of that tax the total income of any individual from all sources shall be taken to be the total income of that individual from all sources for the previous year, estimated in the same manner as the total income from all sources is estimated for the purposes of exemptions or abatements under the Income Tax Acts,"

with certain modifications which follow thereafter. In the course of estimating his income in accordance with the rules thus indicated, the subject has, under s. 190 of the Income Tax Act, 1842, Sched. G, List XVII, to make a declaration of ". . . other annual payments, for which the party is liable to allow and deduct the duty": see the process clearly stated by Swinfen Eady, L.J., in *Brooks* v.

I.R.Comrs. (10). The sums in question have been made liable to the payment of income tax, but is the quota received by the shareholders an annual payment or in the nature of an annual payment of which a declaration has to be made? A

These sums have not been distributed to the shareholders as dividends. The voluntary liquidation has deprived the directors of the power of declaring a dividend. These facts must be faced and due weight given to the considerations which arise from them. The rights of the Crown and the subject must be governed by what B is, and not what might have been. Further, it is a misapprehension after the liquidator has assumed his duties to continue the distinction between surplus profits and capital. LORD MACNAGHTEN, in *Birch* v. *Cropper* (8)—the case which finally determined the rights of the preference and ordinary shareholders in the Bridgewater Canal, inter se—said (14 A.C. at p. 346):

> "I think it rather leads to confusion to speak of the assets which are to be C subject of this application as 'surplus assets' as if they were an accretion or addition to the capital of the company capable of being distinguished from it and open to different considerations. They are part and parcel of the property of the company—part and parcel of the joint stock or common fund—which, at the date of the winding-up, represented the capital of the company."

As LINDLEY, L.J., said in *Re Armitage*, *Armitage* v. *Garnett* (7) ([1893] 3 Ch. at p. 346): D

> "The moment the company got into liquidation there was an end of all power of declaring dividends and of equalising dividends, and the only thing that the liquidator had to do was to turn the assets into money and divide the money among the shareholders in proportion to their shares." E

See also the observations of STIRLING, L.J., as to the meaning of profits available for dividends in *Re Crichton's Oil Co.* (6), where, on a voluntary liquidation, a surplus of trading profit made in a particular year was held distributable rateably among all the shareholders as capital, and was not to be devoted as profits in the payment of a cumulative preferential dividend.

On the grounds, and in accordance with the authorities, which I have up to this F point stated and referred to, the Crown are not, in my judgment, entitled to charge supertax in accordance with the assessments made. It is not right to split up the sums received by the shareholders into capital and income by examining the accounts of the company when it carried on business, and disintegrating the sum received by the shareholders subsequently into component parts, based on an estimate of what might possibly have been done but was not done. There is, in G addition, a dictum of SCRUTTON, L.J., directly in point: see *I.R.Comrs.* v. *Blott* (1). In that case the question was whether certain bonus shares allotted to a shareholder could be treated for purposes of supertax as part of his total income from all sources for the previous years within s. 66 above quoted. ROWLATT, J., the Court of Appeal, and the House of Lords all decided in the negative. SCRUTTON, L.J., in the course of his judgment dealt with the very point to be decided here. H He said ([1920] 2 K.B. at p. 675):

> "A company is liquidated during the year of assessment and the liquidator returns to the shareholders (i) their original capital, (ii) accretions of capital due to increase in the value of the assets of the company, (iii) the reserve fund of undivided profits in the company, (iv) the undivided profits of the last year of assessment. Heads (iii) and (iv) will have paid income tax through the I assessment of the company; but it appears to me that none of the heads will be returnable to supertax as assessment; they are not income from property, but the property itself in course of division."

No doubt this opinion was expressed obiter in the course of the judgment, but I agree with it. The quota returned to the shareholder is returned to him as that part of the property of the company to which he is entitled by the officer whose duty it is to distribute the "property of the company" in accordance with s. 186

of the Companies Act, 1908. That officer does not carry on the company as the directors did, and he has no longer the power that they had to divide the profits as dividend upon the shares—profits to which, in that character, the shareholder had no right to pay a demand. There is nothing in the speeches of the majority or the minority of the House, when the case was determined by it on appeal, that countervails this view: see [1921] 2 A.C. 171. One point, however, was dealt with by LORD CAVE which has a bearing on, and breaks, one of the links in the argument for the Crown. It was said that the fact that the profits in the hands of the company had paid income tax was of some importance as illustrative of the character of an equivalent amount in the hands of the recipient, because the amount of tax paid, appropriate to the sum received, could have been deducted from it, as if paid on his behalf. LORD CAVE says ([1921] 2 A.C. at p. 201):

> "Plainly, a company paying income tax on its profits does not pay it as agent for its shareholders. It pays as a taxpayer, and if no dividend is declared the shareholders have no direct concern in the payment."

For these reasons I am of opinion that the appeal fails and must be dismissed with costs.

ATKIN, L.J.—The respondents in this case were the principal shareholders in a number of single ship companies, managed by the firm of Burrell & Son, in which the taxpayers are partners. The taxpayers have been assessed to supertax on sums received in respect of each of the companies, but the facts relating to one company, the Strathleven Steamship Co., Ltd., has been taken as illustrative of the whole. The *Strathleven* steamship was sold by the company in 1916 at a sum considerably exceeding that at which it stood in the company's books. The company thereupon went into voluntary liquidation. At that time it appears to have had in its possession investments and cash representing undivided profits amounting to £8,799. After deducting from that sum liabilities to creditors and income tax, the liquidator in the liquidation account brings out a balance of £4,272. There were also trading profits realised for the current year of £8,842, and interest and dividends on investments for the current year of £582. For the purpose of this case, there is deemed to be deducted from these sums further expenses—audit fees, income tax and staff bonus—amounting to £1,729; and the balance added to that sum of £4,272 and making £11,968, which is thus arrived at, forms part of the total sum distributed amongst the shareholders, of which the respondents received their share, constituted the subject of the assessment. It is said by the Crown that on that sum income tax has been paid by the company, that when the shareholder claims, in the liquidation, any right or interest in it, he must necessarily allow to the company the proportionate deduction of income tax already paid by the company, and that he must therefore bring into account in supertax the deduction so allowed. This is said to be the result of the Income Tax Act, 1842, ss. 40, 54, and 190, Sched. G, List XVII, and the Finance (1909–10) Act, 1910, s. 66 (2).

It was also put, as I understood, alternatively, that the sum at the date of the liquidation represented profits, never ceased in the hands of the liquidator to be profits, was therefore distributed as profits, and being received by the shareholder as profits, must be accounted for by him for supertax. I think both arguments, if they are severable, are defective by not taking into account sufficiently the legal results of the winding-up. The duties of a voluntary liquidator are governed by the Companies Act and subject to the Companies Act by any express provisions in the articles of association. By the Companies Act it is provided (s. 184):

> "When a company is wound up voluntarily the company shall, from the commencement of the winding-up, cease to carry on its business, except so far as may be required for the beneficial winding-up thereof. Provided that the corporate state and corporate powers of the company shall, notwithstanding anything to the contrary in its articles, continue until it is dissolved."

Section 186 provides: A

"The following consequences shall ensue on the voluntary winding-up of a company: (i) The property of the company shall be applied in satisfaction of its liabilities pari passu, and subject thereto, shall, unless the articles otherwise provide, be distributed among the members according to their rights and interests in the company; (ii) the company in general meeting shall appoint one or more liquidators for the purpose of winding up the affairs and distributing the assets of the company, and may fix the remuneration to be paid to him or them; (iii) on the appointment of a liquidator all the powers of the directors shall cease, except so far as the company in general meeting, or the liquidator, sanctions the continuance thereof; (iv) the liquidator may, without the sanction of the court, exercise all powers by this Act given to the liquidator in a winding-up by the court." B C

And among those powers which are provided for by s. 151 (2):

"The liquidator in a winding-up by the court shall have power, but (subject to the provisions of this section) in the case of a winding-up in Scotland or Ireland only with the sanction of the court: (a) To sell the real and personal property, and things in action of the company, by public auction or private contract, with power to transfer the whole thereof to any person or company, or to sell the same in parcels." D

The property of the company remains the property of the company. The liquidator's duty is to realise it and to pay off the liabilities and distribute the remaining assets among the shareholders, subject to the rights given under the articles. The liquidator cannot declare a dividend or distribute a dividend. E He deals with assets. He need not trouble himself with the question whether the assets in the company's books represent capital or uncapitalised profits. He can realise the assets in the most beneficial way and can pay capital liabilities out of assets that represented profits, or liabilities on revenue account out of assets that represented capital. Having paid the liabilities and having a lump sum in his hands, there appears to me to be no liability on him to reconstruct his capital F account or other accounts and no power in the shareholders either to insist on the liquidator doing so, or themselves so to adventure. Of course the property that comes to his hands as it always remains the property of the company, is bound by the engagements of the company, whether created by the articles or otherwise. Thus, if profits in the hands of the company are charged to a third person, the charge is operative against the liquidator. This, I think, is the case of *Re Spanish* G *Prospecting Co., Ltd.* (9). If the articles have given any particular body of shareholders the right to profits, whether distributed or not, this (subject to the claims of creditors) must be recognised in distribution by the liquidator: see *Re Bridgewater Navigation Co.* (2), which turned on a special article. But though the liquidator must honour such obligations, he himself has no power to capitalise or decapitalise, to distinguish in his distribution between capital or income. His H duty is simply to distribute assets. He may, while carrying on the business with a view to a beneficial realisation, earn profits. In such a case the company will be assessable to income tax on such profits. But the shareholders will not receive them as profits. For him they are but an accretion to the assets, and if they become surplus assets, it is in the form that the shareholder will receive them. We are thus removed from the sphere of cases such as *I.R.Comrs.* v. *Blott* (1), I where there had to be considered the rights produced by the action of a company still carrying on its business and distributing some of its assets in some form of bonus. There the intention of the company is dominant for all purposes. Did the company intend to distribute by profits or capital? Here the liquidator has no choice, and the question cannot arise in that form. This inquiry takes a different shape. Not what does the liquidator intend to give the shareholder, but what does the shareholder in fact receive. In fact, he receives his share of the joint stock. As SCRUTTON, L.J., said, in *I.R.Comrs.* v. *Blott* (1) ([1920] 2 K.B. at p. 675):

A ". . . they [undivided profits] are not income from the property, but the property itself. . . ." In most cases it would require an elaborate analysis of the liquidation account to discover whether the sum received was profits or not. In the present case it is not easy to see why some expenses are deducted from the account and some not, or why they should not all be deducted from the sum received from the sale of the steamer. But, in any case, I think that for the shareholder profits B have ceased to be profits and have become irrevocably merged in the total sum of assets and should not be treated for taxation purposes as part of his annual profits or gains.

The articles of association of this company do not appear to affect the legal position. The relevant articles appear to be these. Article 67:

C "The company in general meeting, or the managers, with the sanction of the company in general meeting, may declare a dividend to be paid to the members according to their priority and to the amount paid, or deemed to be paid, on their shares."

Article 68:

D "No dividend shall be payable except out of the profits, of whatever nature, arising directly or indirectly, from the business or operations of the company, or from the property or reserve funds of the company, or from premiums on issue of shares or stock."

Article 69:

E "No dividend shall exceed the amount recommended from time to time by the managers, and the declaration of the managers as to the amount of the profits available for dividend shall be conclusive."

Article 77:

F "The managers may, before recommending or declaring any dividend on the ordinary shares, set aside out of profits, such sum as they may think proper, to form a fund, herein referred to as the reserve fund, to meet contingencies or depreciation in the value of the property of the company, or for insurance, or for equalising dividends, or of bonuses, and so on."

Article 78:

G "All moneys carried to the reserve fund and all other moneys of the company, not immediately applicable to or required for any payment to be made by the company, may be either employed in the business of the company, or be invested by the managers upon such securities. . . ."

The remaining article is art. 99, and it is entitled: "Distribution of assets on winding up." Article 99:

H "If the company shall be wound up voluntarily and there shall be any surplus assets, after payment of all debts and satisfaction of all liabilities of the company, such surplus assets shall, subject to any preferential rights and priorities appertaining to preference shareholders (if any) and after satisfying the same, belong to the holders of the ordinary shares, in proportion to the amounts paid up or reckoned as paid up, on such ordinary shares."

This last article gives effect to the rights of shareholders as set out above.

I It follows from what I have said that the argument of the Crown fails under both heads. The profits are not distributed or received as such when their equivalent, or any part of it, is received by the shareholder as part of the surplus assets, the obligation under the sections of the Income Tax Act, 1842, to make allowance for income tax paid, is no longer operative. It is irrelevant to this new state of things. As when the company capitalises undivided profits and distributes them as capital, say, as bonus shares, the shareholder does not bring into account for super-tax the income tax paid by the company thereon, so in the case of accumulated profits which have become surplus assets and are distributed and received as such.

I agree that the appeal should be dismissed with costs.

SARGANT, L.J.—The respondents, William Burrell and George Burrell, as partners in the firm of Burrell & Son, held shares in some twenty-three single shipping companies, and Mrs. George Burrell, the wife of the respondent George Burrell, also held shares in most of these companies in her own right. On the voluntary liquidation of each of these companies, their surplus assets were distributed amongst their shareholders, and during the years ending April 5, 1916, 1917, and 1918, the two respondents and Mrs. George Burrell received, in respect of their several shares, their due proportion of such surplus assets. Assessments in respect of supertax have been made on the respondent William Burrell, in respect of such parts of the sums so received by him as represented accumulated and current profits of these companies, and on the respondent George Burrell, for such parts of the sums so received by him, or by Mrs. George Burrell, as represented the like accumulated and current profits. The respondents appealed against these assessments to the Special Commissioners of Income Tax, who allowed the appeal and stated a Case for the opinion of the King's Bench Division. On the argument of that Case, ROWLATT, J., by order dated May 9, 1923, confirmed the decision of the Special Commissioners, and these appeals are brought from that order.

The Special Case finds, and it is agreed by the parties, that the facts in all the twenty-three cases are similar. The facts in the case of one of these companies, viz., the Strathleven Steamship Co., Ltd., may be taken as typical of all the others, and, further, it was admitted by the Crown, on the argument in this court, that the case for the assessment of supertax is in no way strengthened, the amount assessed is increased by the fact that the companies in which shares were held were numerous. In other words, the liability to assessment in respect of parts or proceeds of all the shares is in principle the same as if a single assessment had been made in respect of parts of the proceeds of one company only. Accordingly, it is not necessary to refer to any case other than that of the Strathleven Steamship Co., Ltd. (herein called "the company").

The company was a single steamship company of an ordinary type, formed in January, 1906. Under the Companies Acts then in force was a memorandum and articles of association, for the purpose of acquiring and turning to account a steamship then in course of construction, which was intended to be and was afterwards called the *Strathleven*. The memorandum of association provided that the capital of the company should be £24,000, divided into two hundred and forty shares of £100 each, all of which were, in fact, issued and fully paid, and contained no power to own or operate any other ship, and by the contemporaneous articles of association it was provided, by art. 98:

> "The duration of the company shall be for such period as it remains the owner of the said vessel. Should the said vessel be lost or sold, the company shall be wound up, and the company, in general meeting, shall thereupon pass a resolution requiring it to be wound up voluntarily."

In the month of September, 1915, the company duly passed and registered a special resolution, within s. 40 of the Companies Consolidation Act, 1908, under which, out of the accumulated profits of the company, there was to be returned to the shareholders a sum of £83 in respect of each £100 share, with the result that there would be a corresponding liability for unpaid capital in respect of each share; and such return was in fact made accordingly, the total amount of capital so returned being a sum of £19,920. And in July, 1916, the *Strathleven* was sold for a sum of over £141,000, less commission, and the company thereupon went into voluntary liquidation. In this liquidation the whole amount of surplus assets (i.e., of the excess of assets over liabilities) to be distributed was £152,909 3s., and of this total the Case finds, though the exact figures do not matter, that a sum of £11,968 0s. 1d. represented profits of the company on which income tax had been paid by the company, about a third of this sum arising from accumulated profits of previous years, and about two-thirds arising from trading profits of the current

A year. For simplicity I will take round figures and assume that a total of £12,000 arose from profits, £4,000 representing accumulated profits and £8,000 current profits.

In this state of things an assessment for supertax was made on the taxpayers in respect of their proportion, both of the £19,920, representing capital returned out of accumulated profits, and also of £12,000, representing current and accumulated B profits. And the Special Commissioners in disallowing these assessments stated, and, I think, quite accurately stated, the point of law for the decision of the court as being,

> "whether that portion of the assets of a company which represents undistributed profits forms part of the income of the recipient for supertax purposes, C when distributed to the shareholders by the liquidator on the liquidation of the company."

On the argument before ROWLATT, J., the Crown supported the assessment both in respect of the proportions of £19,920 representing capital returned out of profits, and in respect of proportions of the £12,000 representing accumulated and current profits. But on the appeal to this court the Crown abandoned the former of these D assessments and confined itself to supporting the latter of them. Its argument may be, and indeed was, summarised as follows. The company, prior to liquidation and the liquidator in the course of the liquidation, made profits from the business which were of the nature of income and on which income tax was in fact paid. Nothing whatever was done to convert these profits into capital before or when they reached the shareholder, and although they reached him, together with E capital in one lump sum, they are clearly identifiable as profits of the nature of income. Such an identification has in fact been made in the *Bridgewater Navigation Case* (2), and in the *Spanish Prospecting Co. Case* (9); and it follows, therefore, that being thus identifiable and never having lost their primary character of profits of the nature of income, they must be treated in the hands of the shareholder as still retaining that character and as being part of his annual income and, F therefore, subject to supertax.

This argument is, to my mind, incomplete and defective in assuming that what is of the nature of income in the hands of the company is also, primâ facie, of the nature of income in the hands of the shareholder. I do not think that there is any presumption of the kind. The character in which any distribution by the company amongst its shareholders reaches their hands depends entirely on the circumstances G in which the distribution is made. In the liquidation of a limited company the distribution of the surplus assets of the company is almost necessarily of a final and non-recurrent character, and reaches the hands of the shareholders quite irrespective of the sources from which the assets have accrued to the company. It is true that so far as the assets can be identified, as here, as having arisen from profits, they might, while the company was a going concern, have been distributed H by way of declaration of dividend; but though this power if exercised would have removed the assets from the ownership of the company and divided them amongst the shareholders by way of income, the mere existence of the power while unexercised cannot, in my judgment, have any effect of the kind. These assets, though capable of distribution as income, remain, while not so distributed, part of the general mass of the property of the company and are subject to the debts and I all the accruing liabilities and possible losses of the company and the expenses of any liquidation; and I cannot see enough in the mere history of the accruer of the assets to the company to enable a distinction to be made for the present purpose between that part of a final distribution of assets of the company which arises from profits of the company capable of distribution as income, and the other parts of that distribution. A somewhat similar example is that of the purchase of stocks just after the declaration of a dividend and a sale of them just before the declaration of a new dividend at a profit which is practically based on the accrued dividend—a case in which I think that there can be no question of the increased price being

taxable as income. And the decision in *Barnardo's Homes* v. *Income Tax Special Comrs.* (11) certainly tends in the same direction.

Nor do I think that the decision in the *Spanish Prospecting Co. Case* (9) and the *Bridgewater Navigation Co. Case* (2) really assist the appellants here. In the former of these cases the question was merely whether the company had made profits so that an employee whose remuneration was dependent on the earning of profits was entitled to rank as a creditor; and the latter case turned on the effect of a special bargain between preference shareholders and ordinary shareholders, which was constituted by one of the articles of association of the company, and under which the ordinary shareholders were entitled to the whole of the annual profits of the company not required to satisfy the preference dividend, and so were exclusively entitled to reserve funds formed out of these surplus annual profits.

Had these particular shares been settled, it is clear that the whole of their proportion of undistributed profits would on the principles of *Re Armitage* (7) have been applicable not as income but as capital; and this is a strong indication that this proportion is capital and not income for revenue purposes; also see the reasoning of LORD HALDANE in *I.R.Comrs.* v. *Blott* (1). In my judgment, the remarks of SCRUTTON, L.J., in *I.R.Comrs.* v. *Blott* (1), though made by way of illustration only and not constituting a definite authority, are well founded and have not been shaken by the argument for the appellants. The appeal should be dismissed.

Appeals dismissed.

Solicitors: *Solicitor of Inland Revenue*; *Murray, Hutchins & Co.*

[*Reported by* J. L. DENISON, ESQ., *Barrister-at-Law.*]

CHIBBETT *v.* JOSEPH ROBINSON & SONS

[KING'S BENCH DIVISION (Rowlatt, J.), June 24, 1924]

[Reported 132 L.T. 26; 9 Tax Cas. 48]

Income Tax—Income—Compensation for loss of office—Company to be wound-up for purposes of reconstruction—Amendment of articles to provide for payment of lump sum to managers—New company acquiring undertaking of liquidated company—Managers employed by new company—Liability to tax of lump sum.

The taxpayers (a partnership firm) were employed as managers by S. Line, Ltd. (a steamship company). On June 22, 1918, the S. Line, Ltd., amended its articles of association (which provided for the remuneration of the managers partially on the basis of the tonnage of the ships of the company, and partially on the net profits) by adding a provision under which, if the company were wound-up (whether for the purposes of reconstruction or otherwise), the company might pay the managers out of surplus assets such sums by way of compensation for loss of office as the company in general meeting might determine. At extraordinary general meetings of S. Line, Ltd., held on June 22, 1918, and July 8, 1918, it was resolved that a scheme of reconstruction be approved, and a resolution to wind-up the company was passed on July 20, 1918. On the latter date it was further resolved to transfer £50,000 5 per cent. National War Bonds 1922 to the taxpayers as compensation for loss of office. In August, 1918, a new company was formed to take over the undertaking, business and property of S. Line, Ltd., and the new company entered into an agreement with S. Line, Ltd., to take over those assets (except substantial

investments which included the £50,000 5 per cent. National Bonds 1922). The taxpayers were appointed managers of the new company. In October, 1918, the said National War Bonds were transferred to the taxpayers. Income tax was claimed from the taxpayers in respect of the National War Bonds so transferred. The commissioners found that the transfer to the taxpayers was made as compensation for loss of office and held that the National War Bonds were not liable to tax.

Held: there was evidence on which the commissioners were entitled to find that the transfer was made as compensation for loss of office or as a testimonial for work done in the past, and tax was not exigible in respect of the National War Bonds.

Cowan v. *Seymour* (1), [1920] 1 K.B. 500, considered.

Notes. Distinguished: *Dewhurst* v. *Hunter*, [1932] All E.R.Rep. 753. Referred to: *Davis* v. *Harrison* (1927), 11 Tax Cas. 707; *Van den Berghs, Ltd.* v. *Clark* (1934), 151 L.T. 435; *Aeolian Co.* v. *I.R.Comrs.*, *I.R.Comrs.* v. *Aeolian Co.*, [1936] 2 All E.R. 219; *Bush, Beach and Gent, Ltd.* v. *Road*, [1939] 3 All E.R. 302; *I.R.Comrs.* v. *Williams' Executors*, *Williams' Executors* v. *I.R.Comrs.*, [1943] 1 All E.R. 318; *Henley* v. *Murray* (1949), 93 Sol. Jo. 792; *Anglo-French Exploration Co.* v. *Clayson*, [1955] 3 All E.R. 779.

As to compensation for loss of office, see 20 Halsbury's Laws (3rd Edn.) 324.

Case referred to:

(1) *Cowan* v. *Seymour*, [1920] 1 K.B. 500; 89 L.J.K.B. 459; 122 L.T. 465; 36 T.L.R. 155; 64 Sol. Jo. 259; 7 Tax Cas. 372, C.A.; 28 Digest (Repl.) 225, *971.*

Case Stated by the General Commissioners of Income Tax for the Division of Castle Ward in the county of Northumberland, for the opinion of the King's Bench Division of the High Court of Justice.

At a meeting of the commissioners held on July 17, 1922, Joseph Robinson & Sons (hereinafter called the respondents) appealed against assessments of £14,397 first assessment and £16,667 additional first assessment for 1919–1920, and £11,911 first assessment and £16,666 additional assessment for 1920–1921, and £27,000 first assessment for 1921–1922, made on them under Sched. D, Case I, of the Income Tax Acts in respect of the profits of the trade or business of steamship managers and ship-brokers carried on by them at Maritime Chambers, Howard Street, North Shields. The question the commissioners were asked to decide was whether £50,000 received by the respondents was liable to income tax or not.

The respondent firm was constituted in succession to a former firm of the same name by a deed of co-partnership, dated Dec. 31, 1901, whereby Joseph Robinson, of the first part (now deceased), Alfred Robinson, of the second part, Charles Ogilvie Robinson (now deceased), of the third part, and Johnson Robinson, of the fourth part, mutually covenanted and agreed to become partners in the business of steamship managers and ship-brokers on and subject to the terms, conditions, and stipulations therein contained, and inter alia: (i) The partnership should commence on Jan. 1, 1902, and should continue until a dissolution by mutual agreement or until the same should be determined under the provisions therein contained. (ii) The style or name of the firm should be Joseph Robinson & Sons. (iii) The partnership business should be carried on at the offices in Maritime Chambers, North Shields, or in such other place or places as the partners should from time to time agree on. (iv) On the death of any partner the partnership should be dissolved so far as regards that partner only, and the share of such deceased partner in the partnership business as from the end of the current year of his death should accrue and belong absolutely and without payment to the remaining partners, and if more than one in shares proportionate to their then shares in the business.

The respondent firm at all dates material to the case consisted of the parties of the second, third, and fourth parts. The respondents at all dates material to the case were managers of the Stag Line, Ltd., a company incorporated under the

Companies Acts, 1862 to 1890, on Aug. 20, 1895, under articles of association which provided, inter alia:

"Art. 66.—The managers of the company shall be the person or persons for the time being constituting the firm of Joseph Robinson & Sons, of North Shields, who shall carry on and manage the business of the company.

Art. 69.—The managers shall, jointly or separately, have power, without the supervision or control of any of the other managers of the company, save as provided herein, to act as managers of the vessels belonging to or controlled by the company, and save as hereunder excepted, to do all things requisite for the attainment of the objects for which the company is established, including the power to purchase, charter, or contract for the building of ships, or vessels, and to sell, exchange or dispose of all or any of the vessels or other property of the company; to bring or defend actions or suits by or against the company; to settle or refer any disputed claims, whether for ship, freight, insurance or cargo, or however arising, to appoint or discharge clerks, agents, brokers, masters, crews, surveyors, superintendents and all other persons required for the purposes of the company, in this country or elsewhere; to contract with any government or Power for the carriage of mails, troops, stores, or other freight; to invest the funds of the company; to lend or borrow money, and to make, accept, endorse, negotiate or pay bills of exchange on behalf of the company, and generally to manage the affairs and business of the company as they in their discretion shall think best for the interests of the company. The managers shall not have power to purchase the business of or to amalgamate with any other company, or to purchase ships or shares of ships other than those named in the memorandum of association, or to dispose of any ship (except in the case of serious damage through accident) or to commence any business as ship engine and boiler builders or repairers, or to issue debentures, or to mortgage any of the property of the company, without the consent of a general meeting.

Art. 71.—The remuneration of the managers shall be an annual salary of two shillings per gross register ton of each of the ships belonging to or controlled by the company, together with seven-and-a-half per cent. of the net profits earned in any year by the company. Provided always that in ascertaining the net profits, depreciation shall be deemed to be an expense to be deducted from the gross profits. Out of this remuneration the managers shall pay office rent and rates and the salaries of indoor clerks at the registered office of the company. All other expenses of carrying on the business of the company, including travelling and hotel expenses, telegrams, use of telephones, stamps, postages, books, stationery, and other out-of-pocket expenses, shall be paid by the company. All return brokerages, or commissions, rebates, discounts and allowances of every kind shall belong to the company. The managers shall be entitled to draw a proportionate part of their salaries, and an estimated amount (subject to adjustment at end of the year) of their percentage of the profit, and debit the same to the respective voyages of the vessels from time to time. The remuneration to the managers shall commence, as to each ship, from the date on which it is taken over by the company, and shall cease three months after her sale or loss."

By a special resolution passed on Dec. 19, 1900, and confirmed on Jan. 5, 1901, art. 71 was extended by the following words, viz.:

"The managers shall for each ship purchased or contracted for by the company also be entitled to an additional six months' salary for their services previous to her being taken over by the company or to her sale, if sold during construction. Only the profits or loss arising from the sale of ships during construction shall be brought into profit and loss account of the year."

By a further special resolution with retrospective effect passed by the company on June 22, 1918, a commission of 7½ per cent. on the excess realised over book

values of vessels lost or sold was made payable to the managers and was actually paid in respect of all vessels of the old company. By a further special resolution passed on June 22, 1918, the company's articles of association were further extended by inserting therein, inter alia, art. 115b as follows:

> "In the event of the winding-up of the company (whether for the purposes of reconstruction or otherwise) the company may pay the managers of the company out of the surplus assets of the company, after satisfying or providing for the debts and liabilities of the company and the costs and expenses of winding up such sums by way of compensation for loss of office as the company in general meeting may determine."

At extraordinary general meetings of the company held on June 22 and July 8, 1918, it was resolved: (i) That the scheme of reconstruction submitted to the meetings should be and the same was thereby approved. (ii) That the liquidator of the company should be and he was thereby authorised to consent to the registration of a new company with a memorandum and articles of association in the form of the draft submitted to the meetings; and (iii) That the draft agreement submitted to the meetings should be and the same was thereby approved, and the liquidator, when constituted, should be and he was thereby authorised, pursuant to s. 192 of the Companies (Consolidation) Act, 1908, to enter into an agreement with the new company, when incorporated, in the terms of the said draft, and to carry the same into effect with such modifications (if any) as he might think fit.

At an extraordinary general meeting of the company held on July 20, 1918, it was resolved to wind-up the company, and Robert Pearson Winter, chartered accountant, was appointed liquidator. It was also resolved that the liquidator be authorised to distribute the sum of £657,920 5 per cent. War Stock 1929–47 and £164,480 5 per cent. National War Bonds 1922, rateably among the members of the company, and further

> "that there should be transferred to the managers of the company as compensation for loss of office such a sum as shall be fixed by the meeting of 5 per cent. National War Bonds 1922, representing part of the surplus assets of the company after satisfying or providing for the debts and liabilities of the company and the costs and expenses of the winding-up."

On the last-named resolution being considered, the managers, as parties interested, left the meeting, and in their absence the shareholders present unanimously resolved that the nominal amount to be so transferred should be £50,000. The said sum of £50,000 5 per cent. National War Bonds 1922 was in terms of the said resolution transferred to the managers—the partners in the said firm of Joseph Robinson & Sons—in October, 1918.

On Aug. 29, 1918, a new company was registered under the Companies Acts, 1908 to 1917, under the name Stag Line, Ltd., with a capital of £500,000, divided into 500,000 shares of £1 each, and with a memorandum and articles of association in the form of the draft before referred to, one of the objects for which the company was formed being to acquire the undertaking, business, and property of the Stag Line, Ltd., or any part thereof, and for that purpose to enter into an agreement in the form of the draft agreement before mentioned, and which agreement was duly made on Nov. 7, 1918, between the said Stag Line, Ltd., incorporated 1895 (the old company), and Robert Pearson Winter, the liquidator thereof, of the one part, and Stag Line, Ltd., incorporated 1918 (the new company), of the other part. By the said agreement it was agreed, inter alia:

> "(1) That the liquidator shall transfer to the new company the undertaking, business, steamers, equipment, ships, furniture, chattels, moneys, credits, book debts, bills, notes, things in action (including the benefit of all pending contracts) and other property and effects of the old company of any nature or kind whatsoever except (a) a sum sufficient to pay and discharge the debts and liabilities of the old company (b) the sum of £657,920 5 per cent. War

stock 1929–47 (c) the sum of £164,480 5 per cent. War Bonds 1922, and (d) the sum of £50,000 5 per cent. National War Bonds 1922, before mentioned;

(2) Every member of the old company should be entitled to an allotment of 25 shares of £1 each in the new company credited as fully paid in respect of every share in the old company held by him."

By the said agreement powers were conferred on the liquidator to deal with the proportion of the said shares which, but for their dissent, would be liable to be claimed by any member of the old company pending the transfer of the property to the new company. The whole of the shareholders of the old company at the date of liquidation thereof were allotted their full proportion of shares in the new company, the seven shareholders who subscribed the memorandum and articles of association being allotted one share for cash in addition.

At the date of the winding-up of the old company that company owned and was trading with two steamers, the *Gardenia* and the *Clintonia*. Those vessels were transferred to the new company as part of the property of the old company falling to be transferred under the terms of the agreement referred to, the whole of the terms of which were duly carried out.

The articles of association of the new company provided, inter alia:

"Art. 76.—The management of the business and control of the company shall be vested in the managers, who, in addition to the powers and authorities by these articles expressly conferred upon them, may exercise all such powers and do all such acts and things as may be exercised or done by the company and are not hereby or by statute expressly directed or required to be exercised or done by the company in general meeting, subject, nevertheless, to the provisions of these articles and to any regulations from time to time made by the company in general meeting, but so that no such regulations shall invalidate any prior act of the managers which would have been valid if no such regulation had been made.

Art. 87.—The remuneration of the managers shall be an annual salary of two shillings per gross register ton of each of the ships belonging to or managed by the company, together with a commission at the rate of seven-and-a-half per cent. on the profits of the company before any deduction is made therefrom for interest on borrowed money or for depreciation or reserve. The managers shall provide suitable offices and shall pay the rent, rates and taxes payable in respect thereof, and the salaries of all indoor clerks employed on the business of the company. All other expenses of carrying on the business of the company, including travelling and hotel expenses of the managers, shall be paid by the company. All return brokerages or commissions, rebates, discounts and allowances of every kind shall belong to the company. The annual salary of the managers shall commence as to each ship acquired under the agreement mentioned in cl. 3 (2) of the memorandum of association from the date on which it is taken over by the company, and as to any other ship acquired by the company six months prior to the date on which it is taken over by the company, and shall cease as to every ship six months after the sale or loss thereof. The company in general meeting may increase the remuneration of the managers, either permanently or for a year or longer period.

Art. 89.—The first managers of the company shall be the firm of Joseph Robinson & Sons, North Shields, as that firm may be for the time being constituted, and any change in the members or style for the time being of that firm shall not prejudice or affect the appointment of that firm as managers, provided the members or member for the time being of that firm shall be willing to act in that capacity."

The partners constituting the said respondent firm of Joseph Robinson & Sons at the date of the liquidation of the old company were shareholders thereof, and were allotted shares in the new company under the terms of the said agreement.

The respondents had annually submitted to the inland revenue accounts of the

profits arising from their business as ship managers, which had been confined solely to the management of the Stag Line, Ltd., with the exception that small sums in fees received through one of the partners, who was a qualified marine surveyor, were brought into the partnership accounts, and amounts received from the Ministry of Shipping from 1918 for management fees. In the profits returned for the year ending Dec. 31, 1918, the respondents excluded the said sum of £50,000, on the grounds that it was not a trading receipt and did not form part of the annual profits. The said sum of £50,000 had been brought into charge to income tax and assessments in respect thereof had been adjusted, against which the respondents appealed.

The respondents contended: (i) The sum of £50,000 was paid to the managers by the company voluntarily, under powers contained in the articles of association and the special resolutions, out of the surplus assets of the company by way of compensation for loss of office. It was not made under any agreement, the amount having been voted voluntarily at the meeting held on July 20, 1918, and the managers were not even present at the meeting when it was passed. The reference to this compensation, in the agreement between the old company and its liquidator and the new company dated Nov. 7, 1918, was merely by way of recital, the resolution having already become effective. (ii) The sum mentioned did not accrue to the respondents in respect of any business carried on by them, but was a voluntary payment by the shareholders to compensate them for loss of office which automatically ceased when the company went into liquidation. (iii) The firm had not a controlling interest in the company, because they only held jointly about one-tenth of the total share capital of the company. (iv) The new company was not formed to acquire and carry on the business of the old company, but only to take over a comparatively small portion of the assets which were clearly specified. There was in no sense a reconstruction of the old company, which was, in point of fact, wound up entirely. (v) The assessment was under Sched. D, which only applies to annual profits or gains. This transaction could not be said to be an annual profit or gain, as it was, in point of fact, the only transaction of its kind that had ever occurred in the history either of the company or of the firm of managers. The only provision for taxing "compensation for loss of office" was that contained in s. 19 (7) of the Finance Act, 1907, which limits such "compensation" to that given in respect of past services. This section applied only to Sched. E and not to Sched. D. (vi) The business of ship-owning was entirely different from almost all other kinds of businesses, inasmuch as such a business began as soon as a vessel was acquired and ceased as soon as it was sold or lost, so that the business of shipowner or ship-manager passed, on a sale, to the purchaser. It naturally followed that when the old company sold its assets to the new company, the business of the old company, and consequently of its managers, ceased entirely, and the new company began a new business on its formation. In this case there was no bargain that the managers of the old company were to be appointed managers of the new company, the appointment being voluntarily made by the shareholders. (vii) The £50,000 was given voluntarily by the shareholders out of the surplus assets which were either not liable to income tax or on which tax was paid before becoming assets, and it was given solely to compensate the managers for loss of future income arising through the distribution of assets of about £800,000 among the shareholders on the income from which the firm had been receiving a percentage as part of their remuneration as managers to the old company, such income ceasing on the formation of the new company. (viii) If instead of paying the managers this £50,000 the company had distributed it among the shareholders, the managers would have received as shareholders about one-tenth, say £5,000 not liable to tax, whereas if the £50,000 were held liable to excess profits duty, income tax and supertax, the managers would only receive about £4,000 and the shareholders nothing. (ix) The said assessments were incorrect and should therefore be discharged.

The appellant contended, inter alia: (i) that the said sum of £50,000 was part of the annual profits or gains arising or accruing to the respondents from a trade, profession, employment, or vocation of steamship managers and ship-brokers carried on by them; (ii) that the said sum of £50,000 was not compensation for loss of office; (iii) that it was never intended either by the respondents or by the company that the respondents should cease to act as managers of the business owned by the company, inasmuch as it was an essential part of the arrangements that the same business should continue to be carried on and that the respondents should continue their managership of such business; (iv) that the respondents did not in fact cease to act as managers of the said business; (v) that the said sum of £50,000 was not a voluntary payment by the shareholders of the company; (vi) that the said assessments were correct and should be confirmed.

The commissioners decided that the receipt of £50,000 by the respondents from the old company was not a profit liable to income tax, whereupon the inspector of taxes expressed dissatisfaction with the decision as being erroneous in point of law, and demanded a Case to be stated for the opinion of the court.

The Attorney-General (*Sir Patrick Hastings, K.C.*) and *Reginald Hills* for the Crown.

Latter, K.C., and *J. H. Stamp* for the taxpayers.

ROWLATT, J.—This case, like all cases of a similar nature, is very troublesome; because all these cases turn upon nice questions of fact, and I, at least, find very great difficulty in apprehending any permanent and clear line of division between the cases which are within and the cases which are without the scope of the Income Tax Acts. I think everybody is agreed, and has been agreed for a long time, that in cases of this kind the circumstance that the payment in question is a voluntary one does not matter. As Sir Richard Henn Collins said, one must not look at the point of view of the person who pays to see whether he is compellable to pay or not; one has to look at the point of view of the person who receives, to see whether he receives it in respect of his services, if it is a question of an office, and in respect of his trade if it is a question of trade, and so on. That is perfectly true. But when one looks at that question from the point of view of the recipient, one is sent back again, looking for that purpose, to the point of view of the payer, not from the point of view of compellability or liability, but from the point of view of a person inquiring what the payment is for; and one has to see whether the maker of the payment makes it for the services and the receiver receives it for the services.

This case is not very unlike *Cowan* v. *Seymour* (1), where officers of a company who had served for nothing during the life of the company, and in the winding-up after the winding-up, were given by the shareholders, out of their divisible profits, a gift. It was held in the Court of Appeal that there was no evidence which would justify the commissioners in holding that that was a profit of the offices of these gentlemen. I am bound to say a good deal of difficulty is caused to me by the way Lord Sterndale, M.R., puts it, when he says ([1920] 1 K.B. at p. 510), in that case, that this was not

> "a profit which accrued to the appellant by reason of his office, but it was very much more in the nature of a testimonial to him for what he had done in the past while his office, which had been terminated, was in existence."

That causes me a great deal of difficulty, because, unless there is some magic in the word "testimonial" which merely means a gift, if it was for what he had done in the past while in his office, that is for his services, and what the Master of the Rolls has described as a thing not taxable seems to me to be a gift for his services unless the distinction turns on the fact that the office had then terminated. There was this distinction between the facts in that case and the facts in the present case, that there, as the office had been an honorary one, there was no question of

payment as compensation for loss of office, and, therefore, the decision could only proceed in favour of the subject on the lines which the Court of Appeal then took and the Master of the Rolls has expressed. But in this case the respondents, the taxpayers, had an employment with, or did business for, the company, which was highly remunerative, and it was coming to an end, and the company took powers at the earliest moment, in distributing their ample excess assets, to make a substantial payment to the taxpayers. I do not think anything turns on the question, as between this case and *Cowan* v. *Seymour* (1), that in one case the company modified its articles of association at the last moment so as to make this present, whereas in *Cowan's Case* (1) they did not modify the articles, but all the shareholders gave it out of what was divisible to them. In this case we have the position that it is possible to make this payment as a compensation for loss of office, and it is so expressed in the resolution, and there is no finding by the commissioners that that resolution does not represent the facts, viz., that it is fallacious to say that the company gave and the taxpayers received this sum as compensation for the loss of profits of their employment, which was terminated. If it was a payment in respect of the termination of their employment, I do not think that is taxable. I do not think that is taxable as a profit. It seems to me that a payment to make up for the cessation for the future of annual taxable profits is not itself an annual profit at all. I do not know whether it has arisen or been discussed, and perhaps the less I say about it the better; but I should not have thought that either damages for wrongful dismissal, or a voluntary payment in respect of breaking an agreement which had some time to run, would be taxable profits. But at any rate, it seems to me that compensation for loss of an employment which need not continue, but which was likely to continue, is not an annual profit within the scope of the income tax at all.

The real crux of this case is this. It has been argued by the Attorney-General that in spite of what must be taken to be the view of the commissioners on the point, this is not compensation for loss of office. He says that here was a firm carrying on this business and acting for this steamship company. There came a reconstruction, and there was, in the course of reconstruction, this valuable windfall which fell to the taxpayers, and fell to them because of their position of managers to this line of steamers. Therefore, he says, it is not to be looked on as compensation for loss of office or employment; it has nothing to do with it; it was simply a windfall in the course of the history of the firm. That is attractive at first sight, but I do not think it will do. In this case there was a difference. There were large investments which contributed to the income of the company, on which the taxpayers got their percentage as part of their remuneration. They were, therefore, losing something; the company which they had served was being wound up. There was a great surplus of assets. The company, as then constituted, certainly came to an end; and when it came to an end it gave this solatium to the taxpayers out of its abundant prosperity, once for all, not because of anything they were doing, but really very much, I think, as the Master of the Rolls puts it, as a testimonial for what they had done in the past in their office which had now terminated.

It is, of course, true that it is a trade receipt in this sense, that if the taxpayers had not been managers they never would have got it. It was not a gift to them as individuals or anything of that sort. A question has been raised as to how it ought to be dealt with in the partnership accounts, and so on, but I do not think that that consideration affects the matter. If the taxpayers had been one man instead of a firm it would have been just the same, in which case there would have been no partnership accounts at all; and the question would have been, what is the position when his office comes to an end and reconstruction is taking place by which he will lose something? The old arrangement has come to an end and he gets this lump sum given him as compensation for loss of office, or as a testimonial because of the work he had done in the past—work which was not at an end. If it

is that, which the commissioners have found it is, and I think there was sufficient evidence for them to find it, I think the tax is not exigible, and, therefore, this appeal must be dismissed and the decision of the commissioners affirmed.

Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue*; *King, Wigg & Brightman*, for *Wilkinson & Marshall*, Newcastle-on-Tyne.

[*Reported by* J. S. SCRIMGEOUR, ESQ., *Barrister-at-Law.*]

Re JESSOP

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Hill, J.), April 14, June 23, 1924]

[Reported [1924] P. 221; 93 L.J.P. 135; 132 L.T. 31; 40 T.L.R. 800]

Will—Alteration—Interlineation—Ascertainment of date of alteration—Evidence—Declaration of intention by testator—Admissibility of declaration made before execution.

When the question is whether an alteration in or an addition by interlineation to a will has been made before or after execution, the court can have regard to a declaration of intention by the testator, to which the alteration or interlineation gives effect, made before the execution of the will, but not to such a declaration made by him subsequent to execution.

Notes. As to alterations in wills, see 34 HALSBURY'S LAWS (2nd Edn.) 70–73; and for cases see 44 DIGEST 305–315.

Cases referred to:

(1) *Doe d. Shallcross* v. *Palmer* (1851), 16 Q.B. 747; 20 L.J.Q.B. 367; 17 L.T.O.S. 252; 15 J.P. 689; 15 Jur. 836; 117 E.R. 1067; 44 Digest 313, *1462.*

(2) *Re Adamson* (1875), L.R. 3 P. & D. 253; 44 Digest 314, *1472.*

(3) *Sugden* v. *Lord St. Leonards* (1876), 1 P.D. 154; 45 L.J.P. 49; 34 L.T. 372; 24 W.R. 860, C.A.; 44 Digest 356, *1884.*

Also referred to in argument:

Atkinson v. *Morris*, [1897] P. 40; 66 L.J.P. 17; 75 L.T. 440; 45 W.R. 293; 13 T.L.R. 83; 41 Sol. Jo. 110, C.A.; 44 Digest 360, *1931.*

Gould v. *Lakes* (1880), 6 P.D. 1; 49 L.J.P. 59; 43 L.T. 382; 44 J.P. 698; 29 W.R. 155; 44 Digest 247, *736.*

In the Goods of Sykes (1873), L.R. 3 P. & D. 26; 42 L.J.P. & M. 17; 28 L.T. 142; 37 J.P. 183; 21 W.R. 416; 44 Digest 314, *1464.*

Motion for probate of the will, dated June 21, 1921, of John De Burgh Jessop, who died on Mar. 23, 1924.

The will contained the following words: "I bequeath to each of my sisters, Mabel Allyne Hurt and Dorothy Babington Johnson, the sum of £1,000 free of legacy duty, and to my sister Eva Fitzherbert Jessop the sum of £5,000 free of legacy duty," but the figure £5,000 had been altered to £1,000 by striking out the "£5,000" and writing the "£1,000" above it, and the following words had been added: "and £1,000 to my god-daughter Judith Allyne Hurt." Both the alteration and the interlineation were in the handwriting of the testator, and initialled by him. Due execution of the will, on June 21, 1921, was proved by an affidavit of one of the attesting witnesses, but this witness could not say whether the alterations were prior or subsequent to the execution, and the other witness was not available.

On June 16, 1921, the testator had written to his solicitor, who had, on his instructions, sent him a draft will: "I see in the will you sent that £5,000 is left to my youngest sister. As she is now to be married in September I shall alter it to £1,000 and initial it, as it will save having to make it out again." In reply the solicitors wrote next day that the copy sent was only a draft will, and that they would send a fair copy for execution by him if he would return the draft with any alterations he desired. The testator, however, executed the draft will, and wrote to his solicitors on June 21, 1921: "I have signed the draft will and put in two alterations as you see. I hope it is in order." His executors moved for probate of the will as altered, and the evidence of an expert was given to the effect that the alteration and the interlineation had both been made at the same time.

Bayford, K.C. (*T. Bucknill* with him), for the executors.
H. W. Barnard for a party interested.

Cur. adv. vult.

June 23. **HILL, J.,** read a judgment, in which, after stating the facts, he said: If there be no evidence, the presumption is that the alterations were made after execution. There is no internal evidence from the document itself from which a conclusion can be drawn as to the alterations as a whole, but from my own examination of them, and from the evidence of the expert, I am satisfied that they were both made at the same time. If a letter written by the testator on the day of execution, but as shown by its terms, after execution, and a letter written by him four days earlier are admissible as evidence, the presumption would be rebutted, and it would be established that the alteration and addition were made before execution. But I think it is clear that on a question of execution declarations of the testator made after execution are not admitted: *Doe d. Shallcross* v. *Palmer* (1); *Re Adamson* (2); and other cases. To admit such evidence would be to substitute a mere statement of the testator for the attestation required by the statute. I cannot find that the contrary view has ever been put higher in regard to alterations than in the passage in COCKBURN, C.J.'s judgment in *Sugden* v. *Lord St. Leonards* (3), where he quotes this passage from LORD CAMPBELL'S judgment in *Doe d. Shallcross* v. *Palmer* (1): "And for the same reason, a declaration after the will was executed that the alteration had been made previously would be inadmissible," and says: "This may be more doubtful. But, assuming it to be right, it does not touch the present case."

I do not think I am entitled to have regard to the declarations after execution. Declarations of intention of the testator made before the execution of the will have been admitted as evidence that the alteration, which gives effect to that intention, was made before execution: *Doe d. Shallcross* v. *Palmer* (1). The declaration there was a declaration of an intention to benefit a certain person who was not mentioned in the will otherwise than in the interlineation. If evidence of a general intention is admissible, evidence of the specific intention to alter the £5,000 to £1,000, i.e., to make the specific alteration which appears in the will, must, a fortiori, be admissible. I have before me evidence of such intention in the letter written by the testator before execution, namely, on June 16, 1921. Admitting the letter of June 16, 1921, I am satisfied that the alteration from £5,000 to £1,000 was made before execution; and as I am satisfied that the interlineation was made at the same time, I come to the conclusion that the presumption is rebutted as to it also, and I find that it was made before execution. Probate will, therefore, issue of the will as altered.

Solicitors: *Tarry, Sherlock & King.*

[*Reported by* J. A. C. SKINNER, ESQ., *Barrister-at-Law.*]

A

SHRIMPTON *v.* RABBITS

[King's Bench Division (Swift and Acton, JJ.), April 2, 1924]

[Reported 131 L.T. 478; 40 T.L.R. 541; 68 Sol. Jo. 685]

Rent Restriction—Possession—Matters to be considered—Position of both landlord and tenant—Reasonableness—Reasonableness of claim—Reasonableness of order being made—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 5 (1), *as substituted by Rent and Mortgage Interest Restrictions Act*, 1923 (13 *&* 14 *Geo.* 5, *c.* 32), *s.* 4.

In considering whether to make an order for possession of a dwelling-house under s. 5 (1) of the Increase of Rent, &c., Act, 1920, as substituted by the Rent, &c., Restrictions Act, 1923, s. 4 [now s. 3 of and Sched. I to the Rent, &c., Restrictions (Amendment) Act, 1933], the court must take into account all the circumstances affecting the case, whether relating to the landlord or to the tenant, and is not confined to considering the landlord's position only. The court must first determine whether the landlord's wish for possession is reasonable; if that is established, the court must then determine whether, in all the circumstances, it is reasonable that the court should accede to that reasonable requirement.

Notes. As to the reasonableness of a claim for possession, see 23 Halsbury's Laws (3rd Edn.) 814, 815; and for cases see 31 Digest (Repl.) 695 et seq. For Rent Restrictions Acts, 1920, 1923, and 1933, see 13 Halsbury's Statutes (2nd Edn.) 981, 1033, 1044.

Case referred to:

(1) *Williamson* v. *Pallant*, ante, p. 623; [1924] 2 K.B. 173; 93 L.J.K.B. 726; 131 L.T. 474; 22 L.G.R. 416, D.C.; 31 Digest (Repl.) 696, *7876*.

Appeal from Marylebone County Court.

The plaintiff, Joseph Shrimpton, was the landlord of a house, No. 33, Strode Road, Willesden, and the defendant, James Rabbits, with his wife and baby, was the tenant of two rooms in the house. The plaintiff, with his wife and daughter, occupied five rooms in the house and he sought to recover possession of the two rooms occupied by the defendant on the ground that they were reasonably required by him for occupation by his grown-up daughter who was about to marry and desired to live in the two rooms in question with her husband. The learned deputy county court judge gave judgment in favour of the plaintiff and made an order for possession of the two rooms in question, holding that, in considering whether or not it was reasonable for him to make the order for possession within the meaning of s. 5 (1) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, as substituted by s. 4 of the Rent and Mortgage Interest Restrictions Act, 1923, he could only have regard to the circumstances of the landlord and could not take the tenant's position into consideration. The tenant appealed.

W. A. Jowitt, K.C., and *W. E. Beckett* for the tenant.

R. J. Sutcliffe for the landlord.

SWIFT, J.—This is an appeal from a judgment ordering possession of two rooms on the top floor of 33, Strode Road, Willesden, to be given up to the landlord by the tenant. The claim is made under s. 5 (1) of the Rent Restrictions Act, 1920, as substituted by s. 4 of the Rent, &c., Restrictions Act, 1923, which provides:

"No order or judgment for the recovery of possession of any dwelling-house to which this Act applies, or for the ejectment of a tenant therefrom, shall be made or given unless"

one or more of the conditions set out under the letters (a), (b), (c), (d), (e), (f), (g), (h), or (i) has been complied with. But the existence of one or more of those

conditions does not entitle a landlord to the possession of the premises. There is a further general condition inserted by the legislature into this section, which is that "the court considers it reasonable to make such an order." So that, although a landlord were able to prove that conditions (a), (b), (c), (d), (e), (f), (g), (h), and (i) were every one existing, he would not be entitled to an order giving him possession of the premises unless the court further considered it reasonable to make such an order.

In considering whether it is reasonable to make such an order, it seems to me that a court which is asked to make the order must take into account all the circumstances affecting the holding of the premises by the person who holds them and as they relate to the landlord who wants to hold them. Certain of those matters are specified in the different conditions laid down by this clause. For example, before a landlord can have possession he must satisfy the court, within the language of condition (d), that

> "the dwelling-house is reasonably required by [him] for occupation as a residence for himself, or for any son or daughter of his over the age of eighteen years, or for any person bona fide residing with him, or . . . in his employment. . . ."

Until he has satisfied the court that he reasonably requires the dwelling-house for the occupation of himself or his son or his daughter or one of the other people who are specified in para. (d), he is not in a position to come and ask for an order for possession, and then it is not sufficient that he should satisfy the court that he reasonably requires the house for his own occupation or that of his son or daughter and so on. He must satisfy the court that it is reasonable to make the order. Then he must satisfy the court that there is alternative accommodation within the meaning of the section for the tenant whom he is seeking to dispossess, or that the circumstances are such that the dwelling-house is reasonably required for the purposes mentioned.

A great deal of confusion, it seems to me, has crept in in the discussion of cases in county courts in regard to this matter from the fact that counsel have not drawn a clear distinction between a reasonable requirement of the landlord for the premises, which is one thing, and a quite different thing, the reasonableness of the county court judge in considering it reasonable to make the order. That confusion is very clearly illustrated in this case, because counsel for the landlord told us that, when he was in the county court, the words coming after (i), "and the court considers it reasonable to make such an order or give such judgment," was never discussed at all. So far from taking into consideration all the circumstances, it was held by the learned deputy county court judge that he could not take the tenant's position into consideration at all, that is to say, that after making up his mind whether or no it was reasonable to make the order, he was altogether to ignore any right, any interest, or any circumstance affecting the tenant. If he had been told that the tenant was upon the point of death which would certainly be accelerated if he were to be carried out of the house, he would not listen to it, and if one of innumerable circumstances could be proved to him to affect the position of the tenant so as to make it most unjust and most cruel to turn him out of his possession, he could not look at it.

In my view that decision was wrong. What weight ought to be given to the evidence when he has it is quite a different matter. I can very well imagine that he might listen to the evidence of the tenant and his wife saying: "We have hunted for lodgings everywhere and we cannot find them, and it is a hardship to turn us out," and still have said: "I consider it reasonable to make this order giving the landlord possession of these premises." But the complaint which is made against him is that as a matter of law he has deprived himself of the right of considering those things and has said: "I cannot take the tenant's position into consideration at all." In that I think that he was wrong. It by no means follows that if he had other evidence his judgment would not have been exactly the same.

On the other hand, we cannot say that, had he considered the matters which he excluded from his consideration, his judgment would necessarily be the same. In these circumstances it is necessary that this case should go back for a new trial, with an intimation that in the view of this court it is bad law to say that the tenant's position is not to be taken into consideration by the court in determining whether or no it considers it reasonable to make an order for possession.

ACTON, J.—I agree. The more these cases are discussed before us the more clearly, in my opinion, it emerges that a difficulty arises from a confusion of thought between the words "reasonably required by the landlord" in s. 5 (1) (d), and the words "the court considers it reasonable to make such an order or give such judgment," which follow upon the last of those lettered paragraphs, namely, para. (i). That confusion of thought may be eliminated and disposed of by this sentence. Because a wish is reasonable, it does not follow that it is reasonable in a court to gratify it. There are two processes which have to be gone through. The first process is to ascertain whether the wish which the landlord has for the possession of the premises is a reasonable wish; unless that is demonstrated there is an end of his claim. But after it has been ascertained that the desire or requirement of the landlord is a reasonable desire or requirement, there follows a further question, too often hitherto either ignored altogether or confounded with the question I have already mentioned, namely: Is it in all the circumstances of the case reasonable that the court should accede to that reasonable requirement? In dealing with that second inquiry it has been decided by this court in *Williamson* v. *Pallant* (1), and is decided now, that it is the duty of the learned county court judge to take into consideration all the relevant circumstances, including every such circumstance which affects the position and the interests of the tenant as well as of the landlord. I think if those principles are borne in mind, we shall very soon see the end of the unfortunate confusion which has crept into the administration of this Act.

New trial ordered.

Solicitors: *Peacock & Goddard*; *E. A. Chandler.*

[*Reported by* T. W. Morgan, Esq., *Barrister-at-Law.*]

A

THE PALUDINA

[Court of Appeal (Bankes, Scrutton and Atkin, L.JJ.), December 5, 1924]

[Reported [1925] P. 40; 132 L.T. 724; 16 Asp.M.L.C. 453]

B *Shipping—Collision—Damages—Consequential damage—Collision between two vessels followed by collision between one of those vessels and a third—Liability for resultant damage—Burden of proof.*

There is no rule of the Admiralty Court that there is a presumption that damage following a collision between two vessels is the result of the collision unless the defendant proves the contrary. In all the cases in which that C doctrine is supposed to have been laid down the consequential damage happens to the ship primarily affected by the collision—as where a collision occurs between ships A. and B. and shortly after the collision the B. goes ashore—and there is no suggestion of the action of a third party, as where a collision between ships A. and B. is followed by a collision between ship B. and ship C. in which the B. is damaged. In the latter case the plaintiff must show that D the chain of causation connecting the damage with the negligence is complete and that the consequential damage was a consequence of the defendant's negligence. For ship B. to recover from ship A. in respect of damage caused to the B. in her collision with the C. the burden is on the B. to prove that the collision between her and the C. and the resultant damage was the consequence of the A.'s negligence in the original collision between the A. and the B.

E Observations of Dr. Lushington in *The Pensher* (1) (1857), Sw. 211, and *The Mellona* (2) (1847), 2 Wm. Rob. 7, 13, distinguished. Observations of Hill, J., in *The Waalstroom* (3) (1923), 17 Lloyd L.R. 53, applied.

Notes. This case went to the House of Lords where it was affirmed sub nom. *Singleton Abbey* (*Owners*) v. *Paludina* (*Owners*), *The Paludina*, [1926] All E.R.Rep. 220, other questions being dealt with.

F As to burden of proof of negligence in cases of collisions at sea and the measure of damages therein, see 30 Halsbury's Laws (2nd Edn.) 819, 820, 855–863; and for cases see 41 Digest 769–771 and 17 Digest (Repl.) 114 et seq.

Cases referred to:

(1) *The Pensher* (1857), Sw. 211; 29 L.T.O.S. 12; 166 E.R. 1100; 41 Digest 770, *6255*.

G (2) *The Mellona* (1847), 3 Wm. Rob. 7; 5 Notes of Cases, 450; 9 L.T.O.S. 474; 11 Jur. 783; 166 E.R. 865; 41 Digest 690, *5194*.

(3) *The Waalstroom* (1923), 17 Lloyd L.R. 53.

(4) *Weld-Blundell* v. *Stephens*, [1920] A.C. 956; 89 L.J.K.B. 705; 123 L.T. 593; 36 T.L.R. 640; 64 Sol. Jo. 529, H.L.; 36 Digest (Repl.) 201, *1064*.

H (5) *Scott* v. *Shepherd* (1773), 2 Wm. Bli. 892; 3 Wils. 403; 96 E.R. 525; 36 Digest (Repl.) 23, *100*.

(6) *Jones* v. *Boyce* (1816), 1 Stark. 493, N.P.; 36 Digest (Repl.) 23, *101*.

Also referred to in argument:

The Linda (1857), Sw. 306; 30 L.T.O.S. 234; 4 Jur.N.S. 146; 6 W.R. 196; 166 E.R. 1149; 41 Digest 787, *6477*.

I *The George and Richard* (1871), L.R. 3 A. & E. 466; 24 L.T. 717; 20 W.R. 245; 1 Asp.M.L.C. 50; 41 Digest 769, *6246*.

Appeal from a decision of the President (Sir Henry Duke, P.) in an action for damage by collision.

The plaintiffs were the owners of the steamship *Singleton Abbey*, 2,324 tons gross and 1,429 tons net register, 303 ft. in length, and the defendants were the owners of the steamship *Paludina*, 5,818 tons gross and 341 tons net register, 425 ft. in length. On the evening of Nov. 21, 1922, the *Singleton Abbey* and the *Paludina* came to moorings at the Fish Market Quay in the Grand Harbour at Valetta.

There was fine weather, each of them was in charge of a pilot, and they took up moorings at which they might remain in safety during the period in which their presence was required at that place. The wind changed during the night, and it became stormy. At 8 a.m. on July 22 the *Paludina's* starboard bow came into contact with the *Singleton Abbey's* port bow, and it remained in contact for upwards of three hours, but small damage was suffered by either vessel. At 11 a.m. the *Paludina*, with the assistance of two tugs, began a series of manœuvres for the purpose of coming away from her moorings at the quay, and taking up a position affording a better shelter. Shortly after 11.30 a.m. the *Paludina* fell down bodily upon the *Singleton Abbey*. She was, by the use of her own steam and with the assistance of a tug, brought alongside the *Singleton Abbey* under port helm and cleared the stern of the *Singleton Abbey*, but thereupon, by reason of the strong wind, she fell across the cables of the *Singleton Abbey*, and caused the *Singleton Abbey* to drag away from her moorings. As a result the *Singleton Abbey* came into collision with another vessel, the *Sara*, which was to leeward, and broke her away from her moorings. After a quarter-of-an-hour or twenty minutes the *Sara*, having got up her anchors to bring herself into a position of safety, came under the stern of the *Singleton Abbey*, brought her side into contact with the propellers of the *Singleton Abbey*, and received such injuries that she sank. By the collision which sank the *Sara*, the propeller of the *Singleton Abbey* was damaged to a substantial extent. There was thus a collision of the bows of the *Singleton Abbey* and the *Paludina*, a collision of the *Singleton Abbey* with the *Sara* in which little damage was done, though the *Sara* was broken adrift, and a collision of the *Sara* with the propeller of the *Singleton Abbey* by which the *Sara* was sunk and the propeller of the *Singleton Abbey* was damaged.

SIR HENRY DUKE, P., found that the *Paludina* was alone to blame for the first collision. As regards the third the owners of the *Paludina* had not established that that collision was due to the negligence of those in charge of the *Sara*. He, therefore, held that the *Paludina* was to blame for these successive collisions, and that the *Singleton Abbey* was not to blame. The owners of the *Paludina* (the defendants) appealed.

Butler Aspinall, *K.C.*, *Stephens*, *K.C.*, and *Langton* for the defendants.
Dunlop, *K.C.*, and *Noad* for the plaintiffs.

BANKES, L.J.—This appeal has reference only to what has been referred to as the last collision of several which occurred on the day in question, the collision between the *Sara* and the *Singleton Abbey*. That collision was the result of something which had happened a considerable time before, and it is necessary to refer to those circumstances in order to lead up to the point which this court has to decide. [His Lordship stated the facts and continued:] The question we have to decide is whether the learned President was justified in coming to the conclusion, after taking the advice of his assessors, that the damage which is the subject of this appeal was directly caused by the original negligence of the *Paludina*.

Something has been said to us about the burden of proof. I entirely adopt what HILL, J., said in *The Waalstroom* (3). It seems to me that the plaintiff must always show, in a case in which he complains of damage resulting from negligence, that the negligence was the direct cause of the damage. In some cases a considerable interval may elapse between the time when the negligence is said to have occurred and the time when the damage is said to have resulted. In those cases I think the onus lies on the plaintiff to show that the chain of causation connecting the damage with the negligence is complete. He may give evidence which, if not challenged and in reference to which no suggestion is made that it is not complete, discharges the burden, or which is such that, in the absence of any such challenge, there is only one inference which can be drawn. I think it is in reference to cases of that class that the authorities to which we were referred by counsel for the plaintiffs apply, and I think that the dicta of the learned judges, which he cited, have reference to the particular facts which were given in evidence

before them. I do not think that they can be treated as in any sense rules of law varying the general rule that in cases of this kind it lies upon the plaintiff to establish his case. I will read what HILL, J., said, because I think it accurately puts in a very few words what the law is in reference to this particular point. He said:

> "In my view, in the circumstances of this case, the burden of proving that the consequential damage was a consequence of the negligence is upon the plaintiffs. In my view it is always upon the plaintiffs; but the facts may speak for themselves, and in themselves shift the burden upon the defendants, as, for instance, in a case where stranding immediately follows the collision, and so follows that it speaks for itself and is primâ facie a consequence of the collision. But here, where there are a great many other facts to decide as to the subsequent disaster, beside the fact of the collision, in my view, the plaintiffs have a burden which, however it shifts from time to time, remains upon them; and they have not discharged that burden."

Here the case for the plaintiffs is that the chain of causation is quite complete; the *Singleton Abbey* and the *Sara* were both broken adrift by the negligence of those in charge of the *Paludina*; there was no novus actus interveniens; and, therefore, the view taken by the President was right. The argument for the defendants is that on the plaintiffs' own evidence there are two links missing. First, it is said that although the *Sara* was broken adrift by the negligence of the *Paludina*, she was still a free agent; that the inference to be drawn from the evidence was that her steam was up, and that she could have gone to any part of the harbour she liked and have been quite safe and out of the way of the *Singleton Abbey*; and that it could not be said, therefore, that the chain of causation was complete when it was found that the *Sara* had this opportunity of which, through a want of proper skill and seamanship, she did not avail herself. Secondly, it is said that another link in the chain is missing owing to the action of the master of the *Singleton Abbey*. He had steam up, he saw, and had an opportunity for twenty minutes of realising, the position in which the *Sara* was. He realised that the *Sara* was coming down upon him, and he was told by the second officer that the engines ought to be stopped. I will read his own words. He was very frank about it. In re-examination he was asked: "The suggestion is made that you ought to have stopped your engines, or rung them to stop before you did, so as to avoid hitting the *Sara* with your propeller—what do you say with regard to that? (A.) Well, I had to keep my engines going as long as I could, because I did not want the wind to take control of my ship. I wanted to have that in my own hands if I could, so I was going to hang on as long as I could. When I thought she was getting dangerously near I stopped the engines, but it apparently must have been a little bit too late." The defendants say that upon that there is a clear break in this chain. They contend that the damage complained of was not the result of the original negligence of the *Paludina*, but was due to the fault of the plaintiffs' master. The plaintiffs' reply is that it ought not to be attributed to him as a fault; he was in a position of danger, a position in which the defendants had placed him; and they contend that in those circumstances the chain is complete.

Both these points on which it is said that the chain is not complete are largely matters of seamanship—what was the right and proper thing to do in the particular circumstances—and we naturally take the advice of our assessors. I have asked them whether, assuming that the *Sara* had steam up, those in charge of the *Sara* were guilty of a want of reasonable care and good seamanship in not keeping the *Sara* clear of the *Singleton Abbey*? They give a reasoned answer, the result of which is that they say "No." On that point, therefore, it is immaterial whether the issue is on the plaintiffs or the defendants, the suggested break in the chain does not exist. The second question was: In the circumstances in which he was placed, was the master of the *Singleton Abbey* guilty of a want of reasonable care

and good seamanship in not stopping his engines in time to prevent the damage by the *Sara* striking the propeller? Their answer is, "Yes." After having heard the arguments of counsel for the plaintiffs on the point, so far as I am able to give an opinion, I entirely concur. In those circumstances it seems to me that it is unnecessary to look very closely at the question of onus of proof, because even assuming it was on the defendants to prove a break in the chain of causation, they have proved it. In these circumstances the decision of the learned President must be reversed on this point, and the appeal will be allowed with costs.

SCRUTTON, L.J.—I do not dissent from the conclusion at which my brothers have arrived, but I think it fair to say that I have felt considerable doubt during the course of the argument, and I do not regard this as at all an easy case. A number of ships were lying moored along a quay in Valetta Harbour with the wind blowing rather strongly into the harbour and with a considerable send of the sea. In these circumstances the *Paludina* broke loose, and, as is inevitable when a number of ships are moored in a row, she broke loose other vessels. No question comes before us in this appeal as regards her liability for breaking loose the *Singleton Abbey*. She knocked the *Singleton Abbey* into the *Sara* and the *Sara* broke adrift. There is no question here as to the liability of the *Paludina* for anything that happened in the collision between the *Singleton Abbey* and the *Sara*. The *Paludina* went on and ran into some other ship, and ultimately collided with some moorings further up the harbour and fetched up. The *Singleton Abbey* and the *Sara* got away from the track of the *Paludina*, and after some twenty minutes they came into collision with each other and the *Sara* was sunk. When the case came before the Admiralty Court the plaintiffs' pleaded case was that the *Paludina* fell bodily against the port side of the *Singleton Abbey* causing her to collide with the *Sara*, whereby the *Sara* was sunk. The defendants replied that it was not through any negligence of theirs that the *Sara* was sunk. It turns out not to be the fact, however, that the *Sara* sank owing to the original collision. What the exact facts are as to the subsequent collision is not very clear. Our assessors advise us that they doubt whether the *Sara* and the *Singleton Abbey* ever got really clear of each other; they think that they were always quite close to each other. Some twenty minutes afterwards, owing to something that was done, probably—this is my own view and not the opinion of the assessors—owing to the *Sara* hauling on her anchor and nearly getting it up in an attempt to get away, the *Sara* began drifting astern and struck the bow of the *Singleton Abbey*, drifted down along her side, and got under the counter where the propeller of the *Singleton Abbey* was revolving. The *Singleton Abbey* was using her propeller to keep herself head to wind and to prevent herself from drifting further. Her second officer was aft in accordance with the usual practice of vessels in port, in order to give warning to the bridge when the use of the propeller might be dangerous. Apparently, the second officer did warn the bridge that there was going to be danger if the propeller was working while the *Sara* was drifting aft, and the master acted on that warning by stopping the engines. But either the warning was given too late or the master did not act upon it in time, with the result that when the *Sara* got under the counter the propeller was still revolving. It struck the *Sara*, broke four blades, and sank the *Sara*.

The question between the *Sara* and the *Singleton Abbey* is not before us; that has been fought out in the court of Malta, which has found neither party to blame. As between the *Sara* and the *Singleton Abbey*, therefore, the damage to the *Sara* is not before this court. What is before us is the attempt of the *Singleton Abbey* to recover from the *Paludina* the damage done by the *Sara* to the propeller of the *Singleton Abbey*. It is said that there is a rule of the Admiralty Court, supported by several decisions of Dr. Lushington, that the presumption is that damage following a collision is the result of the collision unless the defendant proves the contrary. All the cases, so far as I have looked at them, in which that doctrine is supposed to be laid down, are cases where the damage happens to the ship

primarily affected by the collision, and there is no suggestion of the action of third parties. A collision occurs between ships A. and B., and shortly after the collision B. goes ashore—that is the ordinary type of case, and DR. LUSHINGTON has said that in a case like that one does not begin to inquire elaborately why the ship went ashore; it is to be assumed, until the defendant has shown the contrary, that she went ashore because of the collision which happened to her just before. That is quite a different class of case from the present. Here, the *Singleton Abbey*'s case is that the *Paludina* came into collision with her and that in consequence she suffered damage from a third ship. It is not even the case which frequently happens of ship A. running into ship B. and knocking her into C. No one suggests that within any degree of directness the *Paludina* knocked the *Sara* into the *Singleton Abbey* or the *Singleton Abbey* into the *Sara*. She broke them both adrift, and nearly half an hour afterwards they came into collision. It appears to me that whatever may be the position in the simple class of case of which DR. LUSHINGTON was speaking, in the circumstances which I have suggested the plaintiff must prove his case if he alleges that a subsequent collision with a third ship, in respect of which he claims damages, is a consequence of the original collision with the defendant's ship.

There have been a number of decisions dealing with the question how far the intervention of a third person prevents damage being the result of the action of the defendant. LORD SUMNER classified several of them in his judgment in *Weld-Blundell* v. *Stephens* (4) ([1920] A.C. at p. 984):

> "Between the negligence of a defendant and the infliction of hurt or loss on a plaintiff, the action of human beings may intervene in a great variety of ways."

Then he deals with some of the classes of case in which the action of third parties has or has not caused the damage to be too remote. One class of case he mentions is where a person is in a state of excusable alarm owing to the wrongful act of the defendant. He cites two cases. One is the well-known case of *Scott* v. *Shepherd* (5), where a squib was thrown in a crowded market place by A. on to B.'s stall. B. threw it away on to C.'s stall, and C. threw it away, and it exploded in D.'s eyes. D. claimed damages from the original thrower of the squib, and it was held that the intervention of B. and C. did not prevent D. from recovering from A. because the intermediate persons were in a state of excusable alarm produced by the act of A. The other case, *Jones* v. *Boyce* (6), was where a stage coach proprietor took passengers on a coach. The reins were defective and broke, and the horses went off at a gallop, and, as the coach began to sway from side to side, a frightened passenger on the top jumped off and broke his leg. The coach, however, went on and did not overturn. Here also it was held that the intervening act of jumping off did not prevent the passenger from recovering, as he was in a state of excusable alarm owing to the wrongful act of the defendant. The doubt I feel in this case—and I am not sure about it now—is whether, in these circumstances, where a ship by a wrongful act has put several other ships in an awkward position—there was a strong send of the sea, a high wind, not very good holding ground, and all the ships were ranging about among each other—it can be said that the fact that one of them takes a wrong step necessarily breaks the chain of causation. But, after consideration, I do not feel able to differ from the advice which has been given us by the assessors and from the view at which my brothers have arrived. There was a considerable interval between the act of the master in not stopping his engines and the time when his ship was first set adrift by the *Paludina*. In these circumstances I do not feel able to dissent from the view that there is a sufficiently independent act on the part of the *Singleton Abbey*, which prevents the damage caused by the *Sara* being the direct consequence of the original wrong-doing of the *Paludina*. It appears to me, therefore, that the decision of the President on this point should be reversed.

ATKIN, L.J.—I agree. I am certainly not prepared to uphold the suggestion that there is a presumption of law that any damage arising to a ship subsequent to a collision must be deemed to be the result of that collision unless the defendant proves the contrary. That seems to me to be an impossible suggestion. Though the contention has been put as high as that in the arguments in this case based upon certain propositions of DR. LUSHINGTON—if, indeed he did lay down such a principle—I venture to say that at the present day it is wrong. In my opinion, it is impossible that there can be any presumption of law; there might be in some cases a presumption of fact, though I do not think that is true. The onus must always be upon the plaintiff who claims damages to prove that the damage was caused by the negligence of the defendant, and caused in the sense that now governs these cases as laid down by the Court of Appeal, i.e., was in fact the direct result of the negligence. That is the point the plaintiff always has to prove. Of course, it may often happen that in cases of collision at sea the damage that follows is of such a kind, and follows so immediately, that unless it is proved there is some other cause it is to be assumed that the damage was directly caused by the negligence. That is the case that was suggested of an immediate stranding, of which there are several reported decisions. In *The Pensher* (1), heard before DR. LUSHINGTON, a sailing ship was in collision and drifted on to a lee shore with a precarious anchorage. She anchored for a time, and it was suggested that, if there had been a longer scope of chain, she would not have gone ashore. It was held that in those circumstances it was fair to assume that the collision caused the stranding damage, but the Elder Brethren had advised that the same result might have followed even if the alternative scheme had been adopted. *The Mellona* (2) was a still more simple case. The ship had been dismantled in the collision and stranded twenty-four hours afterwards. There the result of the collision was apparent, was obviously continuing throughout, and was a thing which would operate at once, and continue to operate, on the navigation of the ship. Similarly, in cases where the vessels had been deprived of their steering gear.

But now one has to consider the facts of this particular case. Here two ships were set adrift in harbour by the admitted negligence of the defendants, and twenty minutes afterwards they come into collision. The initial collision itself hardly caused any damage at all. The material question is whether the second contact was the result of the first collision. I can see no evidence that the collision caused the *Sara* to drop down upon the *Singleton Abbey*. Indeed, I think that is the result of the learned President's finding, because he says he has consulted the Elder Brethren, and they advise him that in the state of things he has described they cannot say that the *Sara* was to blame for this collision, but they cannot tell him why it probably was that the *Sara* was not able to avoid the propeller blades of the *Singleton Abbey*. That is the first point. In the second place, it seems to me that there is no evidence to show that the collision with the *Paludina* caused the propeller blades of the *Singleton Abbey* to be moving at the time the *Sara* came in contact with her on the second occasion. More than that, we have now the advice of our assessors—with which I entirely agree—that the accident was in fact caused by the negligence of the master of the *Singleton Abbey*. I appreciate that in occasions of difficulty the court should look very benevolently upon the exercise of a mariner's ordinary care and skill. The question always is whether he has been guilty of negligence, but, in estimating the care and skill he has to employ, the court must look at the surrounding circumstances and measure the degree of care and skill by the particular circumstances of responsibility, anxiety and sudden emergency. But here, after taking that into account, we are advised that the master of the *Singleton Abbey* was negligent in not stopping his propeller when he saw the *Sara* in the position in which she was. I think there can be no doubt about the matter. The damage could have been avoided by the exercise of reasonable care and skill, and, if it could, it is impossible for the owners of the *Singleton Abbey* to say that the damage to their ship's propeller was occasioned by the initial negligence of the defendants. For these reasons it appears to me

that the appeal should be allowed. The proper order would seem to be a declaration that the *Paludina* is not responsible for the second collision between the *Sara* and the *Singleton Abbey*, that finding to be treated as an issue, and the costs so far as they have been increased by that issue to be borne by the plaintiffs, and the appeal here allowed with costs.

Appeal allowed.

Solicitors: *Waltons & Co.*; *Downing, Middleton & Lewis*, for *Downing & Handcock*, Cardiff.

[*Reported by* GEOFFREY HUTCHINSON, ESQ., *Barrister-at-Law.*]

BRANDON AND ANOTHER *v.* OSBORNE GARRETT & CO., LTD., AND ANOTHER

[KING'S BENCH DIVISION (Swift, J.), January 16, 17, 1924]

[Reported [1924] 1 K.B. 548; 93 L.J.K.B. 304; 130 L.T. 670; 40 T.L.R. 235; 68 Sol. Jo. 460]

Negligence—Duty to class of persons—Wife and husband—Injury received by wife while trying to save husband from danger—No negligence—Reasonable apprehension of danger.

While the plaintiffs, who were husband and wife, were lawfully on the premises of the first defendants, the roof of which was being repaired by the second defendants, a skylight in the roof, or part of it, owing to the negligence of the second defendants' workmen, fell on the male plaintiff. The female plaintiff saw the glass falling, and reasonably (as the learned judge found) believing her husband to be in danger, clutched his arm to try to pull him away. In so doing she strained her leg and suffered injury. In an action by her against the second defendants,

Held: as the wife had acted reasonably in what she did and without negligence she was entitled to recover.

Notes. The common law rule under which contributory negligence was regarded as a defence in an action for negligence was abolished by the Law Reform (Contributory Negligence) Act, 1945, s. 1 (1) (17 HALSBURY'S STATUTES (2nd Edn.) 12), which provided for the reduction of damages in accordance with the plaintiff's share in the responsibility for the injury suffered.

As to injury received in preventing damage to other persons, see 28 HALSBURY'S LAWS (3rd Edn.) 84; and for cases see 36 DIGEST (Repl.) 190–192, 196–197.

Cases referred to:

(1) *Woods* v. *Caledonian Rail. Co.* (1886), 13 R. (Ct. of Sess.) 1118; 38 Digest 311, *c*.

(2) *Wilkinson* v. *Kinneil Cannel and Coking Coal Co.* (1897), 24 R. (Ct. of Sess.) 1001; 34 Sc.L.R. 533; 4 S.L.T. 349; 34 Digest 232, *t*.

(3) *Eckert* v. *Long Island Railroad* (1871), 43 New York Rep. 502.

(4) *Scaramanga* v. *Stamp* (1880), 5 C.P.D. 295; 49 L.J.Q.B. 674; 42 L.T. 840; 28 W.R. 691; 4 Asp.M.L.C. 295, C.A.; 41 Digest 258, *1001*.

Also referred to in argument:

Clinton v. *J. Lyons & Co., Ltd.*, [1912] 3 K.B. 198; 81 L.J.K.B. 923; 106 L.T. 988; 28 T.L.R. 462; 36 Digest (Repl.) 67, *368*.

Dulieu v. *White & Sons*, [1901] 2 K.B. 669; 70 L.J.K.B. 837; 85 L.T. 126; 50 W.R. 76; 17 T.L.R. 555; 45 Sol. Jo. 578; 36 Digest (Repl.) 197, *1038*. A

Hill v. *New River Co.* (1868), 9 B. & S. 303; 18 L.T. 355; 36 Digest (Repl.) 39, *190*.

Sharp v. *Powell* (1872), L.R. 7 C.P. 253; 41 L.J.C.P. 95; 26 L.T. 436; 20 W.R. 584; 36 Digest (Repl.) 36, *173*.

Wilkinson v. *Downton*, [1897] 2 Q.B. 57; 66 L.J.Q.B. 493; 76 L.T. 493; 45 W.R. 525; 13 T.L.R. 388; 41 Sol. Jo. 493; 17 Digest (Repl.) 122, *334*. B

Action tried without a jury.

The plaintiffs, Sigmund Brandon and Fanny Brandon, his wife, claimed damages for personal injuries caused by the negligence of the defendants, Osborne Garrett & Co., Ltd., and George Parker & Sons, Ltd., or their servants. Osborne Garrett & Co., Ltd., were the owners and occupiers of a warehouse at 51, Frith Street, London, where they carried on the business of wholesale hairdressers' sundriesmen. On July 15, 1922, the plaintiffs entered the warehouse as customers to buy hairdressing fittings from these defendants. These defendants were then causing repairs to be carried out to the premises by the defendants George Parker & Sons, Ltd., and while the plaintiffs were in a room underneath a skylight in the roof of the premises the skylight or part of it fell and struck the male plaintiff, who received a shock. The female plaintiff, who was standing near her husband at the time and reasonably believed her husband to be in danger, thrust out her hand and clutched his arm in an attempt to pull him out of danger of the falling debris. She was not struck by the debris herself, but in her effort to save her husband she strained her leg and brought about a recurrence of an old trouble from which she had suffered in the past, namely, thrombosis. At the trial the plaintiffs proceeded only against the defendants George Parker & Sons, Ltd., who, they alleged, had been guilty of negligence in failing properly to guard the skylight and to prevent building material falling through it on persons lawfully using their co-defendants' premises. C D E

P. B. Morle and *Groves* for the plaintiffs. F

Liversidge for the defendants, Osborne Garrett & Co., Ltd.

Compston, *K.C.*, and *Harold Simmons* for the defendants, George Parker & Sons, Ltd.

SWIFT, J.—This action is brought by Mr. Brandon and his wife Mrs. Fanny Brandon to recover damages for personal injuries suffered by each of them owing to the alleged negligence of the defendants Messrs. G. Parker & Sons, Ltd., while that firm was repairing the premises of the defendants Messrs. Osborne Garrett & Co., Ltd. G

The plaintiff Mr. Brandon and his wife, on July 15, 1922, went to the premises of Messrs. Osborne Garrett & Co., Ltd., who were wholesale hairdressers, to transact some business. They were directed to a department which had a skylight in the roof. While they were standing there the skylight, or a portion of it, fell into the room, and a piece of glass from it struck Mr. Brandon. It did not cut him, nor did it penetrate his hat. He sustained no outward physical injuries, but he sustained a shock. Mr. Brandon was of a neurasthenic temperament, and he had been treated by the doctor for his nerves. Lately he had been much better, but he felt the shock more than a normal man would have done. The claims of both the plaintiffs, however, were exaggerated. There would be no difficulty but for the question of law with regard to the wife's position. The cause of the fall of the glass is now clear. The men were working on the premises on some leading which ran alongside of, and about 6 ft. above, a glass roof. A hole was made in the roof to take up the builders' materials through it, and when it was raining the hole had to be covered up with tarpaulin. When the hole was being covered up with the tarpaulin on the day of the accident a piece of wood fell and broke the glass in the skylight. This would not have happened if the skylight had been H I

covered up with boards as it ought to have been. The servants of the contractors, Messrs. Parker & Sons, Ltd., were negligent in letting the piece of wood fall, and they were also negligent in not having the skylight properly protected against anything falling on it. The male plaintiff is clearly entitled to recover damages, which I assess at £35, for the injuries which he has sustained.

The case with regard to Mrs. Brandon is different. She was not struck by the falling glass although, in my opinion, she was in a position of danger, and was so near that she might well have anticipated some of it striking and injuring her. She saw the falling glass and instinctively clutched her husband's arm to try to pull him away. For years Mrs. Brandon had suffered from leg trouble which had been diagnosed as thrombosis. The disease had been quiescent for years. She now said that when she was attempting to rescue her husband, she strained her leg, which became swollen. The medical evidence was that such a strain would re-start the old trouble. I find as a fact that she strained her leg in an effort to save her husband from what she reasonably believed to be danger, and her action in so assisting her husband did cause a recurrence of thrombosis. It has been argued that her injury was caused by her own voluntary intervention, and not by any act of the defendants. I have come to the conclusion that she is legally entitled to compensation for that injury, although it was caused by her own intervention. Once it is proved that the negligent act of the defendants was the primary cause of the injury to the plaintiff she cannot be deprived of her right to compensation for it unless she is shown to have done something amounting to contributory negligence. If she did something which a reasonable person ought not to have done she would not be entitled to recover, but if she did what was a proper thing for her instinctively to do, I think that she is entitled to recover. It has been stated that there is no English authority directly in point on this matter, so I think it right to see how foreign tribunals have dealt with it. Though they are not binding on this court, they confirm what I think is the law of England. There are two cases in Scotland. In *Woods* v. *Caledonian Rail. Co.* (1), Court of Session refused to disturb a verdict for the plaintiff given in an action for damages against a railway company by the father of a girl who had been killed through the negligence of the railway company's servants while she was attempting to save the life of a companion at a level crossing. In *Wilkinson* v. *Kinneil Cannel and Coking Coal Co.* (2) the Court of Session decided that where two persons are exposed to a common danger through the fault of a third person, and one of those two persons, who might have saved himself, is injured in interposing to save his companion on the impulse of the moment, it is a question for the jury whether the injuries in question are not fairly attributable to the fault of the person which gave rise to the common peril. In the American case of *Eckert* v. *Long Island Railroad* (3) the majority of the court held that there was a duty on a person to save life if possible. COCKBURN, C.J., in *Scaramanga* v. *Stamp* (4) said (5 C.P.D. at p. 304):

> "The impulsive desire to save human life when in peril is one of the most beneficial instincts of humanity."

I do not go so far as to say that there is a legal, as distinct from a moral, duty to risk one's own life to save that of a stranger, but there is a nearer approach to such a duty in the case of a child, a wife, or a husband. But, without considering that matter, where a person suffers injury through a combination of the acts of the defendant and of himself, it is for the jury to say whether the injury was the actual and probable consequence of the act of the defendant, and then whether the plaintiff has been guilty of contributory negligence.

In the present case I do not think that the female plaintiff did anything negligent or improper in instinctively clutching her husband to try to drag him out of danger. If she had been standing in a place of perfect safety, had seen the glass falling and had had time to think what was the wisest course to pursue, it might have been negligent on her part to go under the skylight, even to rescue her husband.

But those are not the facts here, and I direct judgment to be entered for both plaintiffs. I assess the damages of the male plaintiff at £35, and those of the female plaintiff at £25. A

Judgment for plaintiffs.

Solicitors: *Stanley Robinson & Commin*; *Leader, Plunket & Leader.*

[*Reported by* T. W. Morgan, Esq., *Barrister-at-Law.*] B

C

W. H. MULLER & CO. *v.* TRINITY HOUSE (DEPTFORD, STROOD)

D

[King's Bench Division (Rowlatt, J.), October 22, 23, November 14, 1924]

[Reported [1925] 1 K.B. 166; 94 L.J.K.B. 161; 132 L.T. 663; 16 Asp.M.L.C. 458]

Harbour—Pilot—Compulsory pilot—Payment of dues—Liability when no services offered—Effect of byelaw made by pilotage authority—Pilotage Act, 1913 (2 *& 3 Geo.* 5, *c.* 31), *s.* 11, *s.* 17 (1). E

By s. 11 of the Pilotage Act, 1913: "(1) Every ship (other than an excepted ship) while navigating in a pilotage district in which pilotage is compulsory for the purpose of entering, leaving, or making use of any port in the district, and every ship carrying passengers (other than an excepted ship) while navigating for any such purpose as aforesaid in any pilotage district (whether pilotage is compulsory or not compulsory in that district) shall be either— F (a) under the pilotage of a licensed pilot of the district; or (b) under the pilotage of a master or mate possessing a pilotage certificate for the district who is bona fide acting as master or mate of the ship. (2) If any ship (other than an excepted ship) in circumstances in which pilotage is compulsory under this section, is not under pilotage as required by this section, after a licensed pilot of the district has offered to take charge of the ship, the master of that G ship shall be liable in respect of each offence to a fine not exceeding double the amount of the pilotage dues that could be demanded for the conduct of the ship." By s. 17 (1): "A pilotage authority may by byelaws made under this Act . . . (f) fix for the district the rates of payments to be made in respect of the services of a licensed pilot (in this Act referred to as pilotage dues), and define the circumstances and conditions under which pilotage dues may be H payable on different scales and provide for the collection and distribution of pilotage dues."

Pursuant to s. 17 (1) a pilotage authority made the following byelaw: "A ship which enters the London Pilotage District and is subject to compulsory pilotage shall take a pilot at the proper station, and unless unable to obtain one for reasons acceptable to Trinity House, shall pay the full pilotage rate I and shipping charge."

Held: navigation without a pilot in a compulsory pilotage area was not forbidden by s. 11 (1), but the ship was under an obligation to fly the pilot flag and must take a pilot on board if he offered his services; services within s. 17 (1) meant services rendered, so that, if no pilot offered his services, the ship was not liable to pay pilotage dues; and the pilotage authority could not by its byelaws impose on a ship a liability to pay for a pilot when none was taken.

Notes. As to compulsory pilotage, see 30 HALSBURY'S LAWS (2nd Edn.) 938–939; and for cases see 41 DIGEST 906 et seq. For the Pilotage Act, 1913, see 23 HALSBURY'S STATUTES (2nd Edn.) 836.

Action in the Commercial List tried by ROWLATT, J., without a jury.

The plaintiffs, who were a Dutch company, were the owners of the Batavier line of steamships. They maintained, by that line, a frequent service for passengers and cargo between Rotterdam and London, there being five sailings per week each way. According to the points of claim, the direct route for steamships from Rotterdam to London was to pass near the Tongue Light Vessel, and before 1919 the masters of the plaintiffs' steamships, who were Dutch subjects, held pilotage certificates authorising them to pilot their vessels between the Tongue Light Vessel and Gravesend, where the passengers disembarked. The plaintiffs alleged that during the war this route was closed, but was afterwards re-opened. Since 1919 aliens had been precluded from holding pilotage certificates for any pilotage district in the United Kingdom by s. 4 of the Aliens' Restriction Act, 1919, and the plaintiffs' steamships became subject to the ordinary rules as to compulsory pilotage in the London area. The defendants, as the pilotage authority for the London Pilotage District, maintained a number of licensed pilots on board a pilot cutter, which was stationed at the Sunk Light Vessel, to pilot vessels inward bound to the Thames, but refused to station pilots at the Tongue Light Vessel. The plaintiffs said that the route via the Sunk Light Vessel was longer and less favourable than by the Tongue Light Vessel, and they instructed their masters to sail by the Tongue Light Vessel, to fly the pilot flag as soon as they entered the London pilotage district, and to accept the services of a licensed pilot if one offered. These instructions, according to the plaintiffs, were carried out, and pilots were always accepted if they offered. The defendants sought to charge the plaintiffs with pilotage dues from the Sunk Light Vessel, whether a pilot had offered or not. The plaintiffs brought this action to recover £1,351 alleged to be overpaid on the grounds, (i) that they were only liable to pay the pilotage rate from the Tongue Light Vessel to Gravesend (which was lower than from the Sunk Light Vessel) when a pilot was taken on board from the Tongue; (ii) that when no pilot offered his services, and consequently no pilot was taken, they were not liable to pay pilotage dues or rates; (iii) that the byelaws hereinafter mentioned were ultra vires and void.

By the Pilotage Act, 1913:

"Section 11. (1) Every ship (other than an excepted ship) while navigating in a pilotage district in which pilotage is compulsory for the purpose of entering, leaving or making use of any port in the district, and every ship carrying passengers (other than an excepted ship) while navigating for any such purpose as aforesaid in any pilotage district (whether pilotage is compulsory or not compulsory in the district) shall be either (a) under the pilotage of a licensed pilot of the district; or (b) under the pilotage of a master or mate possessing a pilotage certificate for the district who is bona fide acting as master or mate of the ship. (2) If any ship (other than an excepted ship) in circumstances in which pilotage is compulsory under this section, is not under pilotage as required by this section, after a licensed pilot of the district has offered to take charge of the ship, the master of that ship shall be liable in respect of each offence to a fine not exceeding double the amount of the pilotage dues that could be demanded for the conduct of the ship.

Section 17. (1) A pilotage authority may by byelaws made under this Act . . . (d) determine the system to be adopted with respect to the supply and employment of pilots, and provide, so far as necessary, for the approval, licensing and working of pilot boats in the district . . . ; and (f) fix for the district the rates of payments to be made in respect of the services of a licensed pilot (in this Act referred to as pilotage dues), and define the circum-

stances and conditions under which pilotage dues may be payable on different scales. . . ." A

The following byelaws of the pilotage authority were in existence at the dates specified. In April, 1922:

"A ship subject to compulsory pilotage which is bound from any port or place outside the compulsory limits of the London District shall pay the full rate of pilotage, unless it is proved to the satisfaction of the Trinity House that she was unable to obtain a pilot from the proper pilot station on account of the pilot being off station or other special causes. B

The following charges are payable in respect of ships subject to compulsory pilotage bound to any port or place within the London Pilotage District, and also in respect of any other ship supplied with a pilot. [A list of charges followed.]" C

On June 8, 1922, the following byelaws were respectively substituted for the above:

"A ship which enters the London Pilotage District and is subject to compulsory pilotage shall take a pilot at the proper pilot station, and unless unable to obtain one for reasons acceptable to the Trinity House, shall pay the full pilotage rate and shipping charge." D

Then followed the shipping charges payable in respect of any ship (sail or steam) subject to compulsory pilotage bound to any port or place within the London Pilotage District, and also in respect of any ship supplied with a pilot. The defendants contended that by virtue of the Pilotage Act, 1913, and the byelaws made thereunder, it was the duty of the plaintiffs to take all reasonable steps to secure pilots and that such steps were to proceed via the Sunk Light Vessel, where E the pilots were stationed. It was admitted that as an act of grace licensed pilots had been permitted to offer themselves at the Tongue Light Vessel (which they reached in hired motor boats from Margate), but they claimed that if the plaintiffs failed to take (as they ought to do) a pilot at the Sunk Light Vessel, they were nevertheless liable to pay the full rate for pilotage from the Sunk Light Vessel. They counter-claimed for a declaration that the byelaws were intra vires, and that F they were entitled to charge the rates therein provided for.

Dunlop, K.C., and *E. A. Digby* for the plaintiffs.
Bateson, K.C., and *G. P. Langton* (with them *S. D. Cole*) for the defendants.

ROWLATT, J.—The entrances to the Thames are two, one being at the Tongue and the other at the Sunk, and the pilots which the defendants have provided G under their statutory duty are divided into three classes: the Cinque Ports pilots, who pilot ships coming up the Channel, and who get on board at Dungeness, or are distributed at different ports and board ships which are there by accident, or which are taking pilots at that point of their own free will; and the Channel pilots who pilot outwards from Gravesend, but are also trained to pilot inwards. These two classes pilot via the Tongue Light Vessel, which is in the South Channel. The H third class are the North Channel pilots, who pilot from the Sunk Light Vessel by the North Channel. The Sunk pilots cannot pilot via the Tongue nor the Tongue pilots via the Sunk Channel. The Batavier line is a Dutch line, and under present law their masters and mates, not being British subjects, are not eligible as pilots, so that the ship is a ship without a pilot unless she takes one when she reaches the mouth of the Thames. I

The main question here is whether when a ship enters the compulsory pilotage area and continues her passage through it to her destination without having taken a pilot, she can be charged with the pilotage dues as a debt, independently of the question whether any offence has been committed. The defendants contend that she can be so charged, and if that contention is wrong, then the whole defence fails, and there is no longer any question as to what rate is chargeable. The question depends on the Pilotage Act, 1913, and the most material section here is s. 11 (supra). The plaintiffs say that this section covers the whole of the ground and

A that the liability being created by the statute and a penalty for breach being provided there can be no debt. The defendants on the other hand say that sub-s. (2) only deals with the case where the pilot has offered, and that whether a pilot offers his services or not, a debt is incurred for pilotage dues in every case, as soon as an inward ship passes the limits with the intention of navigating to London, but that if in fact a pilot has offered then a penalty is incurred in addition B under s. 11 (2). The question is therefore whether s. 11 (1) creates a debt for pilotage dues. As to this I think the true construction is not that no vessel shall navigate unless she has a licensed pilot on board, but that she is under a continuing obligation to fly the pilot flag, and must take a pilot on board if he offers. To construe the subsection otherwise would be unreasonable, and would place a great responsibility upon the pilotage authority, beside being in conflict with s. 30 C which provides for the supersession of a pilot who is not authorised. Even if the position is that she must stop, it does not follow that if she does not stop she must pay the fees for pilotage, and I cannot see any connection between the two propositions. But, the defendants say that even if she is not bound to stop she must take all reasonable steps to find a pilot, that is to say she must go to the place where she knows the pilots will be assembled, even though that point is at D the Sunk and not at the Tongue, which is the nearest route from the nautical point of view. Even if this is true I am in the same difficulty as before, that if she fails to carry out this obligation, it does not seem to follow that she must pay the pilotage dues.

It was further argued that s. 17 (1) enabled the pilotage authority to make byelaws upon various matters, for example (cl. (d)) to

E "determine the system to be adopted with respect to the supply and employment of pilots, and provide, so far as necessary, for the approval, licensing, and working of pilot boats in the district. . . ."

That means that they may determine by means of byelaws the system which is to govern the supply and employment of pilots as a matter of internal administration. F There were, as has been pointed out, at the time of the passing of the Act of 1913, various pilotage systems in force all over the country, and the pilotage authority had to decide which was the best system, but in my judgment that does not give them power to affect the liability of ships. By cl. (f) they were empowered to "fix for the district the rates of payment to be made in respect of the services of a licensed pilot," and it was argued for the defendants that "services" there means G not "services rendered" but "services available." I think that this only empowers them to fix the rate and not to add to the liabilities of the ship a liability to pay for a pilot when none is taken. It is to be observed that in ss. 49 and 55, which made provision for the recovery and collection of pilotage dues, the words used show that payments are only to be made for services actually rendered. In s. 49 the pilotage dues are "for any ship for which the services of a licensed pilot are H obtained," and in s. 55 the dues for foreign ships are, as to ships inward, "for the distance piloted."

An interesting argument was founded on s. 59 from the historical point of view. That section preserves any "custom . . . with reference to pilotage affecting any pilotage district in particular, and in force at the time of the passing of this Act" until provision is made by pilotage order or byelaw under the Act superseding such I custom. If one turns back to the Pilotage Act, 1812, s. 63, and to the Pilotage Act, 1825, s. 46, one finds, and it was expressly provided in the cases of foreign ships entering the Port of London, that a liability for dues should be incurred even if no pilot were taken; but that legislation disappeared with the Merchant Shipping Repeal Act, 1854, and was replaced by the Merchant Shipping Act, 1854, s. 381, and there has been no similar legislation since. The defendants rely upon the fact that they have taken these dues all the time and that within ss. 368 and 376 of the Merchant Shipping Act, 1854, the power of the Trinity House to alter regulations is preserved. This cannot mean that the Trinity House can continue to

charge fees for which the liability could only accrue under a section which has long been repealed. The provision in the Pilotage Act, 1913, s. 59, as to the Trinity House byelaws is not enough to make the charge here in dispute lawful merely because there is this provision in the old Acts and some evidence of acquiescence in those charges on the part of shipowners. There is no enactment in force authorising the defendants to make this charge, nor is there any proof of custom. I think that s. 59 has application to matters which can be dealt with by pilotage order and byelaws, and it is not applicable to a fundamental question affecting the liability of a ship to pay pilotage dues when she has had no pilotage. In my judgment, the defendants, although they have in one sense been following an old custom, have been proceeding on a basis which was not warranted, and, therefore, they cannot retain this money. If they cannot retain the pilotage dues, neither can they retain the shipping moneys, which for this purpose are on the same footing.

As regards the rate of payment, even if the plaintiffs' ships ought to have gone to the Sunk, with which I do not agree, they have in fact taken a pilot at Margate, and the only thing he could do was to pilot them through the Tongue. The plaintiffs are therefore entitled to succeed both on the claim and counter-claim, and the sum claimed must be refunded. As regards the validity of the byelaws I shall make no general declaration, but only a declaration as regards the plaintiffs: (i) that they are not liable to pay any pilotage dues or shipping moneys to the defendants in respect of any ship inward bound via the Tongue to Gravesend, which has not been piloted by a pilot; (ii) that when any of their ships is piloted from the Tongue to Gravesend, the pilotage rate payable is the rate from the Tongue Light Vessel to Gravesend, and not from the Sunk Light Vessel to Gravesend.

Judgment for the plaintiffs.

Solicitors: *Behrend & Co.*; *Sandilands & Co.*

[*Reported by* T. W. Morgan, Esq., *Barrister-at-Law.*]

SWEDISH CENTRAL RAIL. CO., LTD. *v.* THOMPSON

[Court of Appeal (Sir Ernest Pollock, M.R., Warrington and Atkin, L.JJ.), March 10, 11, April 3, 1924]

[Reported [1924] 2 K.B. 255; 93 L.J.K.B. 739; 131 L.T. 516]

[House of Lords (Viscount Cave, L.C., Lord Dunedin, Lord Atkinson, Lord Sumner and Lord Buckmaster), January 26, 27, 29, March 13, 1925]

[Reported [1925] A.C. 495; 94 L.J.K.B. 527; 133 L.T. 97; 41 T.L.R. 385; 9 Tax Cas. 342]

Income Tax—Foreign possession—Company controlled and managed abroad—Registered office in United Kingdom—Vital functions performed there—Liability of company to tax—Income Tax Act, 1918 (8 *& 9 Geo.* 5, *c.* 40), *Sched. D, Case V.*

Company—Residence—Capacity to have more than one residence.

The appellant company was incorporated in England under the Companies Acts to construct and work a railway in Sweden which it leased to a Swedish company at a rent of £33,500 which at the material time was paid in Sweden. This sum formed the sole income of the company. The control and management of the company was in Sweden, no meetings of the company or of the directors were held in the United Kingdom, all dividends were declared in

A Sweden, and no part of the profits of the company was transmitted to the United Kingdom except in payment of dividends to shareholders in the United Kingdom, but the registered office of the company was in London, the secretary resided in England, the register of shareholders and the seal of the company were kept at the registered office, the company had a banking account in London, and three directors of the company acted as a committee under the B articles of association to deal with transfers of shares in the United Kingdom, attach the seal of the company to share and stock certificates, sign cheques on the London banking account, and transact formal administrative business in the United Kingdom.

Held: a company registered under the Companies Acts could be resident in more than one place; while the control and management of the appellant C company had been transferred to Sweden, functions vital to the company were performed in the United Kingdom; and, therefore, the company was resident in the United Kingdom even though it were also resident in Sweden; and it was liable to income tax on its profits and gains under the Income Tax Act, 1918, Sched. D, Case V [now Income Tax Act, 1952, s. 132 (1)].

Per VISCOUNT CAVE, L.C.: When the central management and control of a D company abide in a particular place, the company is held, for purposes of income tax, to have a residence in that place, but it does not follow that it cannot have a residence elsewhere.

Notes. Explained: *Egyptian Delta Land and Investment Co.* v. *Todd*, [1929] A.C. 1. Considered and explained: *Union Corpn., Ltd.* v. *I.R.Comrs.*, *Johannes-*E *burg Consolidated Investment Co.* v. *I.R.Comrs.*, *Trinidad Leaseholds, Ltd.* v. *I.R.Comrs.*, [1952] 1 All E.R. 646. Referred to: *A.-G.* v. *Aramayo*, *Aramayo* v. *Ogston*, *Eccott* v. *Aramayo Francke Mines*, [1925] 1 K.B. 86; *Baelz* v. *Public Trustee*, [1926] Ch. 863; *Kuenigl* v. *Donnersmarck*, [1955] 1 All E.R. 46; *Davies* v. *British Geon, Ltd.*, [1956] 3 All E.R. 389.

As to liability to tax under Case V, see 20 HALSBURY'S LAWS (3rd Edn.) 276 F et seq.; and for cases see 28 DIGEST (Repl.) 206 et seq. For Income Tax Acts, 1918 and 1952, see 12 HALSBURY'S STATUTES (2nd Edn.) 11 and ibid., vol. 31, p. 1.

Cases referred to:

(1) *A.-G.* v. *Alexander* (1874), L.R. 10 Exch. 20; 44 L.J.Ex. 3; 31 L.T. 694; 23 W.R. 255; 28 Digest (Repl.) 258, *1140*.

G (2) *Cesena Sulphur Co.* v. *Nicholson*, *Calcutta Jute Mills Co.* v. *Nicholson* (1876), 1 Ex.D. 428; 45 L.J.Q.B. 821; 35 L.T. 275; 25 W.R. 71; 1 Tax Cas. 83, 88; 28 Digest (Repl.) 251, *1113*.

(3) *De Beers Consolidated Mines, Ltd.* v. *Howe*, [1905] 2 K.B. 612; 74 L.J.K.B. 934; 93 L.T. 63; 54 W.R. 9; 21 T.L.R. 578, C.A.; affirmed, [1906] A.C. 455; 75 L.J.K.B. 858; 95 L.T. 221; 22 T.L.R. 756; 50 Sol. Jo. 666; 5 Tax Cas. 198; 13 Mans. 394, H.L.; 28 Digest (Repl.) 263, *1172*, 257, *1135*.
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(4) *Carron Iron Co.* v. *Maclaren* (1855), 5 H.L.Cas. 416; 28 Digest (Repl.) 914, *1478*.

(5) *American Thread Co.* v. *Joyce* (1912), 106 L.T. 171; 28 T.L.R. 233; 56 Sol. Jo. 308; 6 Tax Cas. 1; affirmed (1913), 108 L.T. 353; 29 T.L.R. 266; 57 Sol. Jo. 321; 6 Tax Cas. 163, H.L.; 28 Digest (Repl.) 257, *1137*.

I (6) *Inland Revenue* v. *Cadwalader* (1904), 7 F. (Ct. of Sess.) 146; 42 Sc.L.R. 117; 12 S.L.T. 449; sub nom. *Cooper* v. *Cadwalader*, 5 Tax Cas. 101; 28 Digest (Repl.) 251, **612*.

(7) *Goerz & Co.* v. *Bell*, [1904] 2 K.B. 136; 73 L.J.K.B. 448; 90 L.T. 675; 53 W.R. 64; 20 T.L.R. 348; 48 Sol. Jo. 354; 68 J.P.Jo. 136; 28 Digest (Repl.) 258, *1141*.

(8) *Bradbury* v. *English Sewing Cotton Co.*, [1923] A.C. 744; 92 L.J.K.B. 736; 129 L.T. 546; 39 T.L.R. 590; 67 Sol. Jo. 678; 8 Tax Cas. 481, H.L.; 28 Digest (Repl.) 209, *881*.

(9) *Mitchell* v. *Egyptian Hotels, Ltd.*, [1914] 3 K.B. 118; 83 L.J.K.B. 1510; 111 L.T. 189; 30 T.L.R. 457, C.A.; affirmed, [1915] A.C. 1022; 84 L.J.K.B. 1772; 113 L.T. 882; 31 T.L.R. 546; 59 Sol. Jo. 649; sub nom. *Egyptian Hotels, Ltd.* v. *Mitchell*, 6 Tax Cas. 542, H.L.; 28 Digest (Repl.) 252, *1116*.

(10) *Daimler Co., Ltd.* v. *Continental Tyre and Rubber Co. (Great Britain), Ltd.*, [1916] 2 A.C. 307; 85 L.J.K.B. 1333; 114 L.T. 1049; 32 T.L.R. 624; 60 Sol. Jo. 602; 22 Com. Cas. 32, H.L.; 9 Digest (Repl.) 573, *3780*.

(11) *Compagnie Générale Trans-Atlantique* v. *Thomas Law & Co., La Bourgogne*, [1899] P. 1; 68 L.J.P. 9; 79 L.T. 331; 15 T.L.R. 28; affirmed, [1899] A.C. 431; 68 L.J.P. 104; 80 L.T. 845; 15 T.L.R. 424; 8 Asp.M.L.C. 550, H.L.; 13 Digest (Repl.) 352, *1597*.

(12) *Colquhoun* v. *Brooks* (1889), 14 App. Cas. 493; 59 L.J.Q.B. 53; 61 L.T. 518; 54 J.P. 277; 38 W.R. 289; 5 T.L.R. 728; 2 Tax Cas. 490, H.L.; 28 Digest (Repl.) 206, *866*.

(13) *New Zealand Shipping Co., Ltd.* v. *Thew* (1922), 8 Tax Cas. 208, H.L.; 28 Digest (Repl.) 258, *1145*.

(14) *New York Life Insurance Co.* v. *Public Trustee*, [1924] 2 Ch. 101; 93 L.J.Ch. 449; 131 L.T. 438; 40 T.L.R. 430; 68 Sol. Jo. 477, C.A.; Digest Supp. 9, 2, *27a*.

(15) *In the Goods of Ewing* (1881), 6 P.D. 19; 50 L.J.P. 11; 44 L.T. 278; 45 J.P. 376; sub nom. *Hope* v. *Ewing*, 29 W.R. 474; 23 Digest (Repl.) 88, *886*.

(16) *San Paulo (Brazilian) Rail. Co.* v. *Carter*, [1896] A.C. 31; 65 L.J.Q.B. 161; 73 L.T. 538; 60 J.P. 84, 452; 44 W.R. 336; 12 T.L.R. 107; 3 Tax Cas. 407, H.L.; 28 Digest (Repl.) 253, *1119*.

Also referred to in argument:

Currie v. *I.R.Comrs.*, *Durant* v. *I.R.Comrs.*, [1921] 2 K.B. 332; 90 L.J.K.B. 499; 125 L.T. 33; 37 T.L.R. 371; 12 Tax Cas. 245, C.A.; 28 Digest (Repl.) 424, *1867*.

Brassard v. *Smith*, [1925] A.C. 371; 94 L.J.P.C. 81; 132 L.T. 647; 41 T.L.R. 203; Digest Supp.

Appeal by the taxpayers from an order of ROWLATT, J., whereby he confirmed the decision of the Commissioners for the Special Purposes of the Income Tax Acts upon an appeal by way of Case Stated by the commissioners relating to assessments to income tax in the sum of £33,500 for each of the years ending April 5, 1921, and April 5, 1922, made upon the taxpayers, the Swedish Central Rail. Co., Ltd., under Case V of Sched. D to the Income Tax Act, 1918 [see now s. 132 of the Income Tax Act, 1952], in respect of a rent paid to them.

The company was incorporated under the Companies Acts, 1862 and 1867, in December, 1870, with the objects of (inter alia) (a) acquiring a concession for the construction of a railway between Frovi and Ludvika in Sweden, and constructing the railway authorised by such concession; (b) maintaining and working the railway so to be constructed, and entering into any working or other arrangements with any other company for connecting the railway with any other system; (c) leasing the railway to any person, persons or company. The registered office of the company was situate at 11, Ironmonger Lane, London, E.C. By an agreement dated Feb. 10, 1900, and made between the company, of the one part, and the Traffic Co., Grangesburg, Oxelosund (hereinafter referred to as the traffic company), of the other part, the company leased to the traffic company its railway between Frovi and Ludvika for a term of fifty years as from Jan. 1, 1900, with a right to either party to terminate the said agreement after the same had been in force for ten years. The sum of £33,500 (in the agreement called an annual rent) was payable quarterly in advance by the traffic company to the company, such quarterly payments to be made at the company's office in London. The agreement of Feb. 10, 1900, was entered into at Stockholm and was in Swedish. At an extraordinary general meeting of the company, held at the company's office in London, on Oct. 7, 1920, a resolution was passed, and afterwards duly confirmed, with a view

to the alteration of the articles of association of the company which were framed with the object of removing the control and management of the business of the company from England to Sweden. The Special Commissioners were satisfied that since Oct. 2, 1920, the business of the company has been controlled and managed from the head office at Stockholm, Sweden, and that fact was admitted on behalf of the Crown. The registered office of the company remained in London; the secretary resided there, the register of shareholders was kept there as required by s. 30 of the Companies (Consolidation) Act, 1908 [see now s. 110 of the Companies Act, 1948], and the seal of the company was kept at the registered office. The company had a banking account in London. On Oct. 2, 1920, at a meeting of the board of directors of the company, three members of the board were appointed to be a committee, under art. 45a of the amended articles of association, to deal with transfers of shares in the United Kingdom, attach the seal of the company to share and stock certificates, and to sign cheques on the London banking account of the company. The committee so appointed was empowered to transact merely formal administrative business in the United Kingdom. Since Oct. 22, 1920, the rent of £33,500 had been paid in Sweden, but no alteration providing for such payment had been made in the agreement made in 1900. Since Oct. 22, 1920, no ordinary meeting, general meeting, or board meeting of the company had been held in the United Kingdom. All dividends had been declared in Sweden, and no part of the profits of the company had been transmitted to the United Kingdom except in payment of dividends to the shareholders in the United Kingdom. ROWLATT, J., held that the company was resident in the United Kingdom, and, therefore, liable to pay income tax in respect of the rent paid to them under the lease of the railway.

A. M. Latter, K.C., and *A. M. B. Bremner* for the appellant company.
The Attorney-General (*Sir Patrick Hastings, K.C.*) and *R. P. Hills* for the Crown.

Cur. adv. vult.

April 3, 1924. The following judgments were read.

SIR ERNEST POLLOCK, M.R., stated the facts, and continued: The question is thus directly raised whether an English company registered under the Companies Acts, carrying on business abroad, the control and management of which is also abroad, can be made liable to pay income tax, not only in respect of moneys remitted to England, which it is admitted would be liable to income tax under the Rules applicable to Case V of Sched. D of the Income Tax Act, 1918, but also in respect of the full sum of rent which is not paid in or remitted to London. Although, as stated, the business of the company is abroad, and the payment of the rent is made in Sweden, it is to be observed that not only is the company registered in England, but the secretary of the company resides in London, and the seal of the company is kept at the registered office of the company in London. The company has a banking account in London. Transfers of shares are made in London and registered there. The accounts of the company are made up and audited in London, and dividends are paid to English shareholders and interest to English debenture holders from the registered office in London. The relevant charging words of Sched. D are as follows [see now Income Tax Act, 1952, s. 122]:

> "Tax under this schedule shall be charged in respect of—(a) the annual profits or gains arising or accruing—(i) to any person residing in the United Kingdom from any kind of property whatever, whether situate in the United Kingdom or elsewhere."

The question, therefore, is: Does the appellant company reside in the United Kingdom within the above charging words? There can be no question that the £33,500 is rent within the meaning of Case V, r. 1, so that the assessment is correctly made if the company is resident in the United Kingdom. Our attention was called to a passage in DICEY'S CONFLICT OF LAWS (3rd Edn.), p. 163, where

he gives certain rules for determining what is the domicil of a corporation, and adds that "as regards the domicil of a corporation the distinction between residence and domicil does not exist." It is not easy to frame such rules, and it is less easy to apply them to the circumstances of a particular case. But although such rules may be of service and give some guidance, we have to follow decisions binding upon this court. We were referred to *A.-G.* v. *Alexander* (1), in which it was decided that the Imperial Ottoman Bank was not liable to be assessed to income tax in respect of its whole profits "as a person residing within the United Kingdom," but was liable only in respect of the profits arising from its business carried on in England, under the clause of the charging section applicable to non-residents. The Imperial Ottoman Bank was a corporation created by Turkish law. KELLY, C.B., said:

> "If it were resident anywhere, it must be resident in Constantinople, where alone it has its 'seat' under the express terms of its charter."

In *Cesena Sulphur Co.* v. *Nicholson*, *Calcutta Jute Mills Co.* v. *Nicholson* (2) it was held that both companies were liable to pay income tax on the whole of their profits, wherever earned, on the ground that they were residing in the United Kingdom. Both companies were incorporated under the Companies Acts, 1862 and 1867, though the Cesena company was afterwards registered for all purposes in Italy. Their activities were entirely conducted abroad. The dividends required for the English shareholders were the only part of the profits of the Cesena company sent to the United Kingdom. The Calcutta company had no office or other place of business in the United Kingdom, but for registration it had an address in London at the office of one of the directors. HUDDLESTON, B., stated that he did not think the principle of law was really disputed that the artificial residence which must be assigned to the artificial person called a corporation is the place where "the real business is carried on." The decision gives an illustration of the application of that term; for though for most—if not for all—practical purposes, many persons might have described the companies as carrying on their real business, the one in Italy the other in India, it was held that they were resident in the United Kingdom. The question again arose and was decided in the case which has of late years dominated this field of law, *De Beers Consolidated Mines, Ltd.* v. *Howe* (3). That company was incorporated and registered in South Africa. LORD LOREBURN, whose speech embraced the opinions of the other learned Lords, adopted in terms the decision in *Cesena Sulphur Co.* v. *Nicholson*, *Calcutta Jute Mills Co.* v. *Nicholson* (2), that a company resides for purposes of income tax where its real business is carried on, where the central management and control actually abides. In accordance with the proper application of this test, the House held that the De Beer company resided within the United Kingdom, because the real business was carried on, and the central management and control was, in England. LORD LOREBURN also emphasised that this question was one of fact, to be determined, not according to the construction of this or that regulation or byelaw, but upon a scrutiny of the course of business and trading.

The commissioners have held the appellant company liable, and, so far as that decision is one of fact, it is binding upon this court if there is evidence to support it. But, in my judgment, inasmuch as the *Cesena Sulphur Co. and Calcutta Jute Mills Co. Case* (2) was definitely accepted as correct by the House of Lords, the light they throw on the facts of the present case must not be neglected, nor can I accept the argument that the only test is the question: "Where is the real business carried on?" Considered as a question at large, that test must be applied as interpreted in the decided cases. It is true that the House of Lords rejected Mr. Cohen's proposition "that a company resides where it is registered, and nowhere else." But if registration, per se, was thus held not to determine the question, equally the proposition that a company has one residence and one only, namely, where it is registered, was also rejected. The existence of more than one residence has been recognised in cases where the jurisdiction of the courts over companies

A and service of a writ upon them has been in question: see *Carron Iron Co.* v. *Maclaren* (4). In an income tax case—*American Thread Co.* v. *Joyce* (5)—BUCKLEY, L.J., says (106 L.T. at p. 175): "A corporation like an individual may have more than one place of residence." For an illustration that an individual may have more than one residence, so as to render him liable to pay income tax, see *Inland Revenue* v. *Cadwalader* (6). I cannot accept the view that for the B purposes of the Income Tax Acts there cannot be a residence here of a company incorporated and registered here, even if by foreign law, or by the tests applied here to companies registered abroad, if those tests were used by the law of a foreign country, the same company might be held to be resident also in that foreign country. CHANNEL, J., said in *Goerz & Co.* v. *Bell* (7) without deciding the question ([1904] 2 K.B. at p. 146): "It is possible that the company may have C two residences," one of which may be such as to expose it to the liability to income tax. That was another case where it was held that a company registered abroad, but having a head office in London where the controlling power was exercised, is assessable upon the whole of its profits as being resident in the United Kingdom. I do not shrink from the view that a company may have two residences in the sense above suggested.

D We were pressed with the decision and dicta in *Bradbury* v. *English Sewing Cotton Co.* (8). No doubt in that case LORD CAVE says ([1923] A.C. at p. 753):

> "The question therefore arises whether the locality of the shares and stock of a company is to be determined by its place of incorporation and registration, or by its place of residence and trading. After some doubt I have come to the conclusion that the latter is the true view."

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LORD WRENBURY distinguishes between nationality and residence, and decides that the latter is the test relevant to liability to income tax. The question that had to be determined in that case was whether dividends received on shares of the American Thread Co. were to be treated as income from foreign possessions. The American Thread Co. had during the earlier years in question been held liable to F pay income tax in respect of those dividends because it was during those years resident here. Could the same sum be afterwards treated as income from foreign possessions? LORD CAVE stated, as above, the narrow question that was for decision, namely, what was the locality of the shares and stocks of a company. This decision does not, in my opinion, govern the present case, nor is it inconsistent with the view that a company may have more than one place of residence. G There is no case unless it be suggested that *Mitchell* v. *Egyptian Hotels, Ltd.* (9) is one, which decides that an English company is not "resident" here. That case, however, is not a decision which affords any principle for guidance on this point. The direct admission was there made in the Case that the company resided in England. Residence did not matter in that case, for the points raised, and successfully argued, were that only the moneys remitted to England could be H taxed under Case V of Sched. D, and that the whole of the profits were not taxable under Case I. The actual decision of the Court of Appeal, which held good, as the Lords were equally divided, was that no part of the carrying on of the trade was done in this country. Only the spending of the profits, made abroad, occurred over here. It is to be noted that the Master of the Rolls observed that none of the previous decisions touched the case, and that BUCKLEY, L.J., commenced his I judgment by saying: "This company is incorporated in the United Kingdom: it is, therefore, resident here." As to the present case, the register of the shareholders is here, transfers of shares are made in London and registered there, and that may be not only an important but even a vital matter to the company, should there ever be a war between this country and Sweden: see *Daimler Co., Ltd.* v. *Continental Tyre and Rubber Co. (Great Britain), Ltd.* (10). As I have said, if the question be one of fact, the commissioners had, in my judgment, abundant evidence to come to the conclusion they did. But if, as I think, the question as presented by the commissioners is one of law, then I am of opinion, for the reasons

that have been given by ROWLATT, J., and those that I have ventured to add, that his judgment is right, and must be affirmed. The appeal must be dismissed with costs.

WARRINGTON, L.J.—The question is whether the company is residing within the United Kingdom within the meaning of the Income Tax Act, 1918. This case for the first time raises the question whether the fact that the real control and management of an English company is exercised abroad justifies the court in holding that it is not resident here. This, and every other English company, of course, owes its existence to the Act under which it is incorporated. All its proceedings are, directly or indirectly, regulated by it and derive their validity from it. It is provided by s. 62 of the Companies (Consolidation) Act, 1908, that every company shall have a registered office to which all communications and notices may be addressed, and notice of the situation of which and of any change therein must be given to the registrar. [See now s. 107 (1) (2) of the Companies Act, 1948.] Under s. 131 [s. 218 of Act of 1948] the situation of the registered office determines the particular court in which the company may be wound up. As already pointed out, the register of shareholders must be kept and must be open to inspection. The conception of residence in the case of a fictitious person, such as a company, is, of course, artificial, as is the company itself, and the locality of the residence can only be determined by analogy. In the absence of authority—and I will deal with the authorities presently—I should be prepared to hold, having regard to the statutory provisions above mentioned, that the registered office is a residence of the company, and that it must be regarded as residing there, at whatever other place, at home or abroad, it may also reside. For the purposes of the Income Tax Acts an individual may have more than one residence: *Inland Revenue* v. *Cadwalader* (6), and I can see no reason for any distinction in this respect between an individual and a corporation: see per LORD ST. LEONARDS in *Carron Iron Co.* v. *Maclaren* (4) and per COLLINS, L.J., in *La Bourgogne* (11). It is true that in these cases a company was held to have a residence—or, as it was called by LORD ST. LEONARDS, a domicil—in this country for purposes of founding jurisdiction, but in the case of a corporation it seems to me that there is no distinction between such a residence and residence generally, because it is evident that a corporation could not, as an individual can, be caught merely temporarily present in this country, and so served with process. Moreover, when the Act provides that all communications and notices may be addressed to the registered offices, it seems to me to follow that the company must at all times be there to receive them. But even if I am wrong in the view that the registered office ought to be regarded as the statutory residence of the company, the facts in this case are sufficient to enable us to say that this company, at all events, is residing there. I am quite prepared to hold that the keeping and entering up of the register of shareholders and its production for inspection are acts done by the corporation itself and are vital functions of its being, which can only be performed where it is itself resident, and that accordingly this company is, for that reason, resident in the United Kingdom. I think the other facts point in the same direction, but I prefer to rely on those connected with the register, because they are matters as to which, under the provisions of the Companies Act, the company has no option.

I now turn to the authorities. The first general observation to be made is that there is no case in which it has been decided that an English company, the real control and management whereof is abroad, is not residing in the United Kingdom. The point has never called for decision. In *Mitchell* v. *Egyptian Hotels, Ltd.* (9) the facts raised the point, but residence in the United Kingdom was admitted. In the Court of Appeal BUCKLEY, L.J., says: "This company is incorporated in the United Kingdom; it is therefore resident here." But this view was expressed without argument and appears to be little more than an acceptance by the learned lord justice as correct of an admission on the part of the company. The question

A decided was that a trade controlled and managed in Egypt was not carried on here, and the company, therefore, was not liable to be assessed to tax under Case I of Sched. D, on the authority of *Colquhoun* v. *Brooks* (12). The only other case in which the question of residence has arisen in reference to an English company is *Cesena Sulphur Co.* v. *Nicholson* (2), and there the court came to the conclusion that the real and substantial business of the two companies concerned was carried B on in England so that it became unnecessary to decide the question which arises in the present case. It is true that HUDDLESTON, B., expressed the opinion that the registration in this country was only a circumstance to be taken into account, but it does not appear that there was any discussion as to the effect of the statutory provisions relating to the registered office to which I have referred above. The other authorities are cases in which foreign companies have been held to reside in C the United Kingdom by reason of the real control and management thereof, and of the business being in this country, and they are relied upon by the taxpayers because of the terms in which the views of the learned judges concerned in the decisions have been expressed, showing, as it is said, that the control and management finally determines the residence, not only of a foreign, but of an English company. The leading case on this matter is *De Beers Consolidated Mines, Ltd.* D v. *Howe* (3). LORD LOREBURN there said ([1906] A.C. at p. 458):

> "I cannot adopt Mr. Cohen's contention [that a company resides where it is registered]. In applying the conception of residence to a company, we ought, I think, to proceed as nearly as we can upon the analogy of an individual. A company cannot eat or sleep, but it can keep house and do business. We ought, therefore, to see where it really keeps house and does business. An E individual may be of foreign nationality, and yet reside in the United Kingdom; so may a company. Otherwise it might have its chief seat of management and its centre of trading in England, under the protection of English law, and yet escape the appropriate taxation by the simple expedient of being registered abroad and distributing its dividends abroad. The decision of KELLY, C.B., and HUDDLESTON, B., in *Cesena Sulphur Co.* v. *Nicholson*, *Calcutta Jute Mills* F *Co.* v. *Nicholson* (2), now thirty years ago, involved the principle that a company resides, for the purposes of income tax, where its real business is carried on. Those decisions have been acted upon ever since. I regard that as the true rule, and the real business is carried on where the central management and control actually abides."

G It is said here that, applying what LORD LOREBURN said was the true rule, the present company must be held to be resident in Sweden and not here. It is in these last three words that the fallacy, in my opinion, lies. The company may have a residence in Sweden—as to this I express no opinion, for it may involve a question of Swedish law—but I cannot see why it should not also have a residence in the United Kingdom, and if it has, that is sufficient for the present purpose: H per CHANNELL, J., in *Goerz & Co.* v. *Bell* (7). In this, as in other cases, it is, in my opinion, wrong to apply expressions of learned judges used in reference to the facts of the case before them to essentially different facts, and thus give to them a meaning and effect which such judges themselves might well repudiate. The question as to the residence in this country of a foreign company again arose in *American Thread Co.* v. *Joyce* (5), and was decided in accordance with the I principle laid down in the *De Beers Case* (3), but BUCKLEY, L.J., recognised that the place of incorporation might be a place of residence, though not necessarily the only one. *New Zealand Shipping Co.* v. *Thew* (13) is another example of the application of the same principle, and I should not refer to it but for the fact that some stress was laid on the use by LORD BUCKMASTER in the reference to the *De Beers Case* (3) of the expression that what has to be ascertained is the "real residence" of the company. For myself, I do not attach much importance to the expression, but it is right to say that it is not used by LORD LOREBURN. What he says is that one must ascertain where it really "keeps house and does business."

LORD BUCKMASTER, however, uses another expression which, with all respect to him, is not quite accurate, and the inaccuracy may be of some importance. He says (8 Tax Cas. at p. 229):

> "It has long been held that in order to determine whether a company is resident in one place or another the registered office of a company is only an incident in the evidence."

What has in fact been said is that the place of incorporation is only an incident; the difference is material, because in the cases of the foreign companies the only fact found was the incorporation abroad, and there was no evidence as to the provisions of the foreign law as to registered office. In the only case of an English company in which the matter was discussed (*Cesena Sulphur Co.* v. *Nicholson* (2)), HUDDLESTON, B., uses the expression "the place of registration," and, as I have already pointed out, the statutory provisions as to the registered office were not mentioned.

There remains one other case to which I ought to refer, *Bradbury* v. *English Sewing Cotton Co.* (8). The question decided in that case was whether profits derived from shares held by an English company in the American Thread Co., earned during the period of its residence in England, as already mentioned, could, notwithstanding that fact, be treated as profits of the English company from a foreign possession, and it was held that the previous decision as to the residence of the American company was conclusive against the Crown. I have again carefully considered the speeches in that case, and particularly those of LORD CAVE and LORD WRENBURY, and I cannot find in them anything inconsistent with the views I have expressed, always bearing in mind the fact that the company, the residence of which they were discussing, was a foreign company. For the reasons I have given, I think on principle this English company was, during the material period, residing in the United Kingdom, and there is no authority to the contrary. The decision of ROWLATT, J., was, therefore, in my opinion, correct, and this appeal must be dismissed with costs.

ATKIN, L.J.—The learned judge has held that a company may reside in two places and that there is evidence on which the commissioners could find residence in England. If for the purposes of income tax dual residence is possible, I agree with this, and, for the reasons given by my brothers, I think there was evidence on which the commissioners could find residence in England, unless, for the purposes of income tax, the residence of a limited company has a special meaning and can be only in one place. If only in one place, there is strong authority for saying that such place is where the central management and control is. For the purpose of deciding where the residence of an incorporated company is, we are told that we are to proceed as nearly as we can upon the analogy of an individual: *De Beers Consolidated Mines, Ltd.* v. *Howe* (3), per LORD LOREBURN. An individual may reside in more places than one: *Inland Revenue* v. *Cadwalader* (6), an income tax case. So, for other purposes than income tax, may a corporation: see *La Bourgogne* (11), where a foreign shipping corporation with its head office in Paris had an office here with their name painted up and did business through an agent. LORD HALSBURY said ([1899] A.C. at p. 433):

> "It appears to me that as a consequence of these facts the appellants are resident here in the only sense in which a company can be resident, to use the phrase which Mr. Joseph Walton has so constantly used, 'they are here.' "

In this sense it is obvious that a company's residence may not be singular or dual but multiple. In a recent case in this court (*New York Life Insurance Co.* v. *Public Trustee* (14)) we had to consider the position of a great American life assurance corporation who carried on business in their own names in most of the civilised countries of the world, and we held that a debt incurred by it in this country, payable at its office in London, was situate here, both because the company was resident here and because it had localised the debt here. Herein lies

A the difficulty of the case, for if what I have called multiple residence is recognised here for income tax purposes, foreign corporations so resident and making part of their profits here will be liable to pay income tax on the whole of their profits wherever made, and we may presume that foreign nations will not be slow to follow suit in respect of English companies of similarly wide activities. For these reasons it has been argued that the court would not recognise more than two B residences, one what LORD BUCKMASTER calls "the real residence" (*New Zealand Shipping Co.* v. *Thew* (13)), where the real business is carried on; the other, the place where the company is incorporated and has a registered office, where it exercises at any rate some of the functions of its corporate life, where the laws operate which brought it into existence, regulate its constitution, and will regulate its dissolution. On the other hand, if a company may have more than one C residence, it is not easy to see why its residences should be confined to two. The argument for the appellants was that it has been decided that the test of residence for income tax purposes admits of only one residence, the place where the real business is really carried on. It will be necessary to consider the decisions and dicta on this point.

In *A.-G.* v. *Alexander* (1) the Imperial Ottoman Bank, who carried on a branch D in London by a London committee but were established in Constantinople by Turkish law and had their seat fixed there, were held not to be resident in the United Kingdom so as to be assessable for all their profits wherever made. KELLY, C.B., said: "London is not the chief seat of carrying on the business of the bank." In *Cesena Sulphur Co., Ltd.* v. *Nicholson* (2) there were two English companies concerned, both registered in England with registered offices in England. In both E cases the actual operations from which the profits were made took place abroad. KELLY, C.B., answering the question what is the meaning of residence as applied to a joint stock company, said (1 Ex.D. at p. 445):

> "I express no opinion at present. A joint stock company resides where its place of incorporation is, where the meetings of the whole company or those F who represent it are held and where its governing body meets in bodily presence."

HUDDLESTON, B., after saying that residence means not an artificial residence but actual residence, and approving of counsel's argument that it means the place where the real trade and business is carried on, proceeds to negative the argument that registration of a company in England was conclusive of residence in England, G stating that it is a strong circumstance analogous in an individual to the place of birth, and then proceeds (1 Ex.D. at p. 454):

> "But I do not think that the principle of law is really disputed that the artificial residence which must be assigned to the artificial person called a corporation is the place where its real business is carried on. The difficulty is in applying that principle to the facts of each case. I admit that the onus H of proving the residence lies upon the Crown, as my brother CLEASBY said in *A.-G.* v. *Alexander* (1), and if the Crown fails to satisfy the court that the place of residence is within the area of taxation, the company ought not to be taxed. Then I have to ask myself where was the place where the real and substantial business was carried on."

I He proceeds to say that in both cases it was in England. The importance of this judgment is that the test is being applied to English companies registered here with registered offices here and subject to all the provisions of the Companies Act, 1862. I cannot see how HUDDLESTON, B.'s test admits of dual residence, or, at any rate, of any residence that is not determined by the question: Where is the real business carried on? In *Goerz & Co.* v. *Bell* (7), CHANNELL, J., had to deal with a company registered in the Transvaal, but with its head office and directing powers in this country. After saying that it was possible, though he did not decide the point, that a company might have two residences, he came to the conclusion

that the company was resident in England, and, if he had to decide between London and Johannesburg, he would prefer London. A

The next case is *De Beers Consolidated Mines, Ltd.* v. *Howe* (3), to which I have referred. It is contended by the appellants that this decision determines the point in their favour. In that case the company was registered in the Cape Colony, and its head office was at Kimberley, where by the articles all meetings were to be held. Its business was, however, controlled by board meetings in London, and B the commissioners had found that the trade or business was exercised by the company within the United Kingdom at their London office, and that the head and seat and directing power were at the office in London. LORD LOREBURN, after refusing to accept the contention that a company resides where it is registered and nowhere else, and after making the reference to the analogy of an individual which I have mentioned, says ([1906] A.C. at p. 458): C

> "The decision of KELLY, C.B., and HUDDLESTON, B., in *Cesena Sulphur Co.* v. *Nicholson* (2), now nearly thirty years ago, involved the principle that a company resides, for purposes of income tax, where its real business is carried on. Those decisions have been acted upon ever since. I regard that as the true rule, and the real business is carried on where the central management and control actually abides. It remains to be considered whether the present case falls within that rule." D

He then held that, applying this rule, the finding of fact of the commissioners established that the company was resident in the United Kingdom. With that judgment LORD MACNAGHTEN, LORD ROBERTSON and LORD ATKINSON expressly agreed. It is truly said that this decision only relates to a company registered E abroad, but, for the purpose of testing the residence of a foreign company, LORD LOREBURN approves and adopts the test prescribed by the Exchequer Division for an English company. It can hardly be doubted that in the *Cesena Case* (2) the court rejected incorporation and registered office as insufficient, and required investigation of further facts, namely, the place of the real business, and that the judgment in that case proceeded upon the basis that such test was the only test. F If it is laid down in the lower court as the only test of residence, and is expressly approved and adopted in the House of Lords as a test of residence, I find it very difficult to avoid the conclusion that it was adopted as the only test. There is nothing in the judgment of LORD LOREBURN which suggests that he has in his mind the possibility of dual residence involving some other test of residence than that which he laid down, and a test which, if it were available, would be different from, G and inconsistent with, the test accepted from the Exchequer Division.

The doctrine of residence of a trading corporation which appears to me to be approved by the decision in *De Beers Consolidated Mines, Ltd.* v. *Howe* (3), namely, that the sole test is where is the business really carried on, finds support from dicta in several succeeding cases in the House of Lords. In *Daimler Co., Ltd.* v. *Continental Tyre and Rubber Co. (Great Britain), Ltd.* (10), one of the questions H debated was whether the continental company was an alien enemy. The company was registered in England and had its registered office in London, and was formed for the purpose of selling in the United Kingdom motor-car types made in Germany by a German company. Its directors were resident in Germany, and after the outbreak of war in 1914, at any rate, met in Germany. In the course of discussing the question of enemy character, LORD ATKINSON said ([1916] 2 A.C. at p. 318): I

> "Strange as it may appear, the minute book of the company, showing presumably from what centre the business of the company was managed and directed, was not given in evidence before any of the three tribunals. The embarrassing and, as I think, rather unfortunate result of this omission is that the full facts, showing in what country, England or Germany, lay the real business centre from which the governing and directing minds of the company operated, regulating and controlling its important affairs, were never disclosed. These are, however, the very things which, for the purpose of income tax, at

all events, have been held to determine the place of residence of a company like the appellant company, so far as such a fictitious legal entity can have a residence: *De Beers Consolidated Mines, Ltd.* v. *Howe* (3); and I can see no reason why, for the purpose of deciding where the carrying on by such a company of its trade or business does or does not amount to a trading with the enemy, they should not equally determine its place of residence."

Those words are obiter, but they apply the principle of *De Beers Consolidated Mines, Ltd.* v. *Howe* (3) back again, as in the *Cesena Case* (2), to an English company, and I do not think that LORD ATKINSON, in saying that the things mentioned would "determine the place of residence," meant would determine one of the places of residence of a company.

In *New Zealand Shipping Co.* v. *Thew* (13) LORD BUCKMASTER had to deal with the case of a company registered in New Zealand with a registered office fixed by the memorandum of association in New Zealand and a register of members kept both in New Zealand and in London. He says (8 Tax Cas. at p. 229):

> "Now it has long been held that, in order to determine whether a company is registered in one place or another, the registered office of a company is only one incident in the evidence. In the *De Beers Case* (3) it was stated that you must find out what is the chief seat of management and the centre of trading of the company in order to ascertain what is its real residence, and again in *Cesena Sulphur Co.* v. *Nicholson* (2) KELLY, C.B., said: 'The real business is carried on where the central management and control actually abide.' "

I notice two things in these sentences—first, that LORD BUCKMASTER refers to the two cases he mentions as laying down the same test, one of them being the case of an English company and the other of a foreign company; secondly, that he speaks of "the real residence," which presumably means the only residence. In *Bradbury* v. *English Sewing Cotton Co.* (8), a company registered in the United States had for three years been taxed as resident in this country on the principle laid down in the *De Beers Case* (3). The control and real residence was then transferred to the United States. In assessing the profits of a corporation holding shares in the American company, the question arose whether during the years the American company was resident in this country the English shareholder was receiving dividends on the shares as profits from a foreign possession. I think the ultimate decision was based upon the ground that the revenue authorities, having taxed the company during the three years as resident in England, could not thereafter be heard to say that during those years it was resident in America, and that the headnote in the LAW REPORTS states the decision too broadly. But, in the course of his judgment, LORD CAVE said ([1923] A.C. at p. 753):

> "The question, therefore, arises whether the locality of these shares or stock of a company is to be determined by its place of incorporation and registration or by its place of residence and trading. After some doubt, I have come to the conclusion that the latter is the true view. 'Shares in a company,' said SIR JAMES HANNEN in *In the Goods of Ewing* (15), 'are locally situate where the head office is,' and I think this means that they are locally situate where the company's principal place of business is found. . . . It was decided in *American Thread Co.* v. *Joyce* (5) that during the first three years the American company was here for all the purposes of income tax; and, the company being here, I find it impossible to hold that its stock was abroad."

I think that, so far as that company is concerned, LORD CAVE was expressly negativing the possibility of double residence, one in the place where the principal place of business was.

It is necessary to refer to *Mitchell* v. *Egyptian Hotels, Ltd.* (9). That was a case of a company registered in England with its registered office in London, which carried on the business of conducting a hotel in Egypt. It was admitted before the commissioners that the company was resident in England, but, as it was

assessed on its full profits, it was further necessary for the revenue authorities to show that some part of the trade was exercised in England, otherwise, under the decision in *Colquhoun* v. *Brooks* (12), the company could only be assessed on such of its profits as were remitted to this country. The commissioners found that the head seat and controlling power of the company were in England. But this finding was reversed in the Court of Appeal, who held that the control and management were in Egypt, and that, therefore, the trade was solely exercised in Egypt. This decision was upheld in the House of Lords, the numbers being equally divided. In the result, therefore, we have facts which, on the principle of the *De Beers Case* (3), show residence abroad, and we have an admission that the company was resident here. In addition, we have the statement by BUCKLEY, L.J.: "The company is incorporated in the United Kingdom, and is therefore resident here," a proposition which, in its wide form, is clearly inconsistent with the *Cesena Case* (2). All that it is necessary to say is that the case shows that the test which determines residence may, in some cases, determine also the place where the trade is wholly carried on; and it was in the latter aspect only that the courts had to deal with the facts in view of the admission of residence in England, made before the commissioners and recorded by them in their findings of fact.

San Paulo (Brazilian) Rail. Co. v. *Carter* (16) is a case raising the same point. There a company registered in England owned a railway in Brazil where the business operations took place. In that case also it was admitted that the company was resident in England, and it was found that the control and direction were in London, where the business of the company was carried on under the directors. The decision of the House of Lords in that case was that the business was, at any rate partially, if not wholly, carried on in this country, and the company were, therefore, not protected from assessment by the principle of *Colquhoun* v. *Brooks* (12). No question of residence, therefore, arose.

In this condition of the authorities, we are asked to decide for the first time that, for income tax purposes, there are two tests of residence for corporations. One, place of incorporation, registered office, and, perhaps, in addition some functional activity; secondly, the place where the real business is carried on; and that, therefore, a company may have two residences. It appears to me that the *Cesena Case* (2) expressly negatives the first test, and that case has the authority of the House of Lords. The weight of authority seems to me to indicate that, for income tax purposes, there can only be one residence, "the real residence," and that is the place where the real business is carried on. In principle I should have said that the place of incorporation and registered office is conclusive of residence, and that, if one residence only is possible, it is that residence. In other words, I should agree with the dictum of LORD WRENBURY in the *Egyptian Hotels Case* (9), but that view seems to me excluded by the *Cesena Case* (2). Nor do I myself see any difficulty in saying that a corporation can reside in two places, but for income tax purposes, as I have said, that seems excluded by the authorities cited. It is plain, however, that if a company may have, for income tax purposes, a dual residence, it has to be explained why, for the same purposes, it may not have multiple residences, and how multiple residence for purposes of jurisdiction is reduced, if it be reduced, to dual residence for income tax purposes. These problems, in my view of the case, must be solved elsewhere. I feel constrained by authority to come to the conclusion that this appeal should be allowed, and the assessment discharged.

From this decision the company appealed to the House of Lords.

Maugham, K.C., *Latter, K.C.*, and *Bremner* for the appellants.

The Attorney-General (*Sir Douglas Hogg, K.C.*) and *R. P. Hills* for the Crown.

The House took time for consideration.

Mar. 13, 1925. Their Lordships read opinions in which they stated as follows.

VISCOUNT CAVE, L.C.—In my opinion, a registered company can have more than one residence for the purposes of the Income Tax Acts. It has often been

A pointed out that a company cannot in the ordinary sense "reside" anywhere, and that, in applying the conception of residence to a company, it is necessary, as LORD LOREBURN said in the *De Beers Case* (3), to proceed as nearly as possible upon the analogy of an individual. He said ([1906] A.C. at p. 458):

> "A company cannot eat or sleep, but it can keep house and do business. We ought, therefore, to see where it really keeps house and does business. . . . The decision of KELLY, C.B., and HUDDLESTON, B., in *Cesena Sulphur Co.* v. *Nicholson, Calcutta Jute Mills Co.* v. *Nicholson* (2), now thirty years ago, involved the principle that a company resides for purposes of income tax where its real business is carried on. Those decisions have been acted upon ever since. I regard that as the true rule, and the real business is carried on where the central management and control actually abides."

The effect of this decision is that, when the central management and control of a company abide in a particular place, the company is held, for purposes of income tax, to have a residence in that place, but it does not follow that it cannot have a residence elsewhere. An individual may clearly have more than one residence: see *Inland Revenue* v. *Cadwalader* (6), and on principle there appears to be no reason why a company should not be in the same position. The central management and control of a company may be divided, and it may "keep house and do business" in more than one place, and, if so, it may have more than one residence.

When the authorities are examined they do not appear to me to be inconsistent with this view. In *Cesena Sulphur Co.* v. *Nicholson, Calcutta Jute Mills Co.* v. *Nicholson* (2) it was held that a company which was registered in the United Kingdom, the directors of which managed from this country a foreign business, was resident in the United Kingdom within the meaning of the Income Tax Acts; but the question whether such a company also resided in the country where its business was carried on was not considered, and KELLY, C.B., left open the question whether the same joint-stock company might reside at more than one place. In *San Paulo (Brazilian) Rail. Co.* v. *Carter* (16) it was held that a company registered in the United Kingdom, and carrying on its business partly here and partly abroad, was taxable under Case I and not under Case V of Sched. D. It was plain that the company was resident here, and no question of double residence arose. In *Goerz & Co.* v. *Bell* (7) the decision was that a company registered in a foreign country, but having its head office and central management in London, was taxable here as a person residing in the United Kingdom. The question whether a company could have two residences was not material, but CHANNELL, J., said ([1904] 2 K.B. at p. 146):

> "It is possible, though I do not decide the question one way or the other, that the company may have two residences. . . . That is clear in the case of a person, and I think the condition of things might be the same with regard to a company."

In *De Beers Consolidated Mines, Ltd.* v. *Howe* (3), which was a case of a company registered in a British colony and partly managed from London, the decision was in accordance with that given in *Goerz & Co.* v. *Bell* (7), PHILLIMORE, J., in giving judgment in the High Court, said ([1905] 2 K.B. at p. 632):

> "As was pointed out in *Goerz & Co.* v. *Bell* (7), a person and a company may have for the purposes of taxation two residences."

On appeal to the House of Lords no opinion to the contrary was given. *American Thread Co.* v. *Joyce* (5) was another case in which a company registered abroad but controlled and managed in the United Kingdom was held to be resident here; and BUCKLEY, L.J., in giving judgment in the Court of Appeal, said (106 L.T. at p. 175): "A corporation, like an individual, may have more than one place of residence."

In all the cases above cited the companies concerned—some of them registered here and others registered overseas—were controlled and managed (either wholly

or partly) by an English board meeting in England; and this being so, they were held to be "resident" here and taxable under Case I. In these circumstances, the question whether they were also resident elsewhere did not arise, and the expressions quoted above as to the possibility in such a case of a double residence were in the nature of obiter dicta. But in *Mitchell* v. *Egyptian Hotels, Ltd.* (9) the point which is now under discussion actually arose. In that case a company incorporated in the United Kingdom carried on a hotel business in Egypt, and under the articles of association, as altered by special resolution, the company's affairs were to be carried on and managed by a local board meeting in Egypt, the powers of the London boards being confined to keeping accounts, recommending dividends, and controlling the capital. It was admitted that the company resided in England for the purposes of the Income Tax Acts, and the question for decision was whether the company's trade was carried on partially in England, so that it was taxable under Case I in respect of its whole profits, in accordance with the *San Paulo Case* (16), or whether, the trade being carried on wholly abroad, it was assessable only under Case V in respect of profits received in this country. The decision of the Court of Appeal was that the whole control and management of the company's trade was in Egypt and not here, and accordingly that Case V and not Case I applied; and on appeal to this House, the voices being equal, the decision of the Court of Appeal was upheld. It is noticeable that the facts, as found by the commissioners and interpreted in the Court of Appeal and in this House, were sufficient, according to the principle of the *De Beers Case* (3), to establish residence in Egypt, so that, if a company can have but one residence—namely, the place where its control and management abides—it must have been held that the company, being resident in Egypt, was not resident here, and accordingly was not taxable at all; but no such suggestion was made either by counsel or by any member of the tribunals by which the decision was given and upheld. This being so, while the case does not expressly decide that a company may have two residences for income tax purposes, the decision appears to be inconsistent with any other view. In *New Zealand Shipping Co.* v. *Thew* (13) the principle of the *De Beers Case* (3) was again applied by this House to a company registered overseas, but again no question of double residence arose.

There remains *Bradbury* v. *English Sewing Cotton Co., Ltd.* (8), as to which, in view of the interpretation put upon it by ATKIN, L.J., it is necessary to say something. In that case the question arose whether dividends paid by the American Thread Co. at a time when, according to the above-cited decision in *Joyce's Case* (5), it was controlled and managed from Liverpool, and was for income tax purposes resident there, were to be treated in the hands of an English shareholder as profits from a foreign business; and it was held by the Court of Appeal and by this House that they were not. The Crown, having established in *Joyce's Case* (5) that the profits of the company during the period in question were, for the purpose of taxing the company, to be treated as earned here, could not now be heard to say that, for the purpose of taxing the shareholders, they were earned abroad. The source of income was the same in both cases. It is obvious that, so far as the decision goes, the case did not establish that a company can have only one residence; and my own observations, to which ATKIN, L.J., refers, were not directed to any question of residence, but to the position of the shares as a source of income for income tax purposes. The point to which I was directing my attention is very clearly put by LORD WRENBURY in his speech in the same case ([1923] A.C. at p. 767).

From the above examination it would appear that, while the authorities may not establish the possibility of a company having more than one residence for income tax purposes, they are at least not inconsistent with that view. I do not cite the decisions as to the residence of a company for the purpose of founding jurisdiction, because they relate to a different subject-matter, but, so far as they go, they point to the same conclusion. I hold, therefore, that a company may, for income tax purposes, have a residence here as well as a residence abroad. In the present case

A it was found by the commissioners that, while the business of the company was controlled and managed from the head office at Stockholm, so that the company would, in the contemplation of English law, have a residence in Sweden, the company was resident in the United Kingdom for the purposes of the Income Tax Acts, and it was hardly disputed that, assuming that a company can have two residences, there was sufficient material upon which that finding could be based. B I am not at present prepared to say that registration in the United Kingdom would itself be sufficient proof of residence here; that point does not arise in this case, and I express no opinion upon it. But, however that may be, I am satisfied that the fact of registration, together with the other circumstances which were found by the commissioners to exist, were sufficient to enable them to arrive at their finding. It may be noted that the distinction between Case I and Case V, which C bulked so largely in some of the cases cited, is immaterial in the present case, and it need not now be considered. For these reasons I am of opinion that this appeal fails and should be dismissed with costs.

LORD DUNEDIN concurred.

D **LORD ATKINSON,** who dissented, said that he had read and anxiously considered the opinions which had been read by the noble lords who had preceded him. He regretted extremely that he was unable to concur with them. He took the view of the authorities expressed at length in the able judgment delivered in the Court of Appeal by ATKIN, L.J., and, like him, was convinced that those opinions could not be reconciled with the cases which had been decided in this country during the last half-century. He was of opinion that the decision appealed from E was inconsistent with all the authorities which had in this country dealt with this question of the residence of companies for the previous forty-eight years and was, therefore, erroneous and should be reversed. It might well be that the usual consequences to which ATKIN, L.J., refers in his judgment would follow from a decision that a company could have multiple residences. It appeared to him that that was not improbable. There were no materials available on which one could F form a definite opinion on that point. With the rest of the judgment of ATKIN, L.J., he thoroughly concurred.

LORD SUMNER.—I concur in the motion about to be proposed from the Woolsack.

G **LORD BUCKMASTER** also concurred in the appeal being dismissed.

Appeal dismissed.

Solicitors: *Ashurst, Morris, Crisp & Co.*; *Solicitor of Inland Revenue.*

[*Reported by* G. P. LANGWORTHY, ESQ., *and* E. J. M. CHAPLIN, ESQ., *Barristers-at-Law.*]

A

TORONTO CITY CORPORATION *v.* TORONTO RAILWAY CORPORATION

[PRIVY COUNCIL (Viscount Cave, Lord Dunedin, Lord Shaw, Lord Carson, Lord Blanesburgh), June 23, 24, 26, October 24, 1924]

B

[Reported [1925] A.C. 177; 94 L.J.P.C. 25; 132 L.T. 401]

Canada—Ontario—Street railway—Acquirement by city corporation—Basis of valuation—Reproduction cost less depreciation—Estimate of reproduction cost—Right to interest.

By an agreement which was subsequently validated by a statute of the legislature of Ontario the appellant corporation was empowered to take over the respondent company's street railways in the city of Toronto at a value to be determined by arbitration. The Act provided by s. 4 (3) that the arbitrators were "to consider only the actual value of the actual and tangible property, plant, equipments and works connected with and necessary to the operation of the railways," and by sub-s. (4) they were "to consider and award only the value of the said several particulars to the city at the time of the arbitration, having regard to the requirements of a railway of the best kind and system then in operation and applicable to the said city."

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Held: (i) in valuing certain parts of the property taken over, especially the rolling-stock, buildings, and track, on the basis of reproduction cost less depreciation, allowing, not only for wear and tear, but also for obsolescence, defects, and advantages from the operating standpoint, and having regard to good practice in railway administration and to s. 4 (4) of the statute of Ontario, the arbitrators had proceeded on principles which had been approved by many decisions of the House of Lords and of the Judicial Committee; (ii) the arbitrators were also right in estimating the reproduction cost on the basis of the cost of labour and materials generally current at the date of the valuation and in not taking into account rates of wages and prices obtaining over a period which the construction of a railway system comparable with that in question would have occupied; (iii) the duty of the arbitrators being, not to determine all the rights of the company, but only to ascertain the value of certain property at a certain time, it was outside their powers to allow interest on the value of property already taken over by the corporation; but (iv) it was within their powers to determine whether certain properties were "necessary" to the operation of the railways within s. 4 (3) of the statute of Ontario, since, without doing so, they could not ascertain the value of the property which was necessary for that purpose.

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Notes. Followed: *Re Letros and City of Toronto* (1924), 56 O.L.R. 175. Applied: *International Rail. Co.* v. *Niagara Parks Commission*, [1937] 3 All E.R. 181. Considered: *Toronto* v. *Toronto Rail. Co.* (1926), 59 O.L.R. 73; *International Rail. Co.* v. *Niagara Parks Commission*, [1941] 2 All E.R. 456; *Hayden Warehouses and Storage, Ltd.* v. *City of Toronto*, [1955] O.R. 258; *Pawson* v. *City of Sudbury*, [1955] O.R. 504.

H

As to the basis of valuation of a tramway undertaking on its acquirement by the local authority generally, see 32 HALSBURY'S LAWS (2nd Edn.) 732, note (j), and cases there cited.

I

Cases referred to:

(1) *Edinburgh Street Tramways Co.* v. *Edinburgh Corpn.* (1894), 21 R. (Ct. of Sess.) 688; 31 Sc.L.R. 953; affirmed, [1894] A.C. 456; 63 L.J.Q.B. 769; 71 L.T. 301; 10 T.L.R. 625; 6 R. 317, H.L.; 43 Digest 354, *113*.

(2) *Melbourne Tramway and Omnibus Co., Ltd.* v. *Tramway Board*, [1919] A.C. 667, P.C.; 43 Digest 354, *q*.

(3) *Re Manchester Carriage and Tramways Co. and Manchester Corpn.* (1902), 87 L.T. 504; 67 J.P. 14; 18 T.L.R. 779; 46 Sol. Jo. 687; varied, 19 T.L.R. 439, C.A.; 43 Digest 353, *109.*

(4) *Manchester Carriage and Tramways Co., Ltd.* v. *Swinton and Pendlebury U.D.C.*, [1906] A.C. 277; 75 L.J.K.B. 839; 93 L.T. 820; 70 J.P. 81; 22 T.L.R. 154; 4 L.G.R. 214, H.L; 43 Digest 354, *111*

Also referred to in argument:

Oldham, Ashton and Hyde Electric Tramways, Ltd. v. *Ashton Corpn.*, [1921] 3 K.B. 511; 125 L.T. 391; 85 J.P. 181; 10 L.G.R. 327; 90 L.J.K.B. 828, C.A.; 43 Digest 355, *119.*

North Metropolitan Tramways Co. v. *Leyton U.D.C.* (1908), 98 L.T. 792; 72 J.P. 241; 6 L.G.R. 627, C.A.; 2 Digest (Repl.) 623, *1473.*

Re Peterborough City and Peterborough Electric Light and Power Co. (1916), 52 O.L.R. 9; 20 Digest 217, *b.*

Re Leak and City of Toronto (1899), 26 A.R. 351; 30 S.C.R. 321; 33 Digest 14, *l.*

R. v. *Bradford*, [1908] 1 K.B. 365; 77 L.J.K.B. 475; 98 L.T. 620; 72 J.P. 61; 24 T.L.R. 195; 6 L.G.R. 333, D.C.; 26 Digest 356, *819.*

R. v. *Income Tax Special Purposes Comrs.* (1888), 21 Q.B.D. 313; 53 J.P. 84; 36 W.R. 776; sub nom. *R. v. Income Tax Special Comrs., Ex parte Cape Copper Mining Co., Ltd.*, 57 L.J.Q.B. 513; 59 L.T. 455; 4 T.L.R. 636; 2 Tax Cas. 332, C.A.; 28 Digest (Repl.) 403, *1792.*

Rhys v. *Dare Valley Rail. Co.* (1874), L.R. 19 Eq. 93; 23 W.R. 23; 11 Digest (Repl.) 244, *1123.*

Davies v. *James Bay Rail. Co.* (1910), 15 O.W.R. 625; 20 O.L.R. 534; 11 Digest (Repl.) 140, **276.*

Re Ketcheson and Canadian Northern Ontario Rail. Co. (1913), 29 O.L.R. 339; 5 O.W.N. 36; 25 O.W.R. 20; 11 Digest (Repl.) 214, **565.*

Champsey Bhara & Co. v. *Jivraj Balloo Spinning and Weaving Co.*, [1923] A.C. 480; 92 L.J.P.C. 163; 129 L.T. 166; 39 T.L.R. 253, P.C.; 2 Digest (Repl.) 649, *1710.*

Toronto Rail. Co. v. *Toronto Corpn.*, [1906] A.C. 117; 43 Digest 365, *g.*

London Street Tramways Co. v. *L.C.C.*, [1894] A.C. 489; 10 T.L.R. 630, H.L.; 43 Digest 355, *115.*

Appeal and **Cross-appeal** from an order of the Appellate Division of the Supreme Court of Ontario (MACLAREN, HODGINS, FERGUSON and MAGEE, JJ.A.) made on an appeal in a motion to set aside an award made in an arbitration between the Toronto Railway Co. and the corporation of the city of Toronto.

By a statute of 1892 of the legislature of Ontario, s. 4 (4), the corporation of Toronto was empowered, upon the termination of a period expiring on Aug. 31, 1921, to take over from the company the property necessary to be used in the working of street railways at a value to be fixed by arbitrators. An award having been made by a majority of the arbitrators fixing the value of the property which the corporation, having given the company notice of their intention to exercise their powers, was under an obligation to take over, both parties applied to have the award set aside.

Tilley, K.C., Geary, K.C., A. C. McMasters, K.C., and *C. P. H. Carson* (all of the Canadian Bar) for the corporation.

Sir John Simon, K.C., Rowell, K.C. (of the Canadian Bar), *Geoffrey Lawrence*, and *F. McCarthy* (of the Canadian Bar) for the railway company.

Oct. 24. **VISCOUNT CAVE.**—These appeals are brought, the first by the corporation of the city of Toronto and the second by the Toronto Railway Co., against an order of the Appellate Division of the Supreme Court of Ontario, dated Sept. 24, 1923. By that order the Appellate Division, on an appeal from an order of LOGIE, J., partly allowed and partly refused a motion by the corporation to set aside an award made by arbitrators in relation to the taking over by the corporation

from the railway company of certain street railways in Toronto, and also dismissed a motion by the railway company to set aside the same award. Against these decisions both the parties appeal on different grounds.

In the year 1891 the corporation, having agreed to take over from the Toronto Street Rail. Co. (an old company which has now disappeared) the street railways of that company in Toronto and the real and personal property connected therewith, invited tenders for the purchase of an exclusive right to operate surface street railways in Toronto (except in certain parts of the city) for a period of twenty years, which was to be extended to thirty years in the event of legislation being obtained to enable that to be done. Under the conditions of sale upon which the tenders were to be made, the person whose tender was accepted (therein called "the purchaser") was to take over all the property to be acquired by the city from the Toronto Street Rail. Co. at the amount of the award under which the city was to acquire that property. There were also other conditions of sale, including the following:

> "7. At the termination of this contract the city may (in the event of the council so determining) take over all the real and personal property necessary to be used in connection with the working of the said railways, at a value to be determined by one or more arbitrators (not exceeding three) to be appointed as provided in the Municipal Act and Acts respecting arbitrations and references, and to have all the powers of arbitrators appointed under said Acts, and each party shall bear one-half of the cost of the necessary arbitration at conclusion of term of lease, but the city shall only pay for the land conveyed by them to the purchaser what it is worth, without reference to its value for the purpose of operating a street railway or railways."

The successful tender was that of Messrs. Kiely, McKenzie and Everett, and by an indenture dated Sept. 1, 1891, the corporation assigned to them and to Mr. C. C. Woodworth all the railways and property acquired by the corporation from the Toronto Street Rail. Co. and granted to them the exclusive right for a period of twenty years from that date, and for the extended period of ten years in the event of the needed legislation being obtained "and no longer," to operate surface street railways in the city of Toronto with the exceptions therein mentioned, the above conditions of sale being incorporated in and made part of the grant. By a statute of the legislature of Ontario passed on April 14, 1892, the agreement between the corporation and the four persons above named, with the conditions of sale above referred to, were declared to be valid and binding upon all parties for the full period of thirty years from Sept. 1, 1891, and no longer, but subject to the provisions of the Act. By the same statute the respondent company, the Toronto Rail. Co. (therein called the company), was incorporated and was empowered to purchase and take over from the above-named parties the agreement of Sept. 1, 1891, and all the property, rights, and privileges comprised therein. Section 4 of the statute contained certain provisions, relating to the option of taking over the railway property reserved to the city by cl. 7 of the conditions of sale, which it is desirable to set out in full:

> "4. (2) If the city of Toronto desire to exercise the right of taking over the property necessary to be used in the working of the railways at the termination of the said period of thirty years it shall, not less than twelve months prior thereto, give to the purchasers or the company, as the case may be, notice of its intention so to do. (3) After the said city of Toronto shall have given notice of its intention to take over the said property, it may at once proceed to arbitrate under the conditions in that behalf, and both the city and the purchasers or the company, as the case may be, shall in every reasonable way facilitate such arbitration, and the arbitrators appointed in the matter shall proceed so as, if possible, to make their award not later than the time named by the city for taking over the said property. But if from any cause the award shall not be made by such time or if either party be dissatisfied with the award,

A the city may nevertheless take possession of the said railways and all the property and effects thereof, real and personal, necessary to be used in connection with the working thereof on paying into court either the amount of such award, if the award be made, or, if not, upon paying into court or to the purchasers or company, as the case may be, such sum of money as a judge of the High Court of Justice may, after notice to the opposite party, order, and B upon and subject and according to such terms, stipulations and conditions as the said court shall by its order direct and prescribe, provided always that the rights of the parties except in so far as herein specially provided, shall not be affected or prejudiced thereby. In determining such value the rights and privileges granted by the said agreement and the revenue, profits and dividends being or likely to be derived from the enterprise are not to be taken into C consideration, but the arbitrators are to consider only the actual value of the actual and tangible property, plant, equipments and works connected with and necessary to the operation of the railways, which is not to include any land, property or rights acquired or used in connection with the said street railway, and which do not actually form a part of the said street railway undertaking necessary to the carrying on of the same. (4) In arriving at such value the D arbitrators are to consider and award only the value of the said several particulars to the city at the time of the arbitration, having regard to the requirements of a railway of the best kind and system then in operation and applicable to the said city."

The Toronto Railway Co. (which will be referred to as the company) duly purchased and took over the street railways and the property connected therewith E and carried on the railways during the whole period of thirty years expiring on Aug. 31, 1921.

In the month of June, 1920, the corporation gave notice to the company under s. 4 (2) of the Act of 1892 that it was its intention to exercise its right of taking over at the end of the period of thirty years the property necessary to be used in connection with the working of the tramways, and this notice was accepted by the F company. In June, 1921, three arbitrators (Mr. Hume Cronyn, Sir Thomas White and Sir Adam Beck) were appointed under cl. 7 of the conditions of sale and s. 4 (3) of the Act to determine the value of the property to be taken over. The arbitration was formerly opened in that month, but at the request of the parties the hearing of evidence was postponed until the month of September following. On Aug. 25, 1921, G an order was made by LATCHFORD, J., that, upon the corporation paying to the company the sum of $1,000,000, and paying into court the sum of $500,000 to abide the event of the arbitration pending between the parties, the corporation should be at liberty to take possession of the railways of the company and all property necessary to be used in connection therewith immediately upon the expiration of Aug. 31, 1921, pursuant to s. 4 (3) of the Act, and also that the corporation should be H entitled to credit against the purchase price as ascertained in the arbitration a further sum of $1,000,000, being part of the amount due by the company to the city in respect of percentages. The corporation duly paid the above sums of $1,000,000 and $500,000, and at midnight on Aug. 31, 1921, took possession of the railways and other property. The arbitration then proceeded, and on Jan. 30, 1923, the arbitrators by a majority (Mr. Hume Cronyn and Sir Thomas White) I made an award whereby they fixed the value of the property which the city was under an obligation to take over at $11,188,500. Sir Adam Beck, the remaining arbitrator, dissented from the award, but did not name an alternative figure. The majority of the arbitrators issued to the parties a full and lucid statement of the reasons for their award, to which reference will be made later in this judgment. The corporation being dissatisfied with the result of the arbitration moved in the Supreme Court of Ontario by way of appeal from the award and also to set it aside on the ground of certain errors in law which were alleged to appear upon the face of it; and the company also moved to remit the award to the arbitrators on certain

other grounds of law. Both motions came before LOGIE, J., who, without entering upon the merits of the motions, dismissed them pro forma to enable appeals to be taken to the Appellate Division. Appeals were, accordingly, taken to the Appellate Division, and that court, on Sept. 24, 1923, made an order whereby they (i) dismissed the appeal of the corporation against the award, (ii) on the motion of the corporation to set aside the award varied the award by striking out of it the value of certain property which the city had objected to take over as not being necessary for working the tramways, but which the arbitrators had held to be necessary for that purpose, and also by striking out an allowance for interest, but otherwise refused the motion, and (iii) dismissed the company's motion to remit the award to the arbitrators. Hence the present appeal and cross-appeal.

The appeal of the city relates exclusively to the method adopted by the arbitrators in valuing the several properties taken over; and before considering the objections put forward it is desirable to describe in greater detail the reasons given by the arbitrators for their award. In these reasons the arbitrators described the property to be valued by them as follows:

> "The property which it is the duty of the board to value in accordance with the provisions of the agreement and the statute consists of railway tracks and sub-structures, overhead and underground distribution system, rolling-stock, substations with their equipment, land and buildings (including car-building and repair shops and car-barns), tools, and other chattels necessary to be used in connection with the working of the railway."

As to the method or principle to be adopted in making the valuation they referred in detail to the provisions of the Ontario Act above referred to and to cl. 7 of the conditions of sale, and stated their conclusion as follows:

> "The principal question, it seems to us, is: What is the actual value as of the time of the arbitration of the actual and tangible property, plant, equipments, and works connected with and necessary to the operation of the railways? The several qualifications referred to above must be kept constantly in mind in making the valuation."

The arbitrators then proceeded to consider how they were to arrive at such actual value, and after quoting certain decisions (such as *Edinburgh Street Tramways Co.* v. *Edinburgh Corpn.* (1) and *Melbourne Tramway and Omnibus Co., Ltd.* v. *Tramway Board* (2), in which the valuation of tramway property at the sum which it would cost to reconstruct it, subject to a deduction for depreciation, had been approved by the courts, they proceeded as follows:

> "As to all plant in situ, such as track with sub-structures, overhead and underground distribution system, machinery and equipment fixed in place for use in the operation of the railway, it seems clear from the foregoing decisions and judicial utterances that an approved method of determining their value is cost of reproduction at the times as of which the valuation is to be made, less a proper allowance for depreciation. Counsel for the railway company contended that the word 'depreciation' as used in these decisions means only physical wear, and that obsolescence, unless so complete as to require or justify immediate removal of the item of plant under consideration, is not to be considered. We do not concur in this view. We understand the word 'depreciation' occurring in the decisions cited to include obsolescence and deterioration from whatever cause, and not as confined to physical wear and tear, and to what might be called 'obsoleteness' as distinguished from 'obsolescence' at the time of valuation. The fact and degree of obsolescence must be determined from the evidence upon the point, having regard to good practice in railway administration and to the qualification of the above-recited sub-s. (4) of s. 4 of the statute. With respect to immovable plant in situ, this method of valuation seems the most practicable and convenient. In applying it, however, care must be taken to make full deduction for depreciation as defined. Take the case of a section of track which has become so worn that

it should, having regard to good practice, be taken up and replaced by new construction. The cost of reproduction of the section in question might be quite large, but there would have to be deducted an amount for depreciation which would leave only scrap value remaining. In cases of parts or articles connected with plant in situ which, although useful, are not now being manufactured, value may be estimated by reference to prices of parts and articles which can be bought to-day, taking into account, of course, comparative utility, depreciation and all other relevant considerations. The same method (reproduction cost, less depreciation) may, we think, be useful also in valuing the rolling-stock of the railway company, as was done by the arbitrator in the *Melbourne Tramway Case* (2) referred to above. In the case before the board, where so many of the cars taken over are of older types, it would, however, be most difficult to make the valuation solely by reference to cost of reproduction new, less depreciation. We have had placed before us, however, a great deal of evidence as to the character of this rolling-stock, its original cost of construction, reproduction cost, physical deterioration, degree of obsolescence, and as to alleged defects and advantages from the operating standpoint. All this evidence has been given its due weight in reaching conclusions as to the value of the rolling-stock. The principle of reproduction cost less depreciation is also of service in valuing buildings, such as car-barns, car-construction and repair shops, substations and the plant and machinery which they contain. Care must be taken here also to make full deduction for depreciation (including obsolescence) and to take into account the evidence adduced bearing upon the question of the suitability of such buildings, plant and machinery for the purposes for which they are being used, and generally, all factors bearing upon the matter of their usefulness and fair value, subject to the qualifications of the agreement and statute. With regard to tools, stores and small chattels (fixed or unfixed) generally, it is not necessary to go to the trouble of considering what it would cost to reproduce them new and then deduct an amount for depreciation. We have had evidence as to the market value of such chattels or of others which would serve as well or better, and from such market value and comparison and other evidence relating to use, condition and extent of depreciation a conclusion as to value may be reached. As to land (other than land acquired from and now re-taken by the city) it seems to us that it should be valued at its fair value as of the time of the arbitration. In estimating its fair value we are, we think, entitled to consider, in addition to other relevant factors of value of individual parcels, their suitability (having regard to size and location) for street railway purposes. As to the land (including buildings) acquired from the city by the purchasers and particularly referred to in cl. 7 of the conditions, the question is, what is its fair value without reference to its value for the purpose of operating a street railway."

The arbitrators concluded this part of their reasons by the following statement:

"Speaking generally, we have had before us an immense amount of evidence dealing with the suitability, physical condition, depreciation, original cost of construction or purchase price, cost of reproduction and overhead costs connected with reproduction, of all the properties, real and personal, taken over by the city. All this evidence has been considered in its bearing upon the question of value. In this connection we have kept before us the language of the judgment of the Honourable Chief Justice MEREDITH delivered Dec. 16, 1921, upon a Case stated by the board for the opinion of the court upon a point as to the relevancy of certain evidence. He says: 'There is no law which limits arbitrators to one method of determining value; any and every method that may be helpful may be applied. Actual cost, reproduction cost and market value—direct or indirect—or actual value, may each and all give assistance; or only one may be useful, according to the nature and circumstances of the particular inquiry.' All evidence adduced by both sides has been carefully

considered and given its due weight in its bearing upon the question of actual value at the time of the arbitration, having regard to the provisos and qualifications of the agreement and statute. The board has also had the advantage of an inspection of the land and buildings, railway, plant and equipment of the company."

Having disposed of these general considerations, upon which they based the principal items in their valuation, the arbitrators proceeded to deal with certain more special questions which had been raised by the parties, and their decisions on such of these questions as are now material to be referred to may be summarised as follows. (A) They rejected a contention on the part of the company that in estimating the cost of reproduction they should take into account the rates of wages and prices obtaining during a period of three years prior to Sept. 1, 1921, on the assumption that if the city had been obliged to construct a railway system which was to be available on that date it must have begun operations three years earlier, adding:

"It seems to us that, so far as the principle of reproduction cost less depreciation is availed of, it must be reproduction cost as of 'the time of the arbitration.' "

(B) They rejected a contention on behalf of the city that in estimating the cost of reproduction they should base their estimates upon the prices of material and rates of wages prevailing before the war of 1914–1918, as such prices and rates would have varied had there been no war and had the trend of prices and wages in progress before the war continued down to the time of the arbitration, adding:

"In our opinion, it would be impossible to determine the 'actual' value at the time of the arbitration' upon such a hypothetical basis, which has no reality in fact, and consequently seems opposed to the meaning contained in the word 'actual' in the expression 'actual value.' We do not conceive that the valuation as of the time of the arbitration should have precise regard to the prices of labour or of material as of a specific date such as Sept. 1, 1921. Where the method of reproduction cost less depreciation is used or market prices are considered, regard should be had to the evidence as to construction cost and prices generally as of the time of the arbitration. In view of the stress laid by counsel for the city upon war-time costs and speculative prices, it may be pointed out that the war has been over for more than four years and that since the date of taking over the railway prices of commodities and cost of labour have, according to the evidence, become fairly stabilised."

(C) They dealt in detail with certain items of overhead expenditure, preliminary expenses and other "intangible" items for which the company claimed credit. (D) They rejected a claim by the company that payments made by the company towards the cost of constructing a subway in Avenue Road under the tracks of the Canadian Pacific Railway and a bridge (known as the Don Bridge) over the steam railways on Queen Street East should be included in the valuation of the track on the following grounds:

"These payments were made by the company in pursuance of orders of the Board of Railway Commissioners for Canada, the object being the elimination of dangerous level crossings and consequent protection and convenience of the public. It does not appear to us that these payments constitute 'actual and tangible property' within the meaning of the statute, and we have been unable to agree with the argument put forward by counsel for the company that these payments became, so to speak, attached to or inherent in the cost of construction of the tracks of the company carried through the subway and over the bridge respectively. By mandatory orders the Board of Railway Commissioners assessed these payments against the company, and we cannot see that they may be taken into consideration by the board in estimating the cost of reproduction of the railway track."

(E) They included in their award, though with some doubt, interest upon the amount of the valuation from the time when the railway was taken over by the city to the date of the award. (F) With regard to the items of property which the city objected to take over on the ground that they were not "necessary to be used in connection with the working of the railway" (which items were set out in detail in Sched. B to the award), the arbitrators considered that they had authority to decide whether such items in fact came within the above description, and held that certain items came within the description and the value thereof should be allowed, but that certain other items of property, including (a) the main office building of the company; (b) the "Scarboro' Bridge property"; and (c) the "King Street and St. Lawrence Street property," were not necessary to be used in connection with the working of the railway, and, accordingly, were not to be included in the valuation.

Appeals against the award having been brought as above mentioned, the Supreme Court, on the application of the city, varied the award by striking out of the award and valuation the sums allowed in respect of certain of the items set out in Sched. B of the award on the ground that the arbitrators had no jurisdiction to determine whether those items were or were not necessary to be used in connection with the working of the railways, and that the parties must first have their necessity established within the terms of the contract before an arbitration could be had as to their value; and also by striking out the allowance of interest on the value as ascertained by the arbitrators on the ground that, though it was equitable that interest should be paid from the time of taking possession, there was no warrant for including it in the award. In other respects the appeals were dismissed. Hence the present appeals.

In support of the appeal the city council raised two points relating to the methods of valuation adopted by the arbitrators. First, they contended that, in valuing certain parts of the property taken over, and especially in valuing the rolling-stock, buildings, and track, the arbitrators had proceeded on the theory that in every case the value must be taken to be what it would cost to reproduce the items less depreciation, and that no such method should have been applied to this property in the present case. The proper course, they urged, having regard to the provisions of s. 4 (4) of the Act of 1892, was first to consider whether, having regard to size, suitability, location and other factors, a reasonable person would reproduce these assets as part of a Toronto railway system in 1921, and if not, to value them on the basis of what they would fetch, or, if no sale were possible, then on "scrap" basis. In their Lordships' opinion this argument proceeds on a misconception as to what the arbitrators did. No doubt, they took reproduction cost less depreciation as affording a serviceable guide in valuing the track, rolling-stock and buildings; and in this they were fully justified by the authorities cited. Indeed it is difficult to see how such items as fixed plant in situ, car-barns, car-construction and repair shops, substations and the machinery which they contain, could have been valued except with the assistance of some such principle. But the arbitrators were careful to make it clear that they had by no means adopted reproduction cost less depreciation as the only and sufficient test of value. In valuing the track and other plant in situ they allowed (as the above quotations show) not only for wear and tear, but for "obsolescence," and had regard to good practice in railway administration and to s. 4 (4) of the Act, and also to comparative utility and other relevant considerations. So, in valuing rolling-stock, they gave due weight to character, obsolescence and alleged defects and advantages from the operating standpoint; and with regard to buildings, suitability and other matters bearing upon their value were plainly not neglected. If the statements made by the arbitrators in the reasons for their award as to the methods which they had adopted in making their valuation are accepted as correct—and there is no reason whatever for not so accepting them—it will appear that they not only proceeded on lines which had been approved by many decisions of the House of Lords and of this Board, but gave due weight to the special provisions of the Act of 1892 and to all

the circumstances of the case. This contention, therefore, fails. But, secondly, it was contended on behalf of the city that in cases where reproduction cost had to be taken into consideration that cost should have been estimated, not on the basis of the prices of labour and materials which were current at the date of the valuation, but either on normal prices or on the "trend basis" referred to in the above extract from the arbitrators' reasons marked (B). One cannot, it was said, apply the theory of reproduction at current prices at a time when, having regard to the abnormal prices actually current, no reasonable man would reproduce the subject-matter at those prices. Their Lordships agree with the arbitrators in holding that they were under no obligation to proceed on any such imaginary basis. At the time when the valuation was made prices had (the arbitrators say) become fairly stabilised; and in determining actual value at that time they were entitled to have regard to the prices then generally current. For these reasons their Lordships are of opinion that the appeal of the city fails.

Passing to the cross-appeal, it will be necessary to deal first with an objection taken by the company to the method of valuation adopted by the arbitrators. In applying the principle of reproduction cost less depreciation, it was argued, the arbitrators should have estimated reproduction cost upon the basis mentioned under the above heading marked (A), that is to say, upon the basis of the prices of labour and materials which were current during the three years next preceding Sept. 1, 1921. The right method, it was said, was to consider what must have been paid by a contractor who had contracted to have the property in question ready on that date, and such a contractor would have expended three years in the work of construction and would have proceeded upon the prices from time to time current during that period. In their Lordships' opinion this argument is equally untenable. There is not sufficient evidence to show that a period of three years must have been expended in construction, and indeed it is plain that as to some of the property in question a much shorter period would have sufficed. But in any case there is no warrant for pushing the hypothesis of reconstruction to this length, and the arbitrators were entitled to base their valuation on the prices generally current at the time of the arbitration. In short, the argument which disposes of the "trend basis" disposes of the "three years' basis" also. The remaining points taken on the company's cross-appeal related to the decisions of the arbitrators summarised above under the headings (C) to (F) and may be considered under like headings. (C) The objection to the finding of the arbitrators as to overhead expenditure was abandoned. (D) It was contended that the payments made by the company towards the cost of the Avenue Road subway and the Don Bridge should be included in the valuation of the track. A track over a bridge or in a subway, it was said, was worth more than a track on a level road and should be valued accordingly. In their Lordships' opinion, this argument should prevail. It is true that, as the arbitrators point out, the payments in question were not "actual and tangible property" within the meaning of s. 4 (3) of the statute; the payments as such represent cost and not value. But the asset produced by means of the payments—namely, a track passing under the Canadian Pacific line and over the steam railways in Queen Street and so escaping both these obstructions to traffic—is still in existence and available to the city, and it could hardly be reproduced except by means of an expenditure at least equivalent to the contributions made by the company: see LORD LOW'S judgment in the *Edinburgh Tramway Case* (1) (21 R. (Ct. of Sess.) at p. 695). In their Lordships' opinion, the sum of $125,000 fixed by the arbitrators as representing these payments properly depreciated, should be allowed. (E) The company claimed that the award of the arbitrators so far as it allowed interest on the value of the property taken over from the date when possession was taken to the date of the award should be restored. Upon this point their Lordships agree with the view taken by the Supreme Court. The general rule under which a purchaser who takes possession is charged with interest on his purchase money from that time until it is paid is well established and has on many occasions been applied to compulsory purchases, and their Lordships are not aware

of any circumstances which would prevent that principle from applying in the present case. But the duty of the arbitrators in this case was not to determine all the rights of the company, but only to ascertain the actual value of certain property at a certain time, and it is a truism to say that such value cannot include interest upon it. The liability for interest depending upon the principle stated, lies outside of the arbitration for its enforcement. (F) Lastly, it was contended on behalf of the company, contrary to the decision of the Supreme Court, that the arbitrators had jurisdiction to determine whether the disputed items of property comprised in Sched. B to the award were or were not necessary to be used in connection with the working of the railway, and, accordingly, that the value of the items of this character allowed by the arbitrators and struck out by the Supreme Court should be restored. It was also contended that as to the above items marked (a), (b), and (c) the arbitrators were wrong in law in holding them not necessary to be used.

Upon the question of the arbitrators' jurisdiction their Lordships are unable to agree with the decision of the Supreme Court. No doubt it is true, as pointed out by HODGINS, J., that the arbitrators were only authorised to ascertain the value of property necessary for the working of the railways; but it was impossible for them in this case to fix a sum representing that value without incidentally determining (in case of dispute) what items were to be included in it. The question of "necessity," like the question of value, was a question of fact. Both questions had to be determined before the arbitrators could name a sum as representing the value of the "necessary" property; and both were, in their Lordships' opinion, committed to the arbitrators for decision. The decisions in *Re Manchester Carriage and Tramways Co. and Manchester Corpn.* (3) and *Manchester Carriage and Tramways Co.* v. *Swinton and Pendlebury U.D.C.* (4) appear to be in point. The value of the items allowed by the arbitrators amounting to $543,500 should, therefore, be restored to the award. As to the particular items which were disallowed by the arbitrators and which were in question on the cross-appeal, their Lordships have come to the following conclusions. (a) As to the head office of the company the arbitrators have found that from the standpoint of the administration of the railway a head office was necessary, that the office in question was situated on a convenient site, and that at the time of the taking over of the railway it was being used for the purposes of the company and was "practically" used only in the operation of the railway. In their Lordships' opinion, the true legal inference from these findings is that the office was within the meaning of the conditions necessary to be used in connection with the working of the railway. The value, fixed by the arbitrators at $170,000, should, therefore, be added to the award. (b) The Scarboro' Bridge property belonged at the time of the taking over of the railway to a subsidiary company in which the appellant company held a controlling interest, but it was not the property of the appellant company, and that company had no title to it. In these circumstances their Lordships are of opinion that the arbitrators acted rightly in excluding it from their valuation. (c) The King Street and St. Lawrence Street property was found by the arbitrators not to be necessary to be used in connection with the working of the railway, and they add:

> "The city took possession and for a time occupied a small parcel of this property used as a compressor station. The parties, however, having agreed that the property shall be dealt with as a whole and that the compressor station shall follow the fate of the major part of the property, we have included nothing in our award for said station."

Their Lordships see no reason for questioning the decision of the arbitrators on this point.

This disposes of the points raised in these appeals, and, for the above reasons, their Lordships are of opinion that the appeal of the city should be dismissed with costs, and that the appeal of the company should be allowed as to the Avenue Road Subway and Don Bridge, the items in Sched. B to the award allowed by the arbitrators, and the main office buildings, but otherwise should be dismissed. As

the company have only partly succeeded in the cross-appeal, there will be no costs of the cross-appeal. Their Lordships will humbly advise His Majesty accordingly.

Original appeal dismissed; cross-appeal allowed in part.

Solicitors: *Freshfields, Leese & Munns*; *Charles Russell & Co.*

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

STEPHENSON *v.* THOMPSON

[COURT OF APPEAL (Sir Ernest Pollock, M.R., Atkin and Sargant, L.JJ.), March 27, 1924]

[Reported [1924] 2 K.B. 240; 93 L.J.K.B. 771; 131 L.T. 279; 88 J.P. 142; 40 T.L.R. 513; 68 Sol. Jo. 536; 22 L.G.R. 359; [1924] B. & C.R. 170]

Bill of Sale—Sale of growing crop of potatoes—"Goods"—"Transfers of goods in the ordinary course of business of any trade or calling"—Bills of Sale Act, 1878 (41 & 42 *Vict.*, *c.* 31), *s.* 4.

A contract for the sale of growing crops is a transfer of goods within the meaning of the Bills of Sale Act, 1878, s. 4, and comes within the exception from the definition of "bill of sale" in that section, viz., "transfers of goods in the ordinary course of business of any trade or calling."

Brantom v. *Griffits* (1) (1877), 2 C.P.D. 212, distinguished.

Dictum of LORD HOBHOUSE in *Tennant* v. *Howatson* (2) (1888), 13 App. Cas. at pp. 493, 494, not applied.

Decision of SHEARMAN, J., [1924] 1 K.B. 608, reversed.

Notes. As to the subject-matter of bills of sale, see 3 HALSBURY'S LAWS (3rd Edn.) 274 et seq; and for cases see 7 DIGEST 31 et seq. For the Bills of Sale Act, 1878, s. 4, see 2 HALSBURY'S STATUTES (2nd Edn.) 558.

Cases referred to:

(1) *Brantom* v. *Griffits* (1876), 1 C.P.D. 349; 45 L.J.C.P. 588; 34 L.T. 871; 24 W.R. 762; affirmed (1876), 2 C.P.D. 212; 46 L.J.Q.B. 408; 36 L.T. 4; 41 J.P. 468; 25 W.R. 313, C.A.; 7 Digest 36, *190.*

(2) *Tennant* v. *Howatson* (1888), 13 App. Cas. 489; 57 L.J.P.C. 110; 58 L.T. 646, P.C.; 7 Digest 37, *c.*

(3) *Gough* v. *Everard* (1863), 2 H. & C. 1; 2 New Rep. 169; 32 L.J.Ex. 210; 8 L.T. 363; 11 W.R. 702; 159 E.R. 1; 7 Digest 113, *663.*

(4) *Re Roberts, Evans* v. *Roberts* (1887), 36 Ch.D. 196; 56 L.J.Ch. 952; 57 L.T. 79; 51 J.P. 757; 35 W.R. 684; 3 T.L.R. 678; 7 Digest 12, *53.*

(5) *Marshall* v. *Green* (1875), 1 C.P.D. 35; 45 L.J.Q.B. 153; 33 L.T. 404; 24 W.R. 175, D.C.; 39 Digest 378, *172.*

(6) *Duppa* v. *Mayo* (1669), 1 Saund. 275; 1 Wm. Saund. 380.

Appeal from a decision of SHEARMAN, J.

By an agreement in writing dated May 12, 1922, Frank Brooks, a farmer, of Long Sutton, Lincolnshire, sold to the defendant, Henry Thompson, of Middleton Hall, in Norfolk, who was also a farmer, the crop of potatoes planted on a farm at Terrington Marsh, Norfolk, in the spring of 1922. The sale was an out-and-out sale made bona fide and for cash and was made in the ordinary course of business as customary in the district. The price of the crop was agreed at £3,000, which was paid in two instalments. It was agreed that the vendor was to cultivate and manage the crop in a good husbandlike manner, and ultimately to deliver the

potatoes to the defendant or his order. After the sale the potatoes were at the buyer's risk. The agreement was not registered as a bill of sale. On Oct. 24, 1922, Mr. Brooks entered into a deed of arrangement for the benefit of his creditors, and the plaintiff, Joseph Stephenson, became the assignee under the deed. The potatoes sold under the document of May 12 covered an area of about one hundred acres, and at the date when the deed of arrangement was made over eighty acres were still in the ground. The remainder had been dug up and placed in clamps on the vendor's land. There was delay in delivery owing to the threat of a bankruptcy petition. Then a dispute arose as to the ownership of the potatoes between the defendant and the plaintiff, who, as assignee, claimed them for the benefit of the creditors. Eventually, the defendant was allowed to remove them without prejudice to the plaintiff's legal rights in the matter.

The plaintiff claimed for the benefit of the creditors the sum of £944, being the difference between the sum realised by the defendant on the sale of the potatoes, namely, £1,264, and the sum of £320, which was the sum reasonably expended by the defendant in removing the potatoes which would have been done by the vendor if the plaintiff's claim had not arisen, and claimed a declaration that the agreement of May 12, 1922, was a bill of sale and was void because it was not registered under the Bills of Sale Act, 1878. SHEARMAN, J., held that the agreement of May 12, 1922, was a bill of sale which required attestation and registration, and was void as against the plaintiff for want of registration. The defendant appealed.

Clayton, K.C., *C. E. Dyer, K.C.*, and *P. E. Sandlands* for the defendant.
E. W. Hansell and *W. N. Stable* for the plaintiff.

SIR ERNEST POLLOCK, M.R., stated the facts, and continued: The question that arises is whether or not, under the Bills of Sale Act, 1878, the agreement of May 12, 1922, ought to have been registered as a bill of sale, or, in default of it having been so registered, whether it is avoided by virtue of s. 8. SHEARMAN, J., thought that the matter was concluded by cases which were cited to him, and said that he thought it was practically not open to him to decide otherwise than for the plaintiff unless he disregarded a decision which, though not technically binding on him, he was bound to regard with great respect. From that judgment this appeal is brought, and we have to consider the short point which I have indicated above, a point which is of some importance.

Before I comment on the Act, I wish to make two general observations. The first is this: We are invited to consider what is the meaning of the Bills of Sale Act, 1878, by a close scrutiny of that Act and its predecessor, the Bills of Sale Act, 1854, and we are asked to say that, inasmuch as there has been an alteration of the Act of 1854, we can, by superimposing the one Act on the other, come to a conclusion as to what the Act of 1878 means. It is quite clear that we are bound by the authorities which have been decided on the Act of 1854 so far as they are binding on this court and so far as they are material; but I do not accept the principle that a sort of parliamentary interpretation is to be placed on an Act by an examination of its clauses which differ from a previous Act, more particularly when the previous Act is repealed, as the Act of 1854 was repealed by s. 23 of the Act of 1878. Where there are two statutes which are to be read together and both are in force, there the principle no doubt is not infrequently applied, but the subsequent Act gives what is called a parliamentary interpretation to the previous Act. But the converse is now suggested, and we are invited to scrutinise and to interpret the Act of 1878 in the light of clauses which have been finally repealed by the Act which we have to construe. There is one other observation I wish to make. In having regard to the Bills of Sale Acts, there are some important and valuable observations referred to by BRETT, J., in *Brantom* v. *Griffits* (1), made by the Court of Exchequer in *Gough* v. *Everard* (3) (2 H. & C. at p. 8), which may usefully be borne in mind. The Bills of Sale Acts were passed for the purpose of preventing fraud by means of concealed transfers of goods, and allowing a person who has made the transfer to remain in possession of the goods, with the

result that a possible creditor might be deceived in giving credit to a debtor who has apparently in his possession goods which might mislead the intending creditor. POLLOCK, C.B., said, in *Gough* v. *Everard* (3) (ibid.), that

> "if any class of Acts ought to be construed strictly, it should be those which, having for their object the prevention of fraud, have in certain cases a tendency to invalidate bona fide contracts. Where fraud does not exist, this Act should at all events receive no more than its true construction."

It must be borne in mind that the decision which has been given might, instead of doing good, do a great deal of harm if instruments used in the ordinary course of business had their validity destroyed.

As I have pointed out, this was a bona fide sale made in the ordinary course of business as is customary in the district. Rather more than forty-five years have elapsed since the Act of 1878 was passed, and counsel for the plaintiff, who has had great experience in such matters, says that, save and except one unreported case, he does not know of one where an ordinary instrument of sale, like the present, has been suggested to be a bill of sale so as to be invalid if not registered. It is of some importance to note that this decision, if it stood, would have a very serious effect on the ordinary course of business in the district, because it would prevent what is a customary method of sale being adopted.

I now come to the question whether or not the judgment of SHEARMAN, J., is right, and whether or not we are bound by the cases which have been cited. The matter stands in this way: I have already adverted to s. 8 of the Act of 1878, which avoids unregistered bills of sale as against a trustee in bankruptcy. The interpretation of the Act is to be found in s. 4, and the expression "bill of sale" is defined in words which we have had read more than once. It is accepted by counsel for the defendant that, primâ facie, the document of May 12, 1922, is one which would fall within the definition of the term in s. 4, and would, primâ facie, be a bill of sale; but in s. 4 there is an exception to the wide embracing words with which that section commences. The exception is:

> "but [the expression bill of sale] shall not include the following documents . . . transfers of goods in the ordinary course of business of any trade or calling."

I do not think it is suggested by the plaintiff that this document is not a transfer within the meaning of those words. We know, from the evidence, that it was made in the ordinary course of the business of the trade. Is it, then, a transfer of "goods"? It is said that it is not, because we have to look at the second portion of s. 4, where a definition is given of the words "personal chattels," which are to mean "goods, furniture, and other articles capable of complete transfer by delivery, and (when separately assigned or charged) fixtures and growing crops. . . ." It is said that, inasmuch as the words "personal chattels" are defined to mean growing crops, but the exception in the earlier portion of s. 4 only covers transfers of goods, without particular reference to growing crops, the exception is not wide enough to exclude the growing crops which are dealt with in the particular document, and in support of that argument attention is called to the difference between the wording of the Act of 1854 and the Act of 1878.

I think it is important in a case which may have a far-reaching effect, to be as clear as possible and not to base one's decision on matters which are unnecessarily intricate. In my judgment, accepting the admission on both sides that the document of May 12 is, primâ facie, a bill of sale, I am of opinion that this document is within the exception "transfers of goods in the ordinary course of business of any trade or calling." The case which was cited to and relied on by SHEARMAN, J., as having an opposite effect was *Brantom* v. *Griffits* (1). I think it is clear that the judges there, and particularly BRETT, J., took as the basis of their decision that, although the growing crops there referred to were goods, they were not goods capable of complete transfer by delivery and, therefore, they were not within the Bills of Sale Act, 1854. But, in reading that judgment, I cannot put any other

A interpretation on it than that both judges accepted the view that the growing crops were goods, although they were not capable of complete transfer by delivery and so did not fulfil the actual words which had there to be construed. The case went up to the Court of Appeal, and the decision was there given by COCKBURN, C.J. He deals with the point in question and comes to the conclusion that the words of the Act of 1854 "personal chattels" are confined, in his opinion, to goods B capable of present delivery and removal, and he says it is impossible that there can be a present delivery of growing crops. A growing crop is valueless, except so far as by its continuing growth it may hereafter benefit the purchaser.

Those two decisions in the court below and in the Court of Appeal do not cast any doubt on the question whether or not the growing crops were goods in that particular case, but what they do say is that growing crops do not fulfil the second C limb of the sentence that they have to fulfil, namely, "capable of complete transfer by delivery." I cannot see that that case really militates against the view that the potatoes in the present case were goods. The point whether or not growing crops are goods at all is, I think, decided in *Evans* v. *Roberts* (4). There, there was a verbal agreement for the sale of then growing crops of potatoes, and it was held, and two judges expressly say so, that that sale was not the sale of an interest D in or concerning land within the meaning of the well-known s. 4 of the Statute of Frauds, but was a contract for the sale of "goods, wares and merchandise" within s. 17; in other words, that court, and a strong court it was, held that growing crops were definitely within s. 17 of the Statute of Frauds, and within the word "goods." That decision has held its position since the year 1826, and I think it is not only too late, but it would be very unfortunate, to upset it. I think it stands, and E there is no reason to think that *Brantom* v. *Griffits* (1) cannot also stand, but that is a decision on the question whether or not growing crops fulfilled the words "capable of complete transfer by delivery."

There is another case, *Tennant* v. *Howatson* (2), in the Privy Council, with which I must deal. The decisions there are technically not binding on this court, although deserving of the greatest attention and respect. That was a decision on F an Ordinance of Trinidad which combined the two Bills of Sale Acts of this country of 1878 and 1882. The Bills of Sale Act, 1878, deals with absolute bills of sale, bills under which a complete transfer is effected. The Act of 1882 dealt with conditional bills of sale, bills of sale which include mortgages on chattels and the like; but the Ordinance of Trinidad threw both those classes of instruments together for certain purposes, and the decision which was come to was that a bill G of sale on crops actually growing at the time of execution was void for want of registration under the Trinidad Ordinance. The decision itself is not binding, nor does it appear to conclude the matter that we have to deal with in this case. LORD HOBHOUSE in the course of his judgment says (13 App. Cas. at p. 493):

> "Their Lordships think that the word 'goods' in this context does not include H growing crops. The expression 'personal chattels' is defined to mean 'goods, furniture, other articles capable of complete transfer by delivery, and (when separately assigned or charged) fixtures and growing crops.' If it were not for this express definition growing crops would not be personal chattels, and the word 'goods' is not at all calculated to include them."

I For my part, I think that is a mistake. I do not agree with that statement; I cannot agree with it because I think it was rightly decided in *Evans* v. *Roberts* (4) that "goods" is calculated to and does include growing crops. But it is important to observe that *Evans* v. *Roberts* (4) was not cited to the Privy Council and the matter does not appear to have been discussed, and it may well be that that observation was made alio intuitu and without careful consideration of what the decisions had been and how far it had been decided that "goods" included growing crops. Having regard to that mistake, or slip, in the judgment, it seems to me that the reasoning does not apply and ought not to bind this court in the construction of the statute of 1878. Having come to the clear conclusion that I have

on that, that there is really no authority for saying that the word "goods" does not include growing crops, and relying on *Evans* v. *Roberts* (4), I am of opinion that the exception in s. 4 does except documents of this nature and, therefore, they need not be registered under the Bills of Sale Act, 1878. The result is that I hold that the declaration made by SHEARMAN, J., ought not to have been made and that the document of May 12, 1922, is valid, and, therefore, the appeal should be allowed.

ATKIN, L.J.—I agree. [His Lordship stated the facts, and continued:] It is not disputed that the document was a bill of sale, that is to say, that it did in fact transfer the property in the goods mentioned in it, and it is not disputed that it was a bill of sale of personal chattels within the definition of personal chattels in the Act, because personal chattels are defined in s. 4 of that Act to include, when separately assigned, fixtures and growing crops, and this was a growing crop. But what is said is that the transaction was within the exception in the definition of a bill of sale, because it is said that it is a transfer of goods in the ordinary course of business of any trade or calling. Primâ facie, I think there can be no doubt at all that, on the agreed statement of facts, this is a transfer in the ordinary course of business of any trade or calling, and the question is whether it is a transfer of goods. It is said that by looking closely at the definition of "personal chattels"—there is no definition of "goods"—and "bills of sale" in the Act in question, one is forced to come to the conclusion that the word "goods" does not, in that statute, include in any connection growing crops. I think that that contention is wrong. There can be no question, it appears to me, that, apart from some special use in a special Act of Parliament, the word "goods" is a word that is wide enough to cover what are known as industrial growing crops. The word "goods" as defined in the Sale of Goods Act, 1893, which it is to be remembered is in fact a codifying Act, in terms includes, in the definition of "goods," industrial growing crops, and that definition is nothing new.

It is quite plain from *Evans* v. *Roberts* (4) that the term at that time was considered by those great lawyers to include industrial growing crops, and there is further authority—*Brantom* v. *Griffits* (1) and *Marshall* v. *Green* (5). The latter was a case of the sale of growing timber, and the decision was that a sale of growing timber to be taken away as soon as possible by the purchaser is not a contract for the sale of land within s. 4 of the Statute of Frauds, and it was held that the case was within s. 17 of the Statute of Frauds. There are only two passages that I wish to read, and one of them incorporates a passage from a great authority. In giving judgment, LORD COLERIDGE, C.J., says (1 C.P.D. at p. 39):

> "I find the following statement of the law with regard to this subject, which must be taken to have received the sanction of that learned judge, SIR EDWARD VAUGHAN WILLIAMS, in the notes in the last edition of WILLIAMS' SAUNDERS upon the case of *Duppa* v. *Mayo* (6) (1871 Edn.) at p. 395:
>
> 'The principle of these decisions appears to be this, that wherever at the time of the contract it is contemplated that the purchaser should derive a benefit from the further growth of the thing sold from further vegetation and from the nutriment to be afforded by the land, the contract is to be considered as for an interest in land; but where the process of vegetation is over, or the parties agree that the thing sold shall be immediately withdrawn from the land, the land is to be considered as a mere warehouse of the thing sold, and the contract is for goods. This doctrine has been materially qualified by later decisions, and it appears to be now settled that, with respect to emblements or fructus industriales, &c., the corn and other growth of the earth which are produced not spontaneously, but by labour and industry, a contract for the sale of them while growing, whether they are in a state of maturity or whether they have still to derive nutriment from the land in order to bring them to that state, is not a contract for the sale of any interest in land, but merely for the sale of goods.' "

BRETT, J., who also gave judgment in *Brantom* v. *Griffits* (1), says (ibid. at p. 42):

> "Certain tests have been judicially agreed on with regard to this question, many, if not all, of which are contained in the note to *Duppa* v. *Mayo* (6), in the last edition of WILLIAMS' SAUNDERS, which has the authority of that profound lawyer, the late Sir E. V. Williams."

Then he proceeds to deal with the matter. He talks about the cases where the vendor is to deliver, and then the class of cases where the purchaser is to take the thing away himself (ibid.):

> "In such a case where the things are fructus industriales, then, although they are still to derive benefit from the land after the sale in order to become fit for delivery, nevertheless it is merely a sale of goods, and not within the section."

I think there can be very little doubt that the word "goods" is one of the widest terms that can be used to describe personal property. In connection with the word "chattels"—goods and chattels—I think it is admitted that it covers in substance the whole of personal property, and, as far as I know, nobody has been able to draw a real distinction between goods and chattels; they are over and over again stated as synonymous. A writ of fi. fa. is a writ directed to the sheriff to levy on the goods and chattels of the debtor, and it is quite plain on that writ that a sheriff has to, and is entitled to, levy on growing crops. The right of an executor is to deal with the goods of a testator, and execution against an executor in respect of the debt of the testator would issue de bonis post beneficium and that expression "the goods of the testator" would include industrial growing crops. Therefore, in the ordinary use of the word "goods," it is clearly wide enough to include industrial growing crops. Here you have an exception from the necessity of registration which is put in for the purpose of protecting trade, in order that the provisions as to registration should not be a hindrance and an embarrassment to trade, and it is quite plain that there is a trade and always has been a trade in this country in industrial growing crops.

In these circumstances, I can see no reason for giving a meaning to the word "goods" which is much more restrictive than the ordinary meaning of the word in law, and a meaning which would defeat what appears to be the obvious intention of the legislature. If we are driven by the words in the Act of Parliament to come to the conclusion that that restrictive meaning must necessarily be put on the words, we must do it, but I find nothing in the Act of Parliament which drives me to that conclusion. I am not going to try to give a clear and distinct terminological meaning to all the different phrases that I read in the definitions of "bill of sale" and "personal chattels" in the Act, because it is quite plain that the draftsman of that Act, following the drafting of the Act of 1854, had not in his mind to draw a clear distinction in the use of these phrases, so that the words could not possibly overlap. For instance, one takes this phrase—and it appears to me on the whole to be an example of the very worst definition that I, personally, have ever found or heard of in any work—"the expression 'personal chattels' shall mean goods, furniture, and other articles capable of complete transfer by delivery." Now, chattels and goods mean the same thing. Furniture, quite plainly on any meaning of "goods," is goods, and articles capable of complete transfer by delivery are goods. So that, when that particular expression is used, it appears to me to be quite impossible to draw an inference that by "goods" there is meant some species of chattels which is narrower than ordinary chattels and which does not include furniture and apparently does not include other articles—whatever that may mean —than goods and furniture which are capable of complete transfer by delivery. Again, there is the use of the word "goods," as is pointed out by counsel for the plaintiff, in the definition of "bill of sale." "Bill of sale," it says, "shall include bills of sale, assignments, . . . declarations of trust without transfer." Then it says,

"inventories of goods with receipt thereto attached, or receipts for purchase moneys of goods, and other assurances of personal chattels, and also powers of attorney, authorities, or licences to take possession of personal chattels as security for any debt, and also any agreement, whether intended or not to be followed by the execution of any other instrument, by which a right in equity to any personal chattels, or to any charge or security thereon, shall be conferred. . . ." A B

Counsel says, and I think says with truth, that those words "inventories of goods with receipt thereto attached" are put in the Act of 1878, though in the Act of 1854 what is used is "goods," and further on they talk of assurances of personal chattels, and, therefore, goods must mean something other than personal chattels. If one can draw any logical inference from the words there, well and good, but I have pointed out that if "goods" in that phrase is to be treated as the same thing as "goods" in the definition of "personal chattels," and one is to exclude from "goods" the words that are used in collocation with that as being something different from that, then it would follow that "goods" in the definition of "bill of sale" does not include furniture and other articles capable of complete transfer by delivery. If there is one thing that quite plainly is intended to be covered by "inventories of goods with receipt thereto attached," I should imagine it would be furniture, and again one is driven to the conclusion that, in this definition, the word "goods" is used in its largest sense; I think it is used with the same effect as saying " 'inventory' shall mean personal chattels, furniture and other articles capable of complete transfer by delivery," and so on. In these circumstances, the mere fact that one has, in defining "personal chattels," said that it is to mean goods capable of complete transfer by delivery, and then have added the words "(when separately assigned or charged) fixtures and growing crops," is no indication of the intention by the draftsman, and, therefore, of the legislature, that those words specifically mentioned are not also included in the word "goods," just as furniture may be included in the word "goods," and, I think, one is driven to that conclusion by the necessary use of the language. It appears to me that one is very far indeed from getting a necessary meaning of "goods" in the words "transfer of goods," which would so cripple trade and would be so entirely different from the ordinary meaning of the word "goods" when used in law. C D E F

Brantom v. *Griffits* (1) appears to me, so far from being an authority in favour of the plaintiff, to be an authority in favour of the defendant. It is a decision by at least two of the judges there that the word "goods" did include growing crops, but inasmuch as the growing crops were not capable of immediate delivery, they were not within the definition in the Act. The only other case which it is necessary to mention is *Tennant* v. *Howatson* (2) in the Privy Council. I think it is sufficient to say that that case can be supported. It is not necessary for us to say whether it can be supported or not, because it is not binding on us, but it can well be supported on the grounds which, I think, are given in the judgment, namely, that this was not a transfer within the ordinary course of trade. But Lord Hobhouse did say that, if it were not for this express definition, growing crops would not be personal chattels, and the word "goods" is not at all calculated to include them. Unless that is meant to have some express reference to the actual words of the Trinidad Ordinance, it appears to me, with the very greatest respect, that that expression does not, in fact, convey the meaning of those words according to established authority, and I do not think the case can be cited as authority for the proposition, which, apparently, is contained in that particular phrase. To my mind, this is a case where the transaction is at any rate within the protecting words in the Bills of Sale Act. A transaction of this kind, in my view, never has been and never was intended to be within the Bills of Sale Act, and I think, therefore, the appeal should be allowed. G H I

SARGANT, L.J.—I am of the same opinion. The question here is whether this agreement for the sale of potatoes comes within the phrase "transfer of goods in

A the ordinary course of business of any trade or calling," those words denoting an exception from the expression "bill of sale" as defined by the Bills of Sale Act, 1878. That all the terms of that definition, except the phrase "goods," are amply fulfilled in this case, appears by the admissions that have been made, and, therefore, this agreement must come within the exception, unless we are to hold that "goods" in that phrase does not extend to and include growing crops. Apart from B the Act itself, there can be no question, I think, that "goods" would include growing crops. Growing crops, of course, pass to the executor as against the heir. To refer to one case only, *Evans* v. *Roberts* (4), it has been held that growing crops are within the phrase "goods and merchandise" in the Statute of Frauds, and, therefore, apart from some special language in the Bills of Sale Act itself, it seems to me that we are driven to the conclusion that these words are satisfied by a sale C of growing crops.

The learned judge has come to the conclusion that "goods" does not include growing crops under the previous legislation, on the strength of *Brantom* v. *Griffits* (1). With great respect to the learned judge, I think that he has misapprehended the force of the reasoning of the Court of Appeal in that case. Whether it amounts to an actual decision or not, that growing crops are goods, it D seems to me to be, at any rate, a recognition of the view that, primâ facie, growing crops are within the expression "goods." The decision there was based on the other words in the definition of the Act, on the ground that growing crops were not capable of complete transfer by delivery. So far, therefore, as that case is concerned, it seems to me to support the view of the defendant rather than that of the plaintiff. That being so, we have to consider whether there is any such E special language in the Act of 1878 as would prevent the broad primâ facie meaning being given to the word "goods" so as to include growing crops. In my judgment, there is nothing sufficient for that purpose. It is quite true that, both in the definition of personal chattels and in the definition of bill of sale, we have a large number of words introduced by way either of definition in the one case, or by way of showing what the word includes in the other case. Those words seem to me to F be a mass of words thrown together without any very logical distinction between them; they overlap, in my judgment, in very many respects. It cannot possibly be taken that they are what may be called the logical definition of a number of species which together make up the genus. To make such a definition would, I think, probably be beyond the powers of the draftsman of any Act of Parliament, certainly this Act of Parliament, and all other Acts of Parliament that I have seen G have never attempted to do anything of that sort. I think that any argument which is founded on any supposed contrast between the various subjects or subject-matters which are brought within these definitions is not to be relied on. I think that "transfers of goods in the ordinary course of any trade or business" is a phrase which has to be given its primâ facie meaning, and it cannot be limited by any such process of elaborate investigation of the special phrases used with regard H to the definition of a bill of sale and with regard to the definition of the expression "personal chattels."

That being so, there is only one other matter that has to be noticed, and that is the judgment of the Privy Council in *Tennant* v. *Howatson* (2). Now the main reason for the decision, the reason on which it was mainly based, was this: that the transaction in question was not a transaction in the ordinary course of business. I When giving the judgment of the council, LORD HOBHOUSE did undoubtedly, in the midst of stating the main reasons for his decision, add, as a sort of pendant, this remark (13 App. Cas. at p. 494):

> "If it were not for this express definition growing crops would not be personal chattels, and the word 'goods' is not at all calculated to include them."

It seems to me that that was a mere dictum, and was a slip. I notice that no argument to that effect had been addressed to him by counsel for the appellants and neither *Brantom* v. *Griffits* (1) nor *Evans* v. *Roberts* (4) had been referred to

at all, so that the matter was one that had never been actually before the tribunal, and it was quite unnecessary for the purposes of the decision to arrive at that conclusion. In my judgment, therefore, that must be looked on as a slip and not as really being an authority to be relied on. I do notice that in the two passages in REED ON THE BILLS OF SALE ACTS (13th Edn.), where this case is referred to, it is not referred to as an authority for the wide proposition that the word "goods" does not include growing crops. It is referred to merely as an authority for this, that, in the particular case, the transaction in question was not a transaction in the ordinary course of business.

Appeal allowed.

Solicitors: *Smiles & Co.*, for *Mossop & Mossop*, Holbeach; *Smith, Rundell, Dods & Bockett*, for *Calthrop & Leopold Harvey*, Spalding.

[*Reported by* J. L. DENISON, ESQ., *Barrister-at-Law.*]

CUSTOMS AND EXCISE COMMISSIONERS *v.* GRIFFITH

[COURT OF APPEAL (Bankes, Scrutton and Sargant, L.JJ.), February 20, 21, 1924]

[Reported [1924] 1 K.B. 735; 93 L.J.K.B. 791; 131 L.T. 111; 88 J.P. 85; 40 T.L.R. 444; 68 Sol. Jo. 683]

Licensing—Licensed premises—Defined part of building—No exclusive access from street—Direct communication with other, unlicensed, parts of building used for public resort—Restaurant in department store—Licensing (Consolidation) Act, 1910 (10 *Edw.* 7 & 1 *Geo.* 5, *c.* 24), *s.* 70 (1).

A new on-licence can be granted in respect of premises which consist of a part, defined by metes and bounds and not having any exclusive access from the street, of a comprising building, the occupier of which is the applicant for the licence, although such part is in direct internal communication with other parts of the building which are used for public resort.

Where, therefore, a licence was granted in respect of a restaurant in a department store,

Held: there was nothing in the Licensing (Consolidation) Act, 1910, which limited the meaning of "premises" to a complete building, so that the licensing of the restaurant, even although it had internal communication with unlicensed premises, was not prohibited.

Per SCRUTTON, L.J., and SARGANT, L.J.: Section 70 of the Licensing (Consolidation) Act, 1910 [see now s. 133 of the Licensing Act, 1953], which provides that "a person shall not make or use . . . any internal communication between any licensed premises and any premises, not being licensed premises, which are used for public . . . resort," refers to internal communication made or used after the granting of the licence in respect of the licensed premises.

Per BANKES, L.J., and SCRUTTON, L.J.: The question whether control over licensed premises situated within a larger building can adequately be kept by the police is a matter for the discretion of the justices when considering whether or not to grant the application for the licence and is not a prohibition against any such licence being granted.

Notes. As to licensed premises generally, see 22 HALSBURY'S LAWS (3rd Edn.) 547–549, 557, 558, 559–562, 678–680; and as to the discretion of licensing justices, see ibid., pp. 525–527. For cases see 30 DIGEST (Repl.) 26, 27 et seq., 45–48. For Licensing Act, 1953, see 33 HALSBURY'S STATUTES (2nd Edn.) 142. The

A procedure on an application for a licence is now that provided in Sched. III, Part I, to the Act.

Appeal from an order of the Divisional Court (Lord Hewart, C.J., Sankey and Salter, JJ.) upon a Case stated by the confirming authority for the county of London.

B The respondent Griffith was the secretary of Harrods, Ltd., who carried on a retail business at their premises at Brompton Road, Hans Road, Basil Street, and Hans Crescent, in the parish of Kensington, in the county of London. The premises comprised a large block of buildings, all under one roof or roofs, and access could be obtained from any part of the premises to any other part without the necessity of going into the public street. The premises consisted of a basement, C ground floor, and four other floors, and contained numerous departments where a large variety of goods and commodities were sold. On the fourth floor of the premises there was a restaurant for the use of the public, and access to the restaurant could only be obtained by lifts or by staircases, two of which involved a necessary, and two of which permitted an optional, passage through other departments. No part of the fourth floor other than that occupied by the restaurant D was open to the public. There was no structural separation between the restaurant and the remainder of the premises occupied by Messrs. Harrods and used by them for their general business. The departmental manager, Mr. Miln, was, on behalf of the company, licensed to sell wine and spirits for consumption "off" the premises in wholesale or retail quantities. The off-licence department to which the public had access consisted of two counters with storage space under and at the back of E the counters on the ground floor close to the corner of Brompton Road and Hans Road. In connection with the off-licence there was a large cellar in the basement on the Hans Road side of the property, to which the public had no access. This cellar was used in connection with the off-licence and (except as hereinafter stated) it was not used or intended to be used in connection with the restaurant. The course of business in connection with the restaurant was intended to be as follows: F On that floor and as part of the restaurant there was a store room, and customers taking intoxicating liquors in the restaurant would be served solely from that store room. The store would be replenished daily from the off-licence cellar, just as the rest of the requirements of the restaurant were satisfied daily by supplies drawn from the other departments, but except to that extent the stock in the cellar would not be used at all in connection with the restaurant. This practice had been G followed since May, 1922, in connection with the wine licence hereinafter referred to. The communication from the basement cellar to the restaurant by means of which the stock in the restaurant would be replenished daily was by means of a goods lift which ran from the basement, close to but not inside the cellar, up through the various floors to the restaurant, and this lift would be used not only for intoxicating liquors but also for supplies of any sort going up to the restaurant.

H At the general annual licensing meeting of the Kensington justices in February, 1922, a wine "on" licence was granted to the respondent in respect of the restaurant and was duly confirmed. Under the authority of this licence wine had been sold for consumption on the premises in the restaurant since May, 1922. On Jan. 5, 1923, the respondent, intending to comply with the requirements of s. 15 (1) (c) (d) of the Licensing (Consolidation) Act, 1910 [see now Licensing Act, 1953, s. 5 (1), I Sched. III, Part 1, para. 1], gave notice of his intention to apply for the grant of a justices' licence authorising him to hold an excise licence to sell in the restaurant by retail any intoxicating liquor which might be sold under a publican's licence for consumption either on or off the premises. At their adjourned general annual licensing meeting held at Kensington on Feb. 27, 1923, the licensing justices granted to the respondent the licence applied for, hereinafter referred to as the "new licence." The new licence was expressed to be granted subject to the payment of £500 as monopoly value which was fixed by the licensing justices and the confirming authority on the assumption that the new licence covered the restaurant

only and did not include any sum in respect of the sale by retail of intoxicating liquor for consumption off the premises. If the new licence could not lawfully be granted for the restaurant only, but would have to be granted for the whole of the premises, subject to restrictions as to the parts where, and the conditions on which, the sales would take place, the sum payable for monopoly value would be largely in excess of this amount. At the meeting of the confirming authority for the county of London, held at the Sessions House, Newington, on April 30, 1923, the respondent by his counsel applied for a confirmation of the new licence, and the appellants, the Commissioners of Customs and Excise, appeared by their representative and were heard upon the question of the legality of the new licence and the monopoly value, and the facts above stated were either proved or admitted. The appellants contended that the confirming authority had no jurisdiction to confirm, and could not lawfully confirm, the new licence, as it was not lawful for the licensing justices to grant a licence covering the restaurant only, it being contended by the appellants that, if any new licence were granted to the respondent, the whole of the premises of Harrods Stores should be included in that licence and the monopoly value increased accordingly. The respondent contended to the contrary, and that the new licence was valid and ought to be confirmed. The confirming authority decided to make an order confirming the new licence subject to the opinion of the High Court upon the question of law whether the new licence could lawfully be granted by the licensing justices in the form in which it was.

By s. 70 of the Licensing (Consolidation) Act, 1910 [see now s. 133 of the Licensing Act, 1953] :

> "(1) A person shall not make or use or allow to be made or used any internal communication between any licensed premises and any premises, not being licensed premises, which are used for public entertainment or resort, or as a refreshment house. (2) If any person acts in contravention of this section, he shall be liable to a fine not exceeding £10 for every day during which the communication remains open, and in addition shall, if he is the holder of a justices' licence, forfeit that licence."

The Divisional Court held that s. 70 of the Act of 1910 did not prohibit the justices from granting a licence prescribed by metes and bounds to a place like the restaurant under discussion. The object and intent of s. 4 of the Finance Act, 1911, which was substituted for the definition of the word "premises" in s. 52 of the Finance (1909–10) Act, 1910, was for an entirely different purpose from that of granting a licence, viz., that of excise—and was not meant to limit the rights of the justices. Therefore, the discretion of the justices as to granting a licence was not fettered by the other sections cited, and there was nothing in law to prevent them granting the licence they did to the room in question, nor was their jurisdiction confined to either granting a licence to the whole of Messrs. Harrods' premises, or not granting one at all. Their decision as to the monopoly value was correct. The Crown appealed.

The Solicitor-General (*Sir H. Slesser, K.C.*), *Bowstead*, and *F. G. Enness* for the Crown.

Sir H. Curtis Bennett, K.C., *Travers Humphreys*, and *St. John Hutchinson* for the respondent.

BANKES, L.J.—This is an appeal upon a Special Case stated by justices, and it undoubtedly raises an important question under the licensing laws which does not seem to have come before the courts on any previous occasion for a direct decision. The question raised may, I think, be stated thus: Can a licence be lawfully granted by justices to a person for a defined part of a building, which part is in direct internal communication with all the other parts of the same building, and the whole building is occupied by the person applying for the licence? The case arises in reference to Messrs. Harrods stores, and I wish to say distinctly at once that the only question that we have to decide is a pure question of law

upon the construction of the statute. We have nothing to do, and need say nothing, in reference to the general policy that the legislature might adopt in reference to such a question.

The Licensing (Consolidation) Act, 1910, consists to some extent of new legislation, but mainly it incorporates in one statute existing legislation by introducing sections taken verbatim from earlier Acts. In other instances it introduces in new language the substance of provisions which existed in earlier statutes. I doubt whether the legislature, in using the language they did, ever contemplated that any application would ever be made for the licensing of a separate part of a building, if the separate part was such a part as exists in Harrods Stores. But that is not the question. The question is whether, upon the true interpretation of the statute, it has forbidden the granting of a licence to such a part of a building. The argument for the Crown is that upon a true construction of the statute the court ought to hold that it has forbidden the granting of such a licence so that the licensing justices had no discretion to grant the licence which they in fact granted. It is said: "You must consider the statute as a whole and gather its intention from the language used and from the safeguards which are imposed by it against any abuse of its provisions." I accept that test to the full. Reading the statute as a whole, one is struck at once with the fact that the legislature at times speaks of "premises" as licensed, and in other parts indicates that it is not the premises at all that are licensed, it is a person who is licensed in respect of defined premises. Undoubtedly, when you look closely at the statute, it is clear that what the legislature provides for is the granting of a licence by justices to a person in respect of defined premises; and one gathers that from reading s. 9 and s. 15 of the statute together. Section 9 [see s. 4 of Licensing Act, 1953] provides:

> "Subject to the provisions of this Act, the licensing justices may at their general annual licensing meeting grant justices' licences to such persons as they, in the execution of their powers under this Act and in the exercise of their discretion, deem fit and proper."

So it is plain that the licence is to a person. Then, when one comes to s. 15 [s. 5 (1) and Sched. III, Part 1, para. 1, of Act of 1953], one finds that a person applying for a new justices' licence must comply with certain conditions, and those conditions include not only certain advertisements, but the depositing with the clerk of the licensing justices of a plan of the premises in respect of which the application is made.

In this particular case, application was made for the sale at a defined part of Messrs. Harrods' premises, which are situate on the fourth floor, and which, together with a room on the fifth floor immediately commmunicating, are known by the name of the Georgian Restaurant. The application was for a licence authorising the applicant to hold an excise licence to sell in that restaurant, by retail, any intoxicating liquor which can be sold under a publican's licence for consumption either on or off the premises. The Case Stated by the justices sets out that this particular part of Messrs. Harrods' premises is in immediate and direct communication with all the other parts of the building, and has no separate staircase of its own leading to the outer air, although there is a staircase which enables a person to go straight from the street to the restaurant without passing through any other parts of the stores. That is the character of the particular portion of the building in respect of which the licence was applied for; and after hearing the applicant, a licence was granted in this form:

> "A justices' licence authorising the applicant to hold an excise licence to sell by retail at the licensed premises, situate at the refreshment rooms forming the fourth floor of certain houses and premises situate at Nos. 13 to 35, Hans Road, in the parish of Kensington, aforesaid, and other, the premises connected therewith, known as Harrods' Georgian Restaurant, any intoxicating liquor which may be sold under a publican's licence for consumption either on or off the premises."

The justices attached certain conditions, one being that the intoxicating liquor was to be sold or consumed only between 12 noon and 3 p.m. Another has regard to the character of the building in which the sale is to be carried on, and a provision that the premises shall be closed on Sundays and public holidays. It is to that licence that objection is taken, and it is said the justices had no jurisdiction to grant it. It appears that the question in reference to the justices' right to grant this licence arose in connection with a matter which is quite extraneous to the present inquiry, and that is in reference to the monopoly value. The justices had fixed the monopoly value at £500, payable in two annual instalments. It so happens that Messrs. Harrods hold an off-licence in respect of some apparently undefined portion of their premises, and some ingenious person came to the conclusion that, in those circumstances, the monopoly value ought to be arrived at, not by a consideration of the value of the new licence which had been granted by the justices, but by a consideration of the fact that, after the new licence had been granted, Messrs. Harrods would hold two licences in respect of these premises, and that fact ought to be taken into consideration in arriving at the monopoly value. But, having been raised in that way in the first instance, the question passed into the second stage, which is the only one we have to consider—that is, whether or not the justices had the right under the statute to grant this licence.

I quite assent to the Solicitor-General's argument relating to the importance of considering the practicability of police supervision in the event of any such licence as this being granted, but with submission to his argument, I do not think that that point really depends upon the construction of the statute so much as upon the matters which the justices should take into consideration in the exercise of their discretion. If they came to the conclusion that the granting of a licence to any particular part of a premises would lead to real difficulty in relation to police supervision, or that the character of the business to be carried on was such that it required constant or frequent police supervision, that ought to influence their judgment to a very material extent, but, in my opinion, it is not really a guide, or to any extent a guide, to the construction one ought to put upon this statute, having regard to the language which is used. There are three sections which can be properly referred to as indicating the intention of the legislature in reference to this matter. There is, first of all, s. 15, to which I confess I attach considerable importance, although I do not think at the stage at which this matter has arrived it is one which ought to govern our decision. I have already referred to that section and the matters with which a person applying for a new justices' licence has to comply. Among those provisions there is a provision that before applying for the licence a certain period of notice must be given by affixing, between the hours of ten in the morning and five in the afternoon of two consecutive Sundays, on the door of the premises in respect of which the licence is being applied for a notice of the applicant's intention to apply for a licence. If application is made in respect of premises to which there is no door which can possibly be said to comply with the statute upon which a notice can be fixed, I myself should be inclined to say that those are premises to which a licence cannot, under the statute, be granted, and, in the present case, I think, considerable argument might have been addressed to the justices on the point that the notice given was not a sufficient notice because the door to which the notice was affixed was not, within the meaning of the statute, the door of the premises. But that is not a pure question of law. I think it is partly a question of fact, and partly a question of law, and the question we have to decide is not whether a good notice was originally given, or whether the justices had a right to decide that the notice was a good notice. All we are asked to decide is whether the justices had a discretion in granting the licence, no point having been taken, as I understand, in reference to the validity of the notice. I think, therefore, in this case that that section has no material bearing upon the decision that we ought to give, although I do think it has some bearing upon the character of the premises to which alone it is possible to grant to a person a justices' licence. The next section to be considered is s. 70 [Licensing Act, 1953,

s. 133], and here again I think a difficulty arises. I am not sure that all the members of the court entertain the same view as to the construction of this section. The section provides:

> "A person shall not make or use or allow to be made or used any internal communication between any licensed premises and any premises, not being licensed premises, which are used for public entertainment or resort. . . ."

The argument upon that is, first, as to construction, that the section includes, not only the making of a new internal communication, but the using of an existing internal communication, and it is said that Messrs. Harrods is a place used for public resort, if not for public entertainment, and that, therefore, if this licence is allowed to stand, the licensee will be de die in diem, committing an offence against the statute by allowing communication from this restaurant with the rest of Messrs. Harrods' unlicensed premises to be used. Personally, I think that the section does refer to the using of an already existing communication—that is to say, already existing at the time of the granting of the licence—as well as to the using of a newly made or subsequently made communication. But in reference to the value that this section has upon the construction of the whole statute, my opinion is that, if it be true that the statute does not forbid the granting of such a licence as this, it follows that this section is practically a brutum fulmen in reference to any prosecution, because I cannot conceive it possible that, in reference to communications already existing and disclosed to the justices at the time of making the application, there ever would be any prosecution for the using of such communications, or, if there was such a prosecution, there would be the slightest possibility of anything more than a conviction for a purely technical offence. I do not think that this section can have the value attributed to it, even upon the construction which I think it ought to bear, in reference to the interpretation of the statute as a whole, it being plain that nowhere, from first to last, does the statute in terms forbid the granting of such a licence as this.

Then it was said that s. 81 (1), by authorising the police at all times to enter any premises for the purpose of preventing any infringement of the statute, implies that the licensed premises must immediately join the street, so that there may be no intervening non-licensed premises over which the police would have no authority to pass. As I have previously said, I recognise the importance of police supervision of licensed premises, but at the same time I do not think that the suggested difficulty has any application to the jurisdiction of the justices to grant the licence —it is rather a matter for them to take into consideration in particular cases when exercising their discretion as to granting or refusing the licence. That section, therefore, does not really throw any light on the matter before us.

Taking the statute as a whole, one does not find in it any indication that the legislature forbids the granting of such a licence as this, and that there is nothing, either in the language of the section or in the policy of the legislature as indicated in the statute, which should lead the court to say that inferentially the legislature forbade the granting of such a licence. I think, therefore, treating the matter as a pure question of law, we must say that the decision of the Divisional Court was right. The appeal fails and must be dismissed.

SCRUTTON, L.J.—In the form in which this appeal comes before this court, it raises a question of considerable general importance, which is not quite the same question as was considered in the court below. In a large block of buildings known as Harrods Stores, the public have access to a considerable portion of the fourth floor and part of the fifth for the purposes of a restaurant. The justices have granted a licence between certain hours in the middle of the day to sell intoxicating liquors in the licensed premises situate at the refreshment room forming the fourth floor of certain houses and other premises connected therewith, known as Harrods' Georgian Restaurant, but they have stated a Special Case on the question whether they have the power to grant such a licence, it being contended by the Crown that, if any licence were granted to the respondent, the whole of the premises of Harrods

Stores should be included in the licence. As stated in the Case, the question went on: "and the monopoly value increased accordingly." Before the justices and the court below great stress was laid on the question of monopoly value, because it appeared that, besides the Georgian Restaurant, Harrods had an off-licence in another part of the premises, and it was suggested that that should be taken into account and, therefore, the monopoly value should be considerably increased. I gather, however, that when this case had got to the Divisional Court, Departments of the government other than those concerned with finance woke up and said: "There is a much more serious objection, in our view, than any question of money to the granting of this licence; we desire to have the question argued whether you can grant a licence to part of a building or whether the licence must be granted to the whole building." The Solicitor-General, therefore, has intentionally abstained from arguing any question here connected with monopoly value and the effect of the off-licence in another part of Harrods' premises, and has confined his argument to the contention that it is not in the power of the magistrates to grant a licence to part of a building, there being internal communication in the building between the licensed part and the rest of the building. The question was put to him: Supposing that the part of the building sought to be licensed is like a flat, a completely severed tenement, whose only community with other severed tenements in the building is a common staircase, and I think he was inclined to admit that such a completely severed tenement might have a licence though it was included in a larger building, but he argued that in this case there was no such severed tenement. The restaurant communicated with the rest of Harrods Stores in a number of ways —two lifts and two staircases—so that you could not describe it as such a separate tenement that a licence might be granted to it.

Whether the magistrates have or have not power to grant such a licence, quite apart from the question whether in their discretion they should do so, appears to me to turn on the meaning to be put on the word "premises" in the Licensing (Consolidation) Act, 1910. While s. 9 of that Act [s. 4 of the Act of 1953] talks about a licence granted to a person, it is quite clear that the licence is not merely a personal licence; it is a personal licence fettered by locality, in that it is only a licence to a person to sell in a defined locality. Section 15 (1) (d) [Sched. III, para. 1, to Act of 1953] refers to "the premises in respect of which the application is to be made," and s. 37 [s. 6 (3) of Act of 1953] speaks of it as "premises shall not be qualified to receive a justices' on-licence unless" they comply with certain requirements. What is meant by "premises"? The word "premises" is singularly vague; etymologically it is the things that have gone before; it is frequently used in conveyances as simply referring to the parcels which have preceded, which are spoken of as "the premises," and, in that capacity, it frequently includes land. In rating enactments "premises" frequently includes lands with no buildings on them, and I do not find anything in the Licensing Act which limits "premises" to a complete building. If you can have a defined part of a building, defined by metes and bounds, to use one of the expressions that have been used, in my view you can have premises which can be licensed, if the justices think they are structurally adapted to the class of licence which is required. I can quite understand, as my Lord has said, that the justices will be very slow to grant licences to parts of buildings included in a large building, because of the difficulty of effective supervision by the police of a part of a building which may have several exits and entrances which cannot all be watched. That is the class of objection which is raised before justices by the police when it is pointed out that, besides the main door into the street, there are one or two or three entrances into back alleys which render it difficult or impossible for the police successfully to watch whether entry is or is not made into licensed premises during prohibited hours. But it appears to me that that is a class of matter which belongs to the discretion of the justices. If I am asked to say that "premises" cannot apply to a defined part of a building, I can find nothing in the Licensing Act which compels me to take this view. It is common knowledge that there are, in the city of London,

A at any rate, floors of buildings, parts of floors of buildings, occupied by restaurants, some of them having more than one entrance to the rest of the building, and served by staircases and passages which are used in common with the occupants of other parts of the building. Anyone who has been into the extensive rabbit warrens which prevail in the city, with their innumerable entrances and their innumerable offices and their restaurants with several entrances from the various passages, will B see that such premises, parts of buildings, are now licensed and can be capable of effective definition.

The only two points that are really raised, apart from the general question of suitability for police control, which appears to me to be a matter for the discretion of the justices, are the question as to how you can put a notice on the door of such premises, and the question of the applicability of s. 70 of the Licensing Act [s. 133 C of Act of 1953] to premises which are parts of buildings. I do not wish to consider all the possible variations of "when is a door not a door?" There have been cases in which the court has had to decide how you are to put a notice on a door when there is not one. In this particular case, I do not see any difficulty in the matter. There is a staircase leading direct from the street to the Georgian Restaurant. It is true that if you go up that common staircase you may at various points diverge D on to other floors of Harrods Stores, but you can go straight on from the street to the restaurant, and it appears to me that the door of that staircase is a door for the purpose of the notice. A more difficult question is the question that arises on s. 70. My Lord has expressed one view of its meaning. I regard it as a difficult section, and at present I take a different view of its meaning, but I do not propose to bind myself to hold that view when the matter is further argued on a case which E directly raises the question. Section 70 (1) provides:

> "A person shall not make or use or allow to be made or used any internal communication between any licensed premises and any premises, not being licensed premises, which are used for public entertainment or resort. . . ."

In my present view, that applies to internal communication made or allowed to F be used after the granting of the licence. "Make or allow to be made," I think, clearly refer to matters since the granting of the licence. In my view, "use" or "used" means, "use a communication so made or allow to be used a communication so made." I see very considerable difficulty in the way of a construction which makes that section refer to communications in existence at the date of the licence. I mention merely one. I suppose St. Pancras Station is a building. From the restaurant in St. Pancras Station there is an internal communication— G that is to say, a communication within the main building—to a platform, which is a place of public resort. It cannot be that an offence is committed by every person using the internal communication in St. Pancras Station from the restaurant to the platform, and other difficulties of the same sort might be pointed out in the Act.

At present, therefore, I do not see any difficulty in holding that a severable part H of Harrods Stores may be licensed, although there is an internal communication to another part of Harrods Stores which is not licensed. The communication existing at the time the licence was granted does not seem to me, as at present advised, to come within the prohibition in s. 70. All these cases will, no doubt, be considered with great care by the magistrates, and I can quite conceive that it will take a very strong case for them to grant a licence to part of premises where I there is internal communication within the building, and that they will consider in every case, as a matter of grave importance, the possibility of proper police control. It seems to me that that is a matter for the discretion of the magistrates in granting the licence, and not a prohibition against any such licence being granted. For these reasons, I think the objection to the granting of this licence fails, and the appeal should be dismissed.

SARGANT, L.J.—I am of the same opinion. The appeal as argued here raises the general question: What are "premises" which can be licensed by the justices? The Solicitor-General in his argument started by assuming that primâ facie

"premises" referred, not merely to a building, but to an entire house. He then called attention to certain provisions of the Act which he said strengthened that primâ facie meaning. In my judgment, the word "premises" had no such original meaning as was contended for by the Solicitor-General. It seems to me that "premises" is as large a word as can be used, and that it is applicable to any kind of hereditament. It is used in respect of easements, it is used in respect of open spaces, and I cannot attach to it any general meaning which involves the notion of actual buildings, still less of one complete building forming a house. The Licensing (Consolidation) Act, 1910, s. 110, contains a definition of licensed premises, but I am afraid that that section does not throw much light on the subject, because the definition is this:

> "The expression 'licensed premises' means premises in respect of which a justices' licence has been granted and is in force."

Perhaps, apart from the sections of the Act of Parliament to which I am about to refer, it may be taken that "premises" means some definite place ascertained by metes and bounds, as that in respect of which the licence is granted to a person by the justices.

Are there any sections in the Act which limit what may be considered as being the primâ facie meaning of the phrase? Section 15 has been referred to, but with great respect to my Lord, I do not attach quite as much importance to the inferences to be derived from the necessity of putting a notice on the door of the premises as he does. It seems to me that, no doubt, that provision may have originated at a time when the ordinary licensed premises were definite houses, but I think that the difficulty of finding a door to which to attach the notice can be got over practically in cases as they arise, and in this particular case, as SCRUTTON, L.J., has pointed out, it does not really cause any difficulty. Then there is s. 37, which was referred to by the Solicitor-General, and the provisions of that section are certainly more applicable to a house than to other premises, but there again the section is one which no doubt owes its present form, to a great extent, to the fact that originally the premises in respect of which the licences were granted were particular houses, and I do not think that, in a general Licensing Act, the mere existence of a phrase of that kind is to be regarded as limiting, necessarily, the description of premises in respect of which licences may be granted. Then comes s. 70, on which the argument mainly turned. With regard to that section, I am inclined to adopt the interpretation which has been provisionally placed upon it by SCRUTTON, L.J. It appears to me that the way in which the phrase runs—"make or use" instead of "use or make"—rather points to this, that the making comes first and the using afterwards, and that the internal communication which is referred to there is an internal communication which is made after the granting of a licence or used when made after the granting of the licence rather than an existing communication which is used. I should have thought that if existing communications were intended to be included as well as future communications, the phrase would rather have run, "shall not use or make," but, however that may be, it seems to me that the section tends in favour of the argument of the respondent's case, assuming that the true interpretation is that which I have just said I preferred. If that is so, the whole of the argument which was founded on the improbability that the legislature would allow a licence to be granted in respect of premises with regard to the user of which an offence would immediately arise is got rid of. On the other hand, if the construction is that which my Lord has preferred, namely, that it applies to existing internal communications—it may be that the argument of the Divisional Court becomes at once effective, because as there said by SANKEY, J., in delivering the judgment:

> "The using of a place may refer to using a place which was there either before or after the granting of the licence, there being an obligation, if there is such a place, that the licensee shall not make use of it. This indicates that the

licensing justices have power to grant a licence to premises, with such an internal communication as aforesaid."

In my judgment, that second interpretation is one, if anything, more in favour of the respondent than the first, as aiding his positive argument, while the first interpretation merely helps him by getting rid of an objection which was raised against him by the Solicitor-General.

Speaking generally, I think that the vagueness or absence of definition of what is meant by "premises," is not really any considerable objection to the argument put forward by the respondent, because it is not as if there were no discretion in the justices. The justices have the opportunity of considering the whole circumstances of the case, they have a definite plan put before them, they have the advantage of the presence of the police who can raise objections to any internal communications that may be objectionable for any reason whatever, and, therefore, there is a practical safeguard against the grant of any licence in respect of a part of a property the use of which would be liable to result in abuses of any kind. I think, too, that this fact should be taken into account. This Act is a Consolidation Act; there can be no question but that at the time it was passed, and for many years previously, there had been in existence licences, which, although they may not have been in places precisely analogous to the present place, were in places which were analogous to it in their main features, places such as restaurants in the city or the refreshment rooms in railway stations. There was a well-known class of premises in respect of which licences were granted, and which were not houses in the sense which the Solicitor-General contended, whether houses in the ordinary sense or houses such as might be houses within the Franchise Acts. It seems to me that in view of that practice, when a Consolidation Act is passed in the year 1910, it can hardly be supposed that it was intended that that Act should have the effect of invalidating, or rendering impossible, the grant of licences of a class which had been granted for many years previously.

Appeal dismissed.

Solicitors: *Solicitor for Customs and Excise*; *Martineau & Reid.*

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

BAXENDALE *v.* MURPHY

[KING'S BENCH DIVISION (Rowlatt, J.), July 3, 1924]

[Reported [1924] 2 K.B. 494; 93 L.J.K.B. 974; 132 L.T. 490; 40 T.L.R. 784; 69 Sol. Jo. 12; 9 Tax Cas. 76]

Income Tax—Annual payment—Remuneration of trustees—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *Sched. D, Case II, All Schedules Rules, r.* 19 (1).

The appellant was one of two trustees appointed under a deed of separation and settlement which provided that each trustee should be entitled to remuneration for his services at the rate of £100 per annum, and that such remuneration should be paid by the trustees out of the income arising from the trust funds in their hands.

Held: the payments to the trustees were annual payments made out of profits and gains brought into charge to tax within r. 19 (1) of the All Schedules Rules in the Income Tax Act, 1918, and were not profits of a profession within Case II of Sched. D; and, therefore, tax was deductible by the trustees in making the payments.

Notes. The Income Tax Act, 1918, Sched. D. Case II, and All Schedules Rules, r. 19, were replaced by the Income Tax Act, 1952, s. 123 and s. 169, respectively.

Distinguished: *Jones* v. *Wright* (1927), 44 T.L.R. 128. Applied: *Hearn* v. *Morgan*, *Pritchard* v. *Harding Lathom-Browne*, [1945] 2 All E.R. 480. Considered: *Dale* v. *I.R.Comrs.*, [1951] 2 All E.R. 517. Applied: *Dale* v. *I.R.Comrs.*, [1952] 2 All E.R. 89. Referred to: *Dale* v. *I.R.Comrs.*, [1953] 2 All E.R. 671; *Temperley* v. *Smith* (1956), 37 Tax Cas. 18.

As to income tax on the remuneration of trustees, see 20 HALSBURY'S LAWS (3rd Edn.) 241, 306.

Case Stated under the Income Tax Act, 1918, s. 149, by the General Commissioners of Income Tax for the Division of Finsbury in the county of Middlesex for the opinion of the King's Bench Division of the High Court of Justice.

At a meeting of the commissioners held on July 12, 1922, Capt. Guy Vernon Baxendale (hereinafter referred to as the appellant) appealed against the undermentioned assessments to income tax made on him under the provisions of Sched. D of the Income Tax Acts in respect of the remuneration paid to him for his services as a trustee of the funds comprised in the indenture of settlement hereinafter referred to, that is to say: an assessment in the sum of £75 for the year ending April 5, 1919; an assessment in the sum of £100 for the year ending April 5, 1920; an assessment in the sum of £100 for the year ending April 5, 1921; an assessment in the sum of £100 for the year ending April 5, 1922.

The following facts were proved or admitted:

By an indenture of separation and settlement dated Feb. 14, 1914, and made between the late Francis Hugh Baxendale of the first part, Emily Ann Baxendale (the wife of the said Francis Hugh Baxendale) of the second part, the appellant and Edward Warren Clarke (therein referred to as the trustees) of the third part, the appellant and Edward Warren Clarke were appointed trustees thereof, and it was provided that a fund consisting of £20,000 5 per cent. debenture stock of Carter, Paterson & Co., Ltd., and £20,000 6 per cent. preference shares of the same company, should be held by the trustees on the trusts relating to the capital and income thereof therein contained; and by cl. 9 of the said indenture it was provided that each of them, the appellant and Edward Warren Clarke, and every other trustee for the time being of the said settlement, should be entitled to remuneration for his services at the rate of £100 per annum, and such remuneration should be paid by the trustees out of the income arising from the trust funds in their hands other than such portion or portions thereof as should for the time being be or be deemed to be severed, and should be paid in priority to the yearly sums therein mentioned (being certain annuities granted under the said indenture).

Clause 18 (c) of the said indenture provided that any trustee being a solicitor or other person engaged in a profession or business was to be entitled to be paid his usual professional charges. The said Francis Hugh Baxendale died on July 23, 1918.

In paying to the appellant his remuneration for each of the years in question in this case the trustees deducted from the full amount of £100 the income tax applicable thereto, on the ground that the payments to be made to the trustees under the provisions of the said settlement were annual payments within the meaning of r. 19 of the General Rules, Scheds. A, B, C, D, and E of the Income Tax Act, 1918.

It was contended by the appellant that as the remuneration at the rate of £100 per annum was payable out of the income of the trust fund from which income tax was deducted at the source, the said remuneration was an annuity or annual payment payable wholly out of profits or gains brought into charge to tax within the meaning of r. 19 of the General Rules applicable to Scheds. A, B, C, D, and E of the Income Tax Act, 1918, and that the trustees in paying the said remuneration had properly deducted therefrom as provided by the said rule income tax at the rate in force during each of the years in question.

The inspector of taxes contended: (i) That the payments in question made to the appellant represented remuneration for his services as trustee and were not in the nature of "yearly interest of money, annuity or other annual payment," and that neither the provisions of r. 1 of Case III of Sched D, nor the said r. 19, applied; and (ii) that the said remuneration was properly chargeable by direct assessment on the appellant under Case II of Sched. D of the Income Tax Act, 1918.

The commissioners, having heard and considered the appeal and the evidence and contentions made on behalf of the appellant and of the respondent, were of opinion that, as the remuneration of the appellant was payable to him for acting as a trustee of the settled fund, he was liable to direct assessment under Case II of Sched. D. They accordingly increased the assessment made upon the appellant for the year ending April 5, 1919, from £75 to £100, and they confirmed the assessments for the three years ending April 5, 1922.

This Case was stated at the request of the appellant.

Raymond Needham for the appellant.

The Solicitor-General (*Sir Henry Slesser, K.C.*) and *Reginald Hills* for the respondent.

ROWLATT, J.—This is a perfectly clear case. These trustees get £100 a year each under the deed of 1914 as an annual payment made to them by virtue of a deed. They are taxed on that as an annual payment under r. 1 (a) applicable to Case III. That being so, it is also an annual payment which is made out of profits or gains charged to tax within the meaning of the All Schedules Rules, r. 19 (1), and is deductible. That seems to me as clear as possible; but it is said that it is not an annual payment within that class of the income tax; it is merely something that each trustee earns every year, just as a man in a profession might get a fee from a particular client every year, perhaps by a contract in his profession, and it comes in a form of employment for this gentleman. Whether he had any other employment does not appear.

That is an entire misconception of the position. It is recited in the deed that the appellant agreed to be a trustee, and so did the other trustee. They must have agreed or they would not have been made trustees. But the appellant was not making a bargain with the husband and the wife and the other people who were interested in the fund, that he should go into his own employment, that he, as trustee, should employ himself as trustee and pay himself as trustee, and not only himself but unknown successors who should thereafter be trustees. The idea is unintelligible. The commissioners have been misled by the word "remuneration," which merely indicates why it has been desired to give the appellant something,

because as a trustee he is taking a lot of trouble. It does not throw any light on the service.

If it is desired to see exactly how a case of this kind stands one has only to refer to what LORD LINDLEY said in *Re Thorley* ([1891] 2 Ch. at p. 624).

Appeal allowed.

Solicitors: *Clarke, Square & Mills*; *Solicitor of Inland Revenue.*

[*Reported by* J. S. SCRIMGEOUR, ESQ., *Barrister-at-Law.*]

Re HORN'S ESTATE. PUBLIC TRUSTEE *v.* GARNETT AND OTHERS

[CHANCERY DIVISION (P. O. Lawrence, J.), February 20, 1924]

[Reported [1924] 2 Ch. 222; 93 L.J.Ch. 490; 131 L.T. 286; 68 Sol. Jo. 577]

Settlement—Capital or income—Tenant for life and remainderman—Apportionment—Foreclosure by trustees in respect of leasehold securities—Rents exceeding interest on mortgages—Nature and application of excess—Conveyancing Act, 1911 (1 *& 2 Geo. 5, c.* 37), *s.* 9 (2).

The testator by his will, dated April 1, 1882, gave the residue of his estate to his trustees on trust for sale, with power to postpone such sale, and to invest the proceeds as therein mentioned, including investments on leasehold securities, and to stand possessed of the trust moneys and investments thereof in trust, to pay the income thereof to his children during their lives, in equal shares, and after their decease, as therein mentioned. The testator died on Dec. 30, 1883. Between 1891 and 1899, the trustees invested over £8,000 on the security of mortgages of leasehold properties. The mortgagor having become bankrupt, the trustees foreclosed in December, 1915, and after the foreclosure sold four of the properties comprised in the mortgages, but were unable to effect a sale of the remaining five properties mortgaged. Of the five properties which remained unsold, in the case of two the net rent of the property exceeded the amount of the interest on the mortgage debt formerly secured on the property, in the case of two others the net rent was about equal to the amount of the former interest, and in the case of the remaining property unsold the net rent was less than the amount of the former interest. The tenants for life claimed as income the whole of the net rents of the five properties which remained unsold, while they remained unsold. The remaindermen contended that in view of the Conveyancing Act, 1911, s. 9 (2), proviso, where the net rent exceeded the interest payable on the relevant mortgage debt, the excess should be treated as capital.

Held: the tenants for life were entitled to receive the whole of the net rents of the five properties from the date of the order for foreclosure until the date of the sale of those properties, the purpose of s. 9 (2) being to place the foreclosed property in the same position, so far as practicable, as if it had originally formed part of the testator's estate and had been devised or bequeathed on trust for sale, the rents until sale to be dealt with as income; the proviso to s. 9 (2) was intended to preserve any rights to apportionment which had been acquired before the foreclosure.

Re Coakes (1), [1911] 1 Ch. 171, distinguished.

Notes. The Conveyancing Act, 1911, s. 9, was re-enacted with amendments in the Law of Property Act, 1925, s. 31.

As to adjustments as between capital and income, see 29 HALSBURY'S LAWS (2nd Edn.) 665 et seq.; and for cases see 40 DIGEST (Repl.) 759 et seq.

Cases referred to:

(1) *Re Coakes, Coakes* v. *Bayley*, [1911] 1 Ch. 171; 80 L.J.Ch. 136; 103 L.T. 799; 40 Digest (Repl.) 763, *2474.*

(2) *Re Atkinson, Barbers' Co.* v. *Grose-Smith*, [1904] 2 Ch. 160; 73 L.J.Ch. 585; 90 L.T. 825; 53 W.R. 7, C.A.; 40 Digest (Repl.) 761, *2466.*

Also referred to in argument:

Re Godden, Teague v. *Fox*, [1893] 1 Ch. 292; 62 L.J.Ch. 469; 68 L.T. 116; 41 W.R. 282; 3 R. 67; 40 Digest (Repl.) 763, *2477.*

Adjourned Summons.

The judge stated the facts in the following way:

"By his will, dated April 1, 1882, the testator, Richard Horn, devised and bequeathed the residue of his estate to his trustees upon trust for sale, and conversion into money as therein mentioned, and out of the proceeds to pay his debts, funeral and testamentary expenses and pecuniary legacies, and to invest the residue of such proceeds as therein mentioned, including investments on leasehold securities, and to stand possessed of such residuary trust moneys in trust to pay the income thereof to his children during their lives in equal shares, and after their decease upon trust as therein mentioned. The testator died on Dec. 30, 1883. In exercise of the power contained in the will, the trustees, between the years 1891 and 1899, invested nine sums of money forming part of the trust estate and amounting in the aggregate to the sum of £8,305 on the security of mortgages of leasehold properties held for long terms of years. The mortgagor having become bankrupt, the trustees foreclosed in December, 1915. There were originally nine mortgages of nine separate properties. Since the foreclosure, four of the nine properties have been sold, but five remain unsold. In the case of two of the five properties which remain unsold, the net rent of the property exceeded the amount of the interest on the mortgage debt formerly secured on the property. In the case of two of the five properties, the net rent of the property was about equal to the amount of the former interest. In the case of one of the five properties, the net rent was less than the amount of the former interest. This summons was taken out by the plaintiff, who had been appointed a trustee of the will, and it raised the question whether, in the circumstances, the whole of the net rents of the five properties which remained unsold ought, while they remained unsold, to be treated as income, or whether any part thereof ought to be treated as capital."

The Conveyancing Act, 1911, s. 9, provides:

"(1) Where any property, vested in trustees by way of security, becomes, by virtue of the Statutes of Limitation, or of an order for foreclosure or otherwise, discharged from the right of redemption, it shall be held by them on trust for sale, with power to postpone such sale for such a period as they may think proper. (2) The net proceeds of sale, after payment of costs and expenses, shall be applied in like manner as the mortgage debt, if received, would have been applicable, and the income of the property until sale shall be applied in like manner as the interest, if received, would have been applicable; but this subsection shall operate without prejudice to any rule of law relating to the apportionment of capital and income between tenant for life and remainderman."

R. M. Pattison for the plaintiff.

C. Stafford Crossman for tenants for life.

R. W. Turnbull for an infant remainderman.

P. O. LAWRENCE, J.—This summons raises the point whether under s. 9 (2) of the Conveyancing Act, 1911, the tenants for life under the testator's will are

entitled to receive the whole of the net rents of certain leasehold properties which were formerly vested in the trustees by way of security, but have become discharged from the right of redemption by virtue of an order for foreclosure. [His Lordship stated the facts and read s. 9 (1) and (2), and continued:] But for the proviso at the end of sub-s. (2) it is plain that after the order for foreclosure the properties in question would have been held by the trustees upon trust for sale with a power to postpone such sale, and upon trust until sale to pay the whole of the net rents to the tenants for life who were the persons entitled to receive the interest on the mortgage debts formerly secured on the properties. Counsel for the infant remainderman contended, however, that the effect of the proviso is that in every case in which the net rent of the property exceeds the amount of the interest on the mortgage debt formerly secured on the property the tenants for life are not entitled to receive the whole of such net rent, but only a part thereof equal to the amount of the interest on the mortgage debt, and that the balance of such rent must be retained as capital.

I do not find that the cases to which my attention has been called lay down or recognise any rule of law relating to the apportionment of the income of property which has become discharged from the right of redemption by virtue of an order for foreclosure. In *Re Coakes, Coakes* v. *Bayley* (1), which was mainly relied on by counsel for the remainderman, there had been no order for foreclosure; the testator had gone into possession some time before his death, and the trustees of the will continued in possession; there were arrears of interest owing to the testator at the time of his death, and the main question decided was that the rents were applicable in the first instance in discharge of such arrears which were a debt due to the testator, and therefore formed part of the capital of his estate. It was also incidentally held that, subject to such application, the rents ought to be applied in payment to the tenants for life of sums not exceeding the interest on the mortgage, and that any excess ought to be applied as capital. From the judgment of WARRINGTON, J., it appears plainly that the basis of his decision was the duty which the trustees owed to the mortgagor to apply the surplus rents after payment of interest in arrear and current interest in reduction of the mortgage debt. It is obvious that this duty furnished the true guide for the apportionment of the rents between tenant for life and remainderman, as the reduction of the mortgage debt effected in favour of the mortgagor by means of the surplus rents necessarily affected the remainderman, and, if such surplus rents had been paid to the tenant for life, the remainderman would suffer a loss of capital on the redemption of the mortgage by the mortgagor.

The question then arises, what is the meaning of the proviso to sub-s. (2) of s. 9? In my opinion the clear intention of s. 9 as a whole is to place property which has been foreclosed so far as practicable in the same position as if it had originally formed part of the estate of the testator, and had been devised or bequeathed by him on trust for sale with discretionary power to postpone such sale and with a direction that the proceeds of sale should form part of the capital of his trust estate, and that the rents until sale should be dealt with as income. In these circumstances the meaning of the proviso that sub-s. (2) shall operate without prejudice to any rule of law relating to the apportionment of capital and income between tenant for life and remainderman is not very obvious. Some meaning, however, must be attached to that proviso, and I think that the true meaning is that suggested by counsel for the life tenants, viz., that the earlier provisions of sub-s. (2) were not to prejudice any rights already acquired before the order for foreclosure such as the right on the ultimate realisation of the property to have the proceeds apportioned in accordance with the rule of law which was recognised and definitely established in *Re Atkinson, Barbers' Co.* v. *Grose-Smith* (2). According to my view of the scheme of s. 9, notwithstanding the provisions of sub-s. (2), all proper apportionments which were or ought to have been made in respect of the rents received during the period preceding the order for foreclosure are not to be disturbed, and when the property is ultimately sold,

if the net proceeds of sale amount to or exceed the aggregate of the amount of the interest on the mortgage debt on such property which was in arrear at the date of the order for foreclosure and of the amount of such mortgage debt, the tenant for life will be entitled to receive out of the net proceeds of sale the amount of such interest in arrear, and, if the net proceeds of sale do not amount to such aggregate, the tenant for life will be entitled to receive a proportionate part of the net proceeds of sale calculated in accordance with the rule laid down in *Re Atkinson, Barbers' Co.* v. *Grose-Smith* (2). As from the date of the order for foreclosure the position is changed to this extent, that the trust fund is no longer represented by a debt, to the interest on which the tenant for life is entitled, but is represented by the property comprised in the mortgage, the net rents of which pending sale the tenant for life is entitled to receive. If this be the true view, no rule of law relating to the apportionment of capital and income between the tenant for life and remainderman will be prejudiced, notwithstanding that as from the date of the order for foreclosure the tenant for life is entitled to receive the whole of the rents.

I can hardly imagine a case where the net rents would exactly equal the interest on the mortgage debt, and, if every excess of rent had to be added to capital, the income of the properties would not, in the terms of sub-s. (2), "be applied in like manner as the interest if received would have been applicable," and, if every deficiency of rents had to be compensated for out of capital, the proceeds of sale would not in the terms of the subsection "be applied in like manner as the mortgage debt if received would have been applicable." To accede to the contention of counsel for the remainderman, therefore, would involve construing the proviso at the end of sub-s. (2) as practically rendering the directions contained in the earlier part of that subsection nugatory. Such a construction, in my opinion, ought if possible to be avoided. If on the other hand the view I have expressed is right, effect is given to the earlier part of the subsection, and at the same time a reasonable construction is placed on the proviso.

In the result, I am of opinion that the tenants for life are entitled to receive the whole of the net rents of the five properties in question from the date of the order for foreclosure until sale, although in two cases such rent exceeds the interest on the mortgage debt formerly secured on the property. It follows logically from this that the tenants for life will not by reason of the net rents of one of the properties having since the date of the order for foreclosure been less than the amount of the interest on the mortgage debt formerly secured on such property be entitled to claim any part of the proceeds of sale of such property when sold as compensation for such deficiency.

Solicitors : *Lee & Pembertons.*

[*Reported by* GEOFFREY P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

A

EADIE *v.* INLAND REVENUE COMMISSIONERS

[KING'S BENCH DIVISION (Rowlatt, J.), March 26, 1924]

[Reported [1924] 2 K.B. 198; 93 L.J.K.B. 914; 131 L.T. 350; 40 T.L.R. 553; 68 Sol. Jo. 667; 9 Tax Cas. 1]

B

Supertax—Total income—Husband and wife—Agreement providing for husband and wife to live in same house—Maintenance of house by wife—Husband removing to another residence—Liability of husband for tax on wife's income—Right to deduct payments made to wife under agreement.

In 1912, the taxpayer and his wife entered into an agreement under which the taxpayer agreed to pay to his wife "during the joint lives of himself and wife . . . so long as they continue to reside at Rigby Hall and so long as the wife performs . . . the covenants on her part hereinafter contained" the weekly sum of £30, but so that that sum should cease to be payable if the parties were divorced or judicially separated. The wife was to pay all rates and taxes in respect of Rigby Hall and keep the building and furniture insured, and was also to maintain the building, keeping it properly repaired and decorated. The wife (who had an income of her own) was to pay all household expenses, wages and tradesmen's bills, and she covenanted to use the £30 for the upkeep of Rigby Hall and for her maintenance and support and for no other purpose. Provision was made for the determination of the agreement on six months' notice. The taxpayer and his wife had ceased to live maritally together, but continued to live at Rigby Hall. In February, 1913, the taxpayer left Rigby Hall and at all material times since had lived elsewhere, and did not live with his wife. In June, 1921, the taxpayer gave notice to the wife terminating the agreement, the notice expiring on Dec. 9, 1921, until which date the payment of £30 each week was made. In the years ending April 5, 1919, and April 5, 1921, no sums were included in the original assessments to supertax made on the taxpayer in respect of the income of his wife, and a deduction of £1,560 (in respect of the payments of £30 per week) was allowed in each assessment in arriving at the taxpayer's total income. Additional assessments to supertax were made on the taxpayer to cover his liability in respect of the income of his wife and the sum (in each year) of £1,560. On appeal against the additional assessments,

C D E F

Held: (i) the taxpayer could not be assessed in respect of his wife's income because the wife was not "living with her husband" within the meaning of r. 16 of the General Rules applicable to all schedules of the Income Tax Act, 1918; (ii) the taxpayer was entitled to deduct the £1,560 in assessing his total income in each year because, on the true construction of the agreement of 1912, the taxpayer was bound to continue his payments under the agreement notwithstanding that he had ceased to reside at Rigby Hall.

G H

Notes. Referred to: *Nugent-Head* v. *Jacobs*, [1948] 1 All E.R. 414.

As to husband's liability in respect of wife's income, see 20 HALSBURY'S LAWS (3rd Edn.) 380 et seq.

Case referred to:

(1) *R.* v. *Creamer*, [1919] 1 K.B. 564; 88 L.J.K.B. 594; 120 L.T. 575; 83 J.P. 120; 35 T.L.R. 281; 26 Cox, C.C. 393; 14 Cr. App. Rep. 19, C.C.A.; 15 Digest (Repl.) 1156, *11,660*.

I

Case Stated by the Special Purposes Commissioners of Income Tax.

At a meeting of the commissioners held on June 13, 1922, for the purpose of hearing appeals, Albert Eadie (hereinafter called the appellant) appealed against additional assessments to supertax in the sum of £3,500 for the years ending April 5, 1919, and April 5, 1921, made upon him under the provisions of the Income Tax Acts.

By an indenture dated Dec. 9, 1912, and made between the appellant (in the said indenture called "the husband") of the one part, and Emmie Elizabeth Eadie the wife of the appellant (in the said indenture called "the wife") of the other part, after reciting that differences had arisen between the appellant and his said wife it was agreed as follows:

"1. The husband will during the joint lives of himself and wife as from the date hereof, and so long as they continue to reside at Rigby Hall and so long as the wife performs and observes the covenants on her part hereinafter contained to pay to the wife the weekly sum of £30 for her sole and separate use, and so far as the same shall extend for the purposes hereinafter expressed, and so that she shall not have power to dispose thereof in the way of anticipation, but so nevertheless that the said weekly sum of £30 shall cease to be payable if the marriage between the said husband and wife shall at any time hereafter be dissolved, or they shall be judicially separated by a court of competent jurisdiction.

2. The husband will, so far as he considers necessary for the use of himself and his friends, keep up the wine cellar at his expense. The husband shall have the sole use of his chauffeur and valet as his own private servants, and shall pay their wages. The husband shall also be at liberty to reside at and have the joint use of Rigby Hall, the garage and appointments and amenities of the estate free of expense; he will occupy the separate bedroom at present occupied by him; he shall also be at liberty at any time to have any of his relations and friends and their servants to stay at Rigby Hall free of expense. And this indenture further witnesseth that in further pursuance of the said agreement and in consideration of the premises, the wife hereby covenants with the husband as follows:

3. The wife will at all times hereafter, so long as the husband shall pay the weekly sum pay all rates taxes charges and assessments payable in respect of Rigby Hall including the fire insurance of the buildings and the furniture and effects and will pay the cost of keeping the premises in the same state of repair and condition as the same are now in and properly painted and decorated and will keep and maintain the contents of the said house substantially as at present and will not remove or interfere with any of the husband's property and effects and will also keep a proper staff of indoor servants suitable to the requirements of the premises and will also maintain and pay their wages and maintain and pay the wages of her chauffeur. The husband will give the wife the B.S.A. motor car but the same shall be maintained and run and petrol oil and tyres and all accessories and repairs for the same supplied by and at the sole expense of the wife.

4. The wife will pay the gardeners' wages (the same number of gardeners being kept as at present) and keep up the 'outside' thereof viz. the electric light plant and the production of the electric current the grounds gardens and greenhouses in as good condition in all respects as the same are now in and the produce of such gardens and greenhouses shall so far as possible be used in the house and the wife shall also receive the rents and profits of the land held with Rigby and now let off.

5. The husband will pay to the wife for the wages of the said gardeners as paid and the expense of the upkeep of the said gardens and electric light actually incurred an annual sum not exceeding £375 per annum upon accounts to be submitted to the husband and if any question shall arise on such accounts the same shall be decided by Mr. Hill accountant of Birmingham.

6. The wife shall indemnify and keep indemnified the husband from and against all debts and liabilities now or hereafter to be contracted or incurred by the wife whether in respect of the aforesaid payments to be made by her in respect of Rigby Hall and the appurtenances or in respect of her wearing apparel maintenance support personal expenditure or otherwise and from and

against all claims and demands for or on account of the same and will not pledge the husband's credit in respect of any of the matters aforesaid or on any other account whatever and if the wife shall make default in observing the aforesaid covenant all monies paid by the husband in respect of any such debt or liability may be retained by him out of the said sums payable to the wife as aforesaid notwithstanding the restraint in anticipation.

7. The wife or any person on her behalf shall not nor will at any time hereafter take any steps to compel the husband to cohabit with her or to allow her any support maintenance or alimony except the said weekly sum of £30 and shall not nor will molest or interfere with the husband or his visitors and guests or valet in any manner.

8. The wife shall pay all house books household expenses and wages and tradesmen's bills at the end of every month and doth hereby covenant that the said weekly sum of £30 shall be used for the upkeep of Rigby Hall and with her own money for her maintenance personal expenses wearing apparel and support and for no other purpose whatever.

9. This agreement may be determined by either party by six months' notice in writing."

Rigby Hall was at the date of this agreement the property of the appellant's wife, for whom it had been purchased by the appellant.

The said indenture of Dec. 9, 1912, was an arrangement made in view of previous disagreements which had led to the appellant and his wife ceasing to live maritally with one another, although both resided in the same house. The appellant did not then or subsequently live maritally with his wife, and in the month of February, 1913, after the marriage of his daughter, the appellant ceased to reside at or to visit Rigby Hall, and since that date the appellant and his wife had lived continuously apart and had had no direct communication. Since February, 1913, the appellant had resided in London. In June, 1921, the appellant gave notice in writing to his wife terminating the indenture of Dec. 9, 1912, which notice expired on Dec. 9, 1921. From Dec. 9, 1912, until Dec. 9, 1921, the weekly sum of £30 (amounting to £1,560 per annum) was paid by the appellant to his wife in accordance with cl. 1 of the said indenture of Dec. 9, 1912.

On or about Oct. 20, 1921, the appellant's wife commenced proceedings against the appellant by filing a petition in the divorce registry of the Probate, Divorce and Admiralty Division of the High Court of Justice, praying for a judicial separation. By an indenture made on Feb. 17, 1922, between the appellant (in the said indenture called "the husband") of the one part, and his said wife (in the said indenture called "the wife") of the other part, after reciting the facts before set out, and that the husband and wife had agreed to continue to live separate from each other, it was agreed (inter alia) as follows:

"1. Subject to cl. 3 hereof the wife may at all times hereafter during the life of the husband live separate from him and free from his control and authority as if she were unmarried and reside at such place as she may from time to time think fit without any interference whatever on the part of the husband.

2. The husband shall continue to live separate from the wife and will not take any proceedings against the wife for restitution of conjugal rights or judicial separation or any other proceedings in the Probate Divorce and Admiralty Division of the High Court of Justice or molest or annoy or interfere with the wife or any person or persons with whom she may be residing or who may be residing with her in any manner whatsoever or howsoever.

3. So long as the husband shall pay to the wife the weekly sum hereinafter mentioned by the instalments and in manner hereinafter mentioned the wife will continue to live separate from her husband and will not take proceedings against the husband for restitution of conjugal rights or judicial separation or any other proceedings in the said Probate Divorce and Admiralty Division or

molest or annoy or interfere with the husband or any person or persons with whom he may be residing or who may be residing with him in any manner whatsoever or howsoever.

6. The said petition presented to the Probate Divorce and Admiralty Division of the High Court of Justice and the allegations made by the wife against the husband therein shall be withdrawn and the husband shall pay to the wife the sum of £50 towards the costs incurred by the wife in relation thereto and save as aforesaid each party shall pay his or her own costs incurred in relation thereto and no new or other proceedings shall be taken by either party in the said court on account of any alleged misconduct of the other party before the date of these presents."

By r. 16 of the General Rules applicable to Sched. A, B, C, D, and E of the Income Tax Act, 1918, it is enacted (inter alia) that:

"A married woman acting as a sole trader or being entitled to any property or profits to her separate use shall be assessable and chargeable to tax as if she were sole and unmarried. Provided that (1) The profits of a married woman living with her husband shall be deemed the profits of the husband, and shall be assessed and charged in his name and not in her name or the name of her trustee. . . ."

In arriving at the original assessments to supertax made on the appellant for the years ending April 5, 1919, and April 5, 1921, no sums were included in respect of the income of the appellant's wife, and a sum of £1,560 (representing the amount paid by the appellant to his said wife under the indenture of Dec. 9, 1912) had been allowed as a deduction in each of the said years in arriving at the appellant's total income for supertax purposes. The additional assessments under appeal were made on the appellant in order to cover his liability in respect of the income of his said wife and the said sum of £1,560.

It was contended on behalf of the appellant that (a) at the date of the said indenture of Dec. 9, 1912, or at the latest by February, 1913, the appellant's wife was not a married woman living with her husband, nor did she thereafter live with him, and was and continued assessable to supertax as a feme sole in respect of her property or profits. (b) The said weekly sum of £30 (amounting to £1,560 per annum) payable under cl. 1 of the indenture of Dec. 9, 1912, formed part of the income of the appellant's wife, and that she was assessable and chargeable to tax in respect thereof as if she were a feme sole.

It was contended on behalf of the respondents that (a) The appellant's wife was a married woman living with her husband and her profits (if any) were assessable in accordance with proviso (1) of r. 16 of the General Rules applicable to Scheds. A, B, C, D, and E of the Income Tax Act, 1918. (b) The said weekly sums of £30 were payable under cl. 1 of the indenture of Dec. 9, 1912, so long as the appellant and his wife continued to reside at Rigby Hall, and that they became voluntary payments after the appellant ceased so to reside, and as such formed part of the total income of the appellant, and were not deductible by him in arriving at his liability to supertax for the years in question. (c) The said weekly payments were not the income of the appellant's wife, and the appellant was assessable to supertax in respect of the said sums.

The commissioners held that the relations existing between Mr. and Mrs. Eadie during the years material to these appeals were governed by the terms of the deed of arrangement dated Dec. 9, 1912. This deed remained in force until terminated by the appellant under cl. 9 by notice in writing expiring on Dec. 9, 1921. Mr. and Mrs. Eadie had not in fact lived together since 1913, but had he so desired, the appellant could at any time have taken up his residence at Rigby Hall, where his wife resided. Separation had taken place under the deed of Feb. 17, 1922. In the commissioners' opinion, down to Feb. 17, 1922, the appellant's wife was "a married woman living with her husband" within the meaning of r. 16, proviso (1), of the General Rules applicable to Scheds. A, B, C, D, and E, even though the

parties had not in fact lived together since February, 1913. They held, therefore, that Mrs. Eadie's income must be deemed to be the income of the appellant, and that the appellant was not entitled to deduct from his statements of total income the £1,560 paid by him yearly under the deed of Dec. 9, 1912.

The questions left by the commissioners for the opinion of the court were (i) whether on the facts the appellant's wife was during the years ended April 5, 1919, and April 5, 1921, a married woman living with her husband, and (ii) whether the said sum of £1,560 formed part of the income of the wife of the appellant.

R. Burrows for the appellant.
The Solicitor-General (*Sir Henry Slesser, K.C.*) and *R. P. Hills* for the Crown.

ROWLATT, J.—This appeal must be allowed. The first question is whether the wife was living with her husband within the meaning of r. 16 of the General Rules applicable to all schedules of the Income Tax Act, which under those circumstances makes him assessable for her income, although the leading scheme of the section, by the commencing words, is that a married woman shall be separately assessed. This is a proviso, therefore, which must be construed with reference to the point it is meant to deal with. It is meant to define circumstances under which a husband can be charged to income tax for the income of his wife, as being earned by her while she is living with him.

In this case a very peculiar deed was entered into between the parties by which they were to have the right to occupy a house together, living not as husband and wife, but having a joint establishment arranged for them by the deed in a very minute manner. The husband was to pay £30 a week to the wife. She had her own property, too. She was to pay wages. They lived there for some time. I should say that they were not by the deed made separate. In February, 1913, the husband went away. He took a residence for himself in London. That has been his residence ever since. He did not go to Rigby Hall, the place mentioned in the deed, but he went on paying £30 a week. That had gone on for five years, when we reach the period to which this inquiry relates. It was perfectly clear that the wife was not living with her husband. She had her residence; he had his residence. His home was not her home, and her home was not his home. They had two separate homes, two separate addresses, two separate residences, and therefore I say they were not living together.

The commissioners, I think, have been led astray by *R.* v. *Creamer* (1) in which it was held incidentally that a woman had not ceased to live with her husband merely by reason of the fact that he had gone to France during the war and had left her living at home. They had not become separated. A man may leave his wife to go on duty, or he may leave her for business purposes. Before communication was so efficient, husbands had to leave their wives for long periods, if they were employed in distant countries. A husband may leave his wife for a time even for pleasure, if he wants to do something which she does not want to do; or she may leave him; but they are not separated from each other. They have still their common home or common homes, for they may have more than one house. They still act from the same base, if I may use that expression. They have their common home all the time, and the physical separation, therefore, is nothing. But when they come to leave each other because they can no longer tolerate living under the same roof, even under the circumstances provided for by this deed, and one lives in Worcestershire and the other in London, and they have two separate addresses and remain like that for five years, I think it is playing with words to say that the wife is still living with her husband. It seems to me, therefore, that this question must be answered in favour of the appellant.

The further question is whether the appellant can deduct from his income the £30 a week, which he pays to the wife. Although he is separated he cannot deduct it if he is under no obligation to pay it, but merely sends it voluntarily week by week. That is merely the way in which he chooses to spend his money. It is not an expense which goes against his income. I have to decide whether that is the

A nature of the payment, or whether he is still obliged to send it. For that I must look at the legal position between the parties. The deed is somewhat curiously drawn in this respect, that it begins by saying:

> "The husband will during the joint lives of himself and his wife as from the date hereof, and so long as they continue to reside at Rigby Hall . . . pay to the wife the weekly sum of £30."

B Then, with regard to the husband living there, it says:

> "The husband shall also be at liberty to reside at, and have the joint use of, Rigby Hall."

When he went away, did that mean that he determined the agreement because they no longer resided together at Rigby Hall? I do not think so. I do not think C the phrase "so long as they continue to reside at Rigby Hall" is a limit of that kind. If the continuing to reside had been meant as an absolute limit of time, there would not have been the expression "joint lives," and, because when they ceased to reside their joint lives would be over and "joint lives" would be unnecessary. I think it means "joint lives" so long as they continue to reside at Rigby Hall—that is to say, this arrangement is to govern their lives at Rigby D Hall, and not at any other place. It is confined in its own operation to their residence at this particular place and no other. I do not think that one party by going away would put an end to the obligations which lay on him or her to perform the other parts of the agreement. It is to be observed that the appellant was only to be at liberty to reside at and to have the joint use of Rigby Hall. He went away, but went on paying the £30. If he had not paid, I do not think he could E have defended an action if one had been brought against him. He could not be heard to say that he had effectively determined the agreement by leaving Rigby Hall at a moment's notice, when the agreement itself provides for six months' notice for its determination. He went on paying the money because he was legally compelled to do so, and was under an obligation to do so. Therefore he is entitled to deduct it, and he is entitled to succeed in this appeal.

F *Appeal allowed.*

Solicitors: *Francis & Crookenden*; *Solicitor of Inland Revenue.*

[*Reported by* J. S. SCRIMGEOUR, ESQ., *Barrister-at-Law.*]

BRADFORD *v.* GAMMON AND OTHERS

[CHANCERY DIVISION (Eve, J.), November 14, 19, 1924]

[Reported [1925] Ch. 132; 94 L.J.Ch. 193; 132 L.T. 342; 69 Sol. Jo. 160]

Partnership—Partnership agreement—Purchase of deceased partner's share by continuing partners—Indemnity of personal representative—Bank overdraft guaranteed by each partner—No demand by bank for payment.

A partnership agreement made between five persons provided for the purchase of an estate in equal shares for the purpose of re-sale, and, in the event of the death of one of the partners before the estate had been completely sold and realised, for the share or interest of that partner to be purchased by the others in equal shares. The legal personal representatives of the deceased partner were to have no voice in the realisation or management of the estate, and were to be indemnified against all future claims and liabilities in respect of the estate. One of the partners died before the realisation of the estate, and at the time of his death the partnership had a bank overdraft of £17,000 odd secured by a deposit of the title deeds of the estate and guaranteed by each partner. On being notified of the death of the partner the bank closed the account and gave notice to the plaintiff, the personal representative of the deceased partner, that that sum was owing, but made no demand for payment. The plaintiff brought an action against the continuing partners claiming specific performance of the partnership agreement and release from all liabilities of the partnership.

Held: so long as the plaintiff was kept indemnified he could not insist on the continuing partners discharging a debt for payment of which no demand had been made, and, therefore, the plaintiff's action failed.

Ascherson v. *Tredegar Dry Dock and Wharf Co., Ltd.* (1), [1909] 2 Ch. 401, distinguished.

Notes. Cases referred to:

(1) *Ascherson* v. *Tredegar Dry Dock and Wharf Co., Ltd.*, [1909] 2 Ch. 401; 78 L.J.Ch. 697; 101 L.T. 519; 16 Mans. 318; 26 Digest 127, *902*.

(2) *Morrison* v. *Barking Chemicals Co., Ltd.*, [1919] 2 Ch. 325; 88 L.J.Ch. 314; 122 L.T. 423; 35 T.L.R. 196; 63 Sol. Jo. 302; 26 Digest 128, *916*.

Action.

The following facts are taken from the judgment: "The plaintiff as legal personal representative of the late Mr. Bradford, who died in October, 1921, claims as against the defendants, who were the deceased's co-partners at the date of his death, certain declarations his right to which is not disputed, and in addition an order on the defendants to procure the release of the plaintiff and his testator's estate from the liabilities of the partnership subsisting at the testator's death. The partnership was constituted by a written instrument dated Feb. 19, 1920, and the joint adventure into which these five persons entered was the purchase in equal shares, the development and the ultimate re-sale of a landed estate. Clause 9 of the partnership deed provided that on the death of any of the partners before the estate should have been completely sold and realised, the share or interest of the one so dying should be purchased by the others in equal shares, and thereafter the legal personal representatives of the deceased partner were to have no voice in the realisation or management of the estate. The price to be paid by the continuing partners was in case of difference to be determined by arbitration, and on payment of the price the legal personal representatives of the deceased partner were to sign and execute such receipts and assurances as should be reasonably required and were to be indemnified by the surviving partners from all future claims, liabilities, and demands in respect of the said estate and premises. The continuing partners are willing to enter into a covenant to pay the partnership debts and to

A indemnify the plaintiff and the testator's estate against the debts and liabilities and when they have done that they contend that they will have done all that can be reasonably required of them. The plaintiff, on the other hand, claims that he is entitled to the order I have already mentioned. At the testator's death the partnership had an overdraft at the bank amounting to £17,000 and upwards, secured by deposit of the title deeds of the estate and guaranteed by each partner. B On being notified of his death, the bank closed the account with a debit of £17,126 16s. 2d. and gave notice to the plaintiff that this was the sum owing, but made no demand for payment. So far as appears on the evidence, the other liabilities of the partnership were not of any substantial amount, but the liability to the bank necessarily ties up the administration of the testator's estate the net amount of which does not largely exceed the claim of the bank. In these circum- C stances the plaintiff finds himself in a difficulty, and is naturally desirous of obtaining a release from the bank, and if such release can only be obtained by payment of the whole amount, he claims that the defendants are bound to pay the whole amount notwithstanding that the bank has made no demand for payment."

Vaisey for the plaintiff.

D *G. D. Johnston* for the defendants.

EVE, J., stated the facts and continued: The question between the parties does not arise in this case on any implied obligation imposed on the surviving partners as purchasers, but on the construction of the partnership articles. Does their covenant to indemnify involve this, that if the plaintiff as legal personal represen- E tative calls on them so to do they are bound to discharge all the partnership debts subsisting at the date of the dissolution brought about by the testator's death, although no creditor is demanding immediate payment? No authority has been cited which goes to that length, and it is obvious that if such be the obligation on continuing partners who enter into the ordinary covenant indemnifying an outgoing, or the estate of a deceased, partner it is one that might very seriously cripple, F and, indeed, in many cases effectually suspend, the carrying on of the business. In this particular case the partnership indebtedness is substantially represented by the debt to one creditor, but that, of course, cannot affect the rights of the parties, and if the plaintiff is right he could obtain the same order he is now asking for if this £17,000 represented the aggregate of partnership debts due to any number of creditors. Counsel for the plaintiff has relied mainly on *Ascherson* v. *Tredegar* G *Dry Dock and Wharf Co., Ltd.* (1), but in one important respect the position there differed essentially from what it is here. The plaintiff there was the executor of a surety and the defendant was the principal debtor; the creditors were bankers and as here as soon as they learned of the death of the surety they closed the account, and informed the surety's executor of the amount owing, and as the learned judge found, made a demand on him for payment. In these circumstances H it was held that the surety's executor was entitled to an order upon the principal debtor to pay the debt. But here the creditors have made no demand for payment and the position existing is that referred to by SARGANT, J., in the concluding paragraph of his judgment in *Morrison* v. *Barking Chemicals Co., Ltd.* (2), where he says:

I "I have not to deal with the case which was much debated before me of what would happen if the bank took the initiative in closing the current account and then abstained from making a demand on the surety."

He adds: "The case is not a probable one," but it happens to be this very case, and I have now to decide whether, in the absence of any demand for payment by the creditor, the circumstances are brought within the principle of the two cases I have referred to. I do not think they are. It may be, of course, that the plaintiff could pay off the bank and then sue the defendants, and by these means get rid of the liability, but that is a possibility which does not touch the problem with which I have to deal in this action, which can be stated thus: Does the ordinary

covenant to pay partnership debts and to indemnify an outgoing partner and the estate of a deceased partner against debts and liabilities entitle the retiring partner or the legal personal representative of the deceased partner to insist upon the immediate payment of debts for which no demand for payment has been made? I do not think it does. So long as the covenantee is kept indemnified he cannot, in my opinion, insist upon the covenantor discharging debts for which no demand has been made; the obligation to make good the indemnity by payment and the right to enforce the covenant arises when the demand is made and not before. I think the plaintiff's claim fails, and I must dismiss the action.

Solicitors: *Speechly, Mumford & Craig*, for *Lamport, Bassitt & Hiscock*, Southampton; *Hurford & Taylor.*

[*Reported by* A. W. Chaster, Esq., *Barrister-at-Law.*]

Re BALEN AND SHEPHERD'S CONTRACT

[Chancery Division (Tomlin, J.), June 27, 1924]

[Reported [1924] 2 Ch. 365; 94 L.J.Ch. 97; 132 L.T. 606; 40 T.L.R. 766; 68 Sol. Jo. 791]

Sale of Land—Contract—Rescission—Recital in abstract that grantee entitled in equity—Interest of heir-at-law on face of abstract—Power of administratrix to give away interest—Offer by vendor to establish correctness of recital.

The abstract of title delivered by the vendor on a contract for the sale of freehold property included a conveyance on sale to C.H.W. and a subsequent conveyance by his administratrix to G.A.W. which recited his death, the appointment of the administratrix, and the fact that G.A.W. had become entitled to the property in equity. The purchaser sought to rescind the contract on the ground that the title was defective in that G.A.W. was not the heiress-at-law of C.H.W. and the abstract did not show how she had become entitled to the property in equity, and claimed that he was entitled to the return of the deposit paid by him.

Held: the principle entitling a vendor to rely on a recital that a grantee to whom the property had been conveyed was entitled in equity could only be applied where the whole legal and beneficial interest was on the face of the abstract in the person who conveyed to the grantee recited to be entitled in equity; in the present case on the face of the abstract the heir-at-law was interested, and there was no power enabling the administratrix by admission to give away the interest of the heir; but the title was not necessarily defective and the vendor had offered to establish the correctness of the recital, and so the purchaser was bound to give her an opportunity to do so; therefore, the purchaser was not entitled to have the contract rescinded.

Notes. As to abstract of title, see 29 Halsbury's Laws (2nd Edn.) 307 et seq.; and for cases see 40 Digest (Repl.) 172 et seq.

Cases referred to:

(1) *Re Chafer and Randall's Contract*, [1916] 2 Ch. 8; 85 L.J.Ch. 435; 114 L.T. 1076; 60 Sol. Jo. 444, C.A.; 40 Digest (Repl.) 174, *1370.*

(2) *Re Soden and Alexander's Contract*, [1918] 2 Ch. 258; 87 L.J.Ch. 529; 119 L.T. 516; 40 Digest (Repl.) 174, *1371.*

(3) *Re Harman and Uxbridge and Rickmansworth Rail. Co.* (1883), 24 Ch.D. 720; 52 L.J.Ch. 808; 49 L.T. 130; 31 W.R. 857; 40 Digest (Repl.) 173, *1369.*

A Also referred to in argument:

Warren v. *Murray*, [1894] 2 Q.B. 648; 64 L.J.Q.B. 42; 71 L.T. 458; 43 W.R. 3; 10 T.L.R. 573; 9 R. 793, C.A.; 32 Digest 453, *1194*.

Re Nisbet and Potts' Contract, [1906] 1 Ch. 386; 75 L.J.Ch. 238; 22 T.L.R. 233; 50 Sol. Jo. 191; sub nom. *Re Nesbitt and Potts' Contract*, 94 L.T. 297; 54 W.R. 286, C.A.; 19 Digest 20, *58*.

B *Re Hailes and Hutchinson's Contract*, [1920] 1 Ch. 233; 89 L.J.Ch. 130; 122 L.T. 459; 36 T.L.R. 130; 64 Sol. Jo. 209; 40 Digest (Repl.) 170, *1332*.

Vendor and Purchaser Summons.

By a letter, dated Nov. 7, 1923, and addressed by William Shepherd (hereinafter referred to as the purchaser) to Messrs. Street and Cresser, auctioneers and C surveyors, as agents for Alis Balen (hereafter referred to as the vendor), the purchaser agreed to purchase from the vendor the freehold property known as Highfield, No. 166, Hamlet Court Road, Westcliff-on-Sea, for the sum of £6,450 and paid a deposit of £600. The letter proceeded:

"I agree to accept the vendor's title, provided such title is not defective and D to complete the purchase on or before the seventh day of January, 1924. If through my default the purchase is not so completed, I agree to pay interest at the rate of 6 per cent. annum upon the unpaid balance until completion. The property is sold subject to the restrictions and stipulations common to the estate of which same forms part. It is understood that vacant possession will be given to me within three months and that the property is sold subject to a E covenant restricting the sale of costumes and furs on any portion of the property, this restrictive covenant to run the land."

This agreement was confirmed on behalf of the vendor by a letter of the same date from Messrs. Street and Cresser and a letter dated Dec. 12, 1923, signed by the vendor. The abstract was delivered on Dec. 19, 1923. It commenced with a conveyance on sale dated Aug. 10, 1896, and disclosed a conveyance on sale on F Mar. 25, 1901, to one Charles Henry Wade, who subsequently mortgaged the property by a first mortgage dated Aug. 15, 1901, and by a second mortgage dated Oct. 7, 1902. The document abstracted next after the second mortgage was a conveyance made between the second mortgagee, of the first part, Eva Wade, of the second part, and Georgetta Annie Wade, of the third part. This conveyance recited, inter alia, the death of C. H. Wade on Oct. 10, 1903, intestate, and the G grant on Oct. 28, 1902, of letters of administration of his estate to Eva Wade, and seisin of C. H. Wade at his death in fee simple free from encumbrances except the first and second mortgages, and satisfaction since his death of the second mortgage. The same conveyance contained a recital that G. A. Wade had become entitled in equity, subject to the first mortgage, to the property, and was desirous of having the same conveyed to her as thereinafter expressed, and by the operative part of the H conveyance the property was conveyed by the second mortgagee and the administratrix to G. A. Wade in fee simple freed from the second mortgage. The abstract then traced the title into the present vendor from G. A. Wade (subsequently referred to as G. A. Spencer) who paid off the first mortgage, obtained a reconveyance by deed dated June 15, 1911, and sold the property.

On Jan. 3, 1924, requisitions were delivered. Nos. 24 and 25 were as follows:

I "No. 24. Who is Georgette Annie Spencer? How did she become entitled in equity to the property conveyed by the indenture dated June 15, 1911. No. 25. Was there any issue to the marriage of Charles Henry Wade and Eva Wade. Their marriage and any issue born therefrom must be proved by a statutory declaration by some competent person with the appropriate certificates of marriage and birth annexed."

Answers were delivered on Jan. 8, 1924, and the answers to requisitions Nos. 24 and 25 were as follows:

"No. 24. G. A. Spencer was formerly G. A. Wade and understood to be a daughter of C. H. Wade. It is recited as a fact in the deed of May 13, 1908, that G. A. Wade had become entitled in equity and the vendor accepted that statement finally. If detailed information is required it can be obtained but at the sole expense of the purchaser. The testator died seised of the property more than twenty years ago and the vendor and her predecessors in title (including G. A. Wade) have been in free and uninterrupted possession since the death. Further G. A. Wade paid off the first mortgage of £800 (dated Aug. 15, 1901) on June 15, 1911. See statutory declaration and see contract."

The answer to No. 25 was:

"This does not arise. See answer to No. 24 and see contract."

Observations on replies were delivered on Jan. 16, 1924, and observation No. 4 was as follows:

"Nos 24 and 25 are repeated. The title shown by the abstract is defective in that there is no evidence that G. A. Wade was entitled in equity as recited in the deed of May 13, 1908, or that there were no other children of C. H. Wade surviving him. The recitals in the deed of May 13, 1908, are not sufficient evidence of the facts therein stated, the deed being less than twenty years old."

The observations were answered on Jan. 26, 1924, and the answer to observation No. 4, so far as material, was in the following terms:

"Nos. 24 and 25. It was for the administratrix of C. H. Wade to consider the equities affecting the property and to convey it accordingly. Her recital that G. A. Wade had become entitled in equity was sufficient foundation for the conveyance to G. A. Wade and was obviously inserted for the purpose of keeping the details of her interest off the title and the validity of this as a conveyancing device has been accepted and acted on in three subsequent conveyances for value. It is submitted that under these circumstances the title is not 'defective.' The alternative is to inquire (if practicable) into the affairs of the Wade family. This would cause delay and would probably involve both the present parties in expense. At this distance of time it seems (apart from the conveyancing device referred to above) quite unnecessary."

On Jan. 28, 1924, the purchaser's solicitor wrote to the vendor's solicitor the following letter:

"I thank you for your letter of the 25th inst., returning my observations with your replies thereto, but regret I cannot accept the same as satisfactory. I have caused inquiries to be made in respect of the title of the late C. H. Wade to the property, and understand that G. A. Wade was not his heiress-at-law, there being two daughters, and if this is so, the title is clearly defective. I am also informed that the vendor contracted to sell the property last year but could not complete owing to the state of the title. According to the abstract delivered, the vendor has not shown a good title, and therefore my client does not propose proceeding with the purchase, and I must ask you therefore to give instructions for his deposit to be returned to me. In view of the fact that your client knew at the time the contract was entered into that her title was defective, it appears to me that my client has a good claim for damages in respect of the expense he has been put to in the matter."

On Jan. 29 the purchaser's solicitor answered that letter by a letter in these terms:

"I am in receipt of your letter of yesterday's date and have submitted the papers to counsel to advise. It is merely a question of expense in obtaining information leading up to the recital that G. A. Wade had become entitled in equity to the property subject to mortgage of Aug. 15, 1901. Your client is not entitled to cancel the contract unless he can prove that the title is defective and obviously he cannot do this until he has sufficient and proper information which would entitle him to say this. My client is advised that the

A title is not defective, and the statements in the second and last paragraph of your letter are serious ones to repeat. Your information that the vendor contracted to sell the property last year but could not complete owing to the state of the title is not correct; the contract to which you refer was cancelled by mutual consent for reasons unconnected with the title. My client insists on the contract being carried out and I will write you again after taking the B opinion of counsel on the title."

After some formal letters the following letter on Feb. 12, 1924, was written by the purchaser's solicitor to the vendor's solicitor:

"I have seen my client again on this matter, and in view of the nature of the title he is not prepared to go on further with the matter, and I shall be C glad, therefore, if you will give instructions for the deposit paid to the estate agents to be repaid to my client."

On Feb. 13, the solicitor replied:

"I am in receipt of your letter of yesterday's date and do not agree that there is anything in the nature of the title which justifies your client in stating that he is not prepared to go on further with the matter. I have made inquiries D of Messrs. Crossman, Block & Co., of 16, Theobalds Road, W.C., the solicitors who prepared the deed in question. They are acquainted with all the circumstances and assure me that everything is in perfect order. They are preparing a report which I expect to receive by any post. This information would have been supplied earlier but for a bundle of papers having been mislaid in their office. It would have been obtained when my client made her purchase of the E property but for the matter having to be completed urgently. I expect to be able to write you fully this week."

On Feb. 15 he wrote again:

"I have now received a letter from Messrs. Crossman, Block & Co. stating the circumstances which led up to the recital in the conveyance of May 13, 1908, that Georgetta Annie Wade (afterwards Mrs. Spencer) was entitled in F equity to the property, subject to the first mortgage. I enclose herewith a copy of the letter. You will see that it furnishes a complete explanation of how Mrs. Spencer became entitled, and also shows that it would have been somewhat difficult to deal with the title in the conveyance except by the method adopted, namely, a recital that Mrs. Spencer was entitled in equity. G Messrs. Crossman, Block & Co.'s letter shows also that my client's title is not and never has been defective, though the strict verification of the facts stated by them might involve some expense. Perhaps you will not think it worth while for your client to incur this; but, if you wish me to do so I shall be pleased to obtain from Messrs. Crossman, Block & Co. any necessary evidence by statutory declaration or otherwise, of course at your client's expense. It would seem, however, that, practically Messrs. Crossman, Block & Co.'s H explanations, supported by possession by Mrs. Spencer and her successors in title since 1908, is sufficient, and I shall be obliged if you will now let me have draft conveyance. Of course your client's claim not to proceed with the purchase cannot be admitted."

The copy of the letter from Messrs. Crossman, Block & Co., which is dated Feb. 12, I is to this effect. After an apology for the delay by reason of the loss of papers they say as follows:

"The facts, however, appear to have been these: Dr. C. H. Wade, as we have previously informed you, was twice married. His first wife, Mrs. Mary Wade, was the daughter of Mr. George Katz Douglas, and Dr. Wade with Mr. Cartmell Harrison were the trustees of this gentleman's will, Dr. Wade being the surviving trustee. The will gave the testator's residue to his daughter Mrs. Mary Wade for life with remainder to her children. Mrs. Mary Wade died in May, 1899, having had two children only, namely, Minnie Douglas

Wade and Georgetta Annie Wade. Dr. Wade died Oct. 28, 1903, intestate and insolvent and it appeared he had invested the trust funds under his father-in-law's will in the purchase of a medical practice and of the house 'Highfield,' now 106, Hamlet Court Road, which he had mortgaged first to Mr. and Mrs. Fisher for £800, secondly to Mrs. Fisher for £300. Mrs. Eva Wade, Dr. Wade's second wife, took out a grant of administration and out of moneys got in by her in respect of debts owing to her husband discharged the second mortgage of £300. In May, 1905, Minnie Douglas Wade died leaving a will by which she left her residue equally between her sister Georgetta Annie and her cousin Miss Eleanor Hall. This property included her half share of 'Highfield' (as representing part of her grandfather's residuary estate) subject to the mortgage, and an arrangement was come to between Miss Hall and Miss Georgetta Annie Wade that Miss Wade should take Miss Hall's share of 'Highfield' as part of her share of her sister's estate. Miss G. A. Wade thus became entitled in equity to 'Highfield' subject to the mortgage for £800 and accordingly as the property stood in the name of Dr. C. H. Wade it was thought that the simplest way of regularising the matter was to take a conveyance from Mrs. Fisher, the second mortgagee, by direction of Mrs. Eva Wade as her husband's administratrix to Miss G. A. Wade subject to the first mortgage. This was accordingly done by the deed of May 13, 1908. The completed draft of this deed is in our office, and we have also the grant of administration to C. H. Wade, and office copy of the will of George Katz Douglas, the grandfather, and a deed of appointment of new trustees under his will in 1905 which partly recites the above facts. It will be seen, therefore, that Dr. C. H. Wade had really no beneficial interest in 'Highfield,' that it was purchased out of moneys forming part of the trust estate of G. K. Douglas and thus under the provisions of his will and the arrangements between Miss C. A. Wade and her sister's representatives passed entirely to Miss G. A. Wade. We hope this explanation may enable you to overcome the difficulty you are experiencing and while we cannot assume any responsibility or liability in the matter we should have no objection to producing the above-mentioned documents in our possession if this would assist matters."

On Feb. 15, 1924, the purchaser's solicitor, who appeared not to have then received the letter of the vendor's solicitor containing this enclosure, wrote as follows:

"My client is advised that the title as deduced is defective, and he has accordingly decided not to go on with the matter. I must ask you therefore to give instructions for the deposit to be repaid to my client."

On Feb. 16 the vendor's solicitor wrote:

"I am in receipt of your letter of the 15th inst. which has crossed mine of the same date. Counsel has advised that the title is not defective and on behalf of my client I strongly object to the expression used in your letter. You are not at liberty to say that the title is defective without having before you sufficient information which would entitle you to say this and obviously you had not this when your previous letter was written. My client insists upon the contract being carried out and I am instructed to enforce it."

That is acknowledged and on Feb. 21 the purchaser's solicitor writes again:

"Referring to your letter of the 16th inst., I have now heard from my client thereon, and he is not prepared to alter the decision he has already come to not to proceed further with the matter. I must ask you therefore to give instructions to the estate agents to return to my client the amount of the deposit forthwith."

That is answered on the 23rd:

"Your client is seeking to avoid his contract by suggesting that the title is defective, indeed he attempted to do this even before information on the subject of the recital in the abstracted deed of May 13 was before you. The

purchaser by his contract has agreed to accept the vendor's title providing such title is not defective. My client is advised by counsel that it is not and never has been defective and I do not suppose that you seriously mean to contend that it is; at any rate you have not shown any grounds and my client is able to adduce evidence to support her title. Mrs. Balen considers that the purchaser is endeavouring to find a means of getting out of his contract if possible. My client will not release him. Unless therefore I hear from you by Tuesday next that the purchaser intends to complete his purchase forthwith I shall be reluctantly compelled to take proceedings at once to enforce the contract in accordance with my final instructions and without further notice."

That is answered on the 26th:

"I am in receipt of your letter of the 23rd inst. It is not a question of my client endeavouring to get out of his contract. He has been advised that the title is defective, and is naturally not prepared to proceed with the purchase. The grounds of his objection are sufficiently raised in my requisitions. If your client thinks it wise to take proceedings to enforce specific performance of the contract, I shall be prepared to accept service of proceedings on my client's behalf."

On Mar. 7, 1924, the purchaser issued this summons asking that it might be declared (i) That the requisitions and objections of the purchaser in respect of the title to the property comprised in the contract of sale had not been sufficiently answered by the vendor, and that a good title to the property had not been shown; (ii) that the vendor might be ordered to return the deposit of £600 with interest at the rate of £4 per cent. per annum from Nov. 7, 1923, until repayment; and (iii) that the vendor might be ordered to pay the purchaser his costs of investigating title and of this application.

Galbraith, K.C., and *Boraston* for the purchaser.
Gavin Simonds and *J. Beaumont* for the vendor.

Cur. adv. vult.

June 27. **TOMLIN, J.**, read the following judgment.—This is a purchaser's summons under the Vendor and Purchaser Act, 1874, asking in effect for a declaration that a good title has not been shown to the property agreed to be purchased, and to have the deposit returned on the footing that the contract has been rescinded, and other consequential relief. [His Lordship stated the facts and continued:] It will be observed that on Jan. 28, 1924, the purchaser, after having been informed that the vendor was prepared to furnish the information to establish the equitable title of G. A. Wade, affected to rescind the contract, and on Feb. 15, 1924, after having been furnished with an outline of such equitable title, adhered to his decision to rescind. The purchaser's case is that on Jan. 28, 1924, the vendor's title was defective because G. A. Wade was not the heiress-at-law of C. H. Wade, and the abstract did not show how she had become entitled in equity, and that, in those circumstances, on that date he was entitled to rescind and did in fact properly and effectually rescind the contract. The vendor's answer is: First, that the purchaser was not entitled to go behind the recital in the conveyance of 1908 as to the equitable title of G. A. Wade; secondly, if the vendor is wrong on his first point, there was on the abstract no such defect of title as entitled the purchaser to rescind on Jan. 28, 1924, but only an omission in the abstract which the purchaser was willing, and offered, and would have been able if a reasonable opportunity had been given her, to supply; and, thirdly, that the vendor in any case can show a statutory title which the purchaser will be bound to accept.

As to the first point, I think the vendor is wrong. The principle entitling a vendor to rely upon a recital to the effect that a grantee to whom the property is conveyed is entitled in equity rests, I think, on this, that where a grantor is on the face of the abstract entitled legally and beneficially, he can admit and is bound by a recital of the equitable title of his grantee, and that a purchaser taking from

the grantee or his successors in title is not bound to inquire as to the instruments, acts in the law, and events which found the grantee's equitable title, and getting the legal estate will not be affected with notice of any adverse equitable claim if in fact the grantee's equitable title was defective. It is true that the use of this device for the purpose of keeping the equitable title off the abstract is not confined to the case of the devolution of a mortgage: see *Re Chafer and Randall's Contract* (1) and *Re Soden and Alexander's Contract* (2). But it can, in my opinion, only be utilised where the whole legal and beneficial interest is on the face of the abstract in the person who conveys to the grantee recited to be entitled in equity. In the present case on the face of the abstract the whole legal and beneficial interest subject to mortgages was in C. H. Wade at his death, but the abstract discloses the death of C. H. Wade intestate, and the question is whether his administratrix was (subject to the mortgages) the person legally and beneficially entitled in these circumstances. I do not think she was. On the face of the abstract the heir-at-law was interested, and there is no power, statutory or otherwise, of which I am aware, enabling the administrator by admission to give away the interest of the heir. The legal personal representative of a deceased mortgagee may well be in a position, with regard to the mortgage debt and the securities for the same, different from that occupied by the administrator in relation to land of which on the face of the abstract his intestate died, seised legally and beneficially in fee simple, and he may well be able by an admission as to the title of the debt of his testator or intestate to bind the property so far as it is a security for the debt: see *Re Harman and Uxbridge and Rickmansworth Rail. Co.* (3).

As to the second point, I do not think that the purchaser was, on Jan. 28, 1924, entitled, as has been on his behalf maintained before me, to rescind the contract. The title was not necessarily defective. The abstract and the proof adduced were no doubt insufficient, but the vendor had offered to establish the correctness of the recital in question, and I think the purchaser was bound to give her a proper opportunity of doing so. That opportunity has hitherto been refused to her. In these circumstances, in my opinion, the purchaser cannot claim to have the contract treated as rescinded and the deposit returned, but the vendor is entitled to be afforded a reasonable opportunity of proving a title. The summons fails, with the usual consequences.

Solicitors: *Vizard, Oldham, Crowder & Cash*, for *F. T. Fisher*, Southend-on-Sea; *M. A. Jacobs.*

[*Reported by* L. Morgan May, Esq., *Barrister-at-Law.*]

GORDON *v.* GOLDSTEIN

[KING'S BENCH DIVISION (Lord Darling, sitting as an additional judge, and Shearman, J.), July 10, 11, 1924]

[Reported [1924] 2 K.B. 779; 94 L.J.K.B. 21; 132 L.T. 155; [1924] B. & C.R. 245]

Bill of Sale—"True owner" of goods—Bill signed by two persons as "grantor"—Goods the property of one person only—Validity of bill—Bills of Sale Act (1878) *Amendment Act*, 1882 (45 & 46 *Vict.*, *c.* 43), *s.* 5.

By a document purporting to be a bill of sale, a husband and wife (in the bill together called "the grantor") assigned to the grantee chattels described in the schedule to the bill. The chattels belonged to the wife only.

Held: the "grantor" not being the true owner of the chattels, the bill of sale was void under the Bills of Sale Act (1878) Amendment Act, 1882, s. 5, except as against the grantor.

Notes. As to the statutory form of a bill of sale, see 3 HALSBURY'S LAWS (3rd Edn.) 289 et seq.; and for cases see 7 DIGEST 51 et seq. For the Bills of Sale Act (1878) Amendment Act, 1882, s. 5, see 2 HALSBURY'S STATUTES (2nd Edn.) 576.

Cases referred to:

(1) *Re Storey, Ex parte Popplewell* (1882), 21 Ch.D. 73; 52 L.J.Ch. 39; 47 L.T. 274; 31 W.R. 35, C.A.; 7 Digest 40, *207*.

(2) *Saunders* v. *White*, [1901] 1 K.B. 70; 70 L.J.K.B. 34; 83 L.T. 712; 49 W.R. 127; 17 T.L.R. 72; 8 Mans. 31; affirmed, [1902] 1 K.B. 472; 71 L.J.K.B. 318; 89 L.T. 173; 50 W.R. 325; 18 T.L.R. 280; 9 Mans. 113, C.A.; 7 Digest 54, *288*.

(3) *Brandon Hill, Ltd.* v. *Lane*, [1915] 1 K.B. 250; 84 L.J.K.B. 347; 112 L.T. 346; 59 Sol. Jo. 75, D.C.; 7 Digest 54, *289*.

Appeal from a master's order.

By a document made in October, 1923, purporting to be a bill of sale, between Jane Goldstein and her husband, Solomon Goldstein (therein together called "the grantor") of the one part, and Benjamin Cohen (therein called "the grantee"), of the other part, it was provided that, in consideration of £120 paid by the grantee to the grantor, the latter assigned to the grantee, his executors, administrators and assigns, the chattels and things specifically described in the schedule thereto and being at the address of Jane Goldstein and her husband, Solomon Goldstein, as security for the payment of the said sum and interest; and the document was signed, sealed and delivered by both the persons therein described as the grantor. Subsequently one Gordon recovered judgment in the High Court against Solomon Goldstein for a debt, and execution was levied on certain goods on the premises including the goods comprised in the document purporting to be a bill of sale. These goods were claimed by Solomon Goldstein's wife, Jane Goldstein, and also by Benjamin Cohen, the grantee of the purported bill of sale. Interpleader proceedings were ordered. The master before whom the interpleader summons was heard found, on the evidence, that, down to the time of making the purported bill of sale, all the goods in question belonged to Jane Goldstein, and he held that the bill of sale was not bad in law by reason of the joinder of Jane Goldstein's husband with her as grantor and he ordered the sheriff to withdraw from possession of the goods seized and claimed by the claimants, and that the execution creditor pay the costs of the interpleader.

The execution creditor appealed.

By s. 5 of the Bills of Sale Act (1878) Amendment Act, 1882:

". . . a bill of sale shall be void, except as against the grantor, in respect of any personal chattels specifically described in the schedule thereto of which the grantor was not the true owner at the time of the execution of the bill of sale."

Margolis for the appellant.
R. J. White for the claimants, the respondents.

LORD DARLING.—In this case, Mrs. Jane Goldstein and her husband, Solomon Goldstein, gave a bill of sale assigning certain goods, therein named, to the grantee. Mr. and Mrs. Goldstein were together described in the document as "the grantor," and they affected to be the true owners of the goods. The appellant subsequently recovered judgment against Solomon Goldstein, and the goods included in the bill of sale were seized by the sheriff in execution. Both the grantee and Mrs. Goldstein claimed the goods, and the sheriff then took out an interpleader summons. The master before whom the matter came found that Solomon Goldstein was not the owner of the goods, which were the property of Mrs. Jane Goldstein. He found further that the bill of sale contained a false statement as to the ownership of the goods by "the grantor." "The grantor"—Mr. and Mrs. Goldstein together—was not the true owner of the goods at the date of the bill of sale. The bill of sale, therefore, does not comply with s. 5 of the Bills of Sale Act (1878) Amendment Act, 1882. It is, therefore, void, and we cannot treat it as good on the ground that Solomon Goldstein was joined in order to prevent him from challenging the validity of the transaction. The bill of sale is not in the statutory form, because it is untrue to say that the two persons described jointly as "the grantor" were both owners of the goods. The bill of sale is void, and the grantee is not entitled to the goods as against the judgment creditor.

SHEARMAN, J.—I am of the same opinion, but will state my view shortly. Solomon Goldstein and his wife, Jane Goldstein, joined in giving the bill of sale in question. They are described jointly as "grantor." Subsequently, the plaintiff levied execution on a judgment which he had obtained against the husband. On the interpleader issue arising from the grantee's claim to the goods, the master has found that the whole of the goods belonged to the wife. On behalf of the appellant it is said that, under s. 5 of the Bills of Sale Act (1878) Amendment Act, 1882, the bill of sale is void as against him, on the ground that "the grantor" was not the true owner. None of the authorities cited appears to cover this case. Before the passing of the Act of 1882, when the only Act relating to bills of sale was the Bills of Sale Act, 1878, which made the transaction public but did not give any special protection to borrowers, it was held that the addition of a person as one of the grantors who had no interest in the goods was mere surplusage: *Re Storey, Ex parte Popplewell* (1). But since the Act of 1882 with its stringent provisions for the protection of the borrower came into force, *Saunders* v. *White* (2) has been decided, where it was held that a joint and several assignment by husband and wife of goods, some of which belonged to each, but none to both jointly, invalidated the bill of sale, both on the ground that it was not in accordance with the schedule and that the grantors were not the true owners. The Court of Appeal affirmed the decision on the former ground without dealing with the other ground. On the other hand, in *Brandon Hill, Ltd.* v. *Lane* (3), the grantor of a bill of sale assigned chattels of his own as security for money paid on behalf of himself and his wife. The wife executed the bill of sale, and was named in the recitals, but did not join in the operative part or in the covenants. The court there held that, as the wife was only joined for a collateral purpose, and the assignment was by the husband who was the true owner of the chattels, there was no infringement of the Act.

The state of affairs in the present case is quite different. Two persons are both described as "the grantor" and as the true owners of the goods. That representation was untrue; the goods belonged to the wife only. The bill of sale was not in accordance with s. 5 of the Act of 1882. The reasoning in *Saunders* v. *White* (2) seems to support that view. If one extra person could be put in as grantor, there would be no reason why half a dozen extra persons should not equally well be put in.

[The claimant under the bill of sale thus failed, but the court held that there was evidence to support the master's finding that the goods belonged to Mrs. Goldstein. This claim, therefore, succeeded against the execution creditor.]

Solicitors: *S. Landman*; *Bruce, Millar & Co.*

[*Reported by* T. W. MORGAN, ESQ., *Barrister-at-Law.*]

WATERHOUSE *v.* WILSON BARKER

[COURT OF APPEAL (Bankes, Scrutton and Atkin, L.JJ.), May 27, June 4, 5, 23, 1924]

[Reported [1924] 2 K.B. 759; 93 L.J.K.B. 897; 132 L.T. 15; 40 T.L.R. 805; 69 Sol. Jo. 51]

Discovery—Production of documents—Inspection—Bankers' books—Principle on which power to order inspection should be exercised—Objection that entries tend to incriminate—Bankers' Books Evidence Act, 1879 (42 *Vict.*, *c.* 11), *s.* 7.

The exercise of the jurisdiction of the court under s. 7 of the Bankers' Books Evidence Act, 1879, which provides that "on the application of any party to a legal proceeding a court or judge may order that such party be at liberty to inspect and take copies of any entries in a bankers' book for any of the purposes of such proceedings," ought to be regulated by the general rules as to inspection of documents before trial, and so the party whose account is sought to be inspected may oppose the application for inspection on any ground on which inspection of ordinary documents could be resisted.

A plaintiff applied for an order under s. 7 allowing her to inspect and take copies of all entries in the books of a bank relating to a defendant's account. The defendant, in her affidavit of documents, swore that the production of copies of these entries would tend to incriminate her and subject her to a criminal prosecution.

Held (SCRUTTON, L.J., dissenting): this oath was conclusive, and so no order should be made under s. 7 before the trial of the action.

Parnell v. *Wood* (1), [1892] P. 137, and *South Staffordshire Tramways Co.* v. *Ebbsmith* (2), [1895] 2 Q.B. 669, applied.

Notes. This topic is no longer annotated in the ANNUAL PRACTICE OF THE SUPREME COURT under R.S.C., Ord. 31, r. 19A (3), to which ATKIN, L.J., referred, but is now dealt with in the notes to R.S.C., Ord. 37, r. 7.

As to applications for orders for inspection of bankers' books, see 2 HALSBURY'S LAWS (3rd Edn.) 243; and for cases see 3 DIGEST 307–309. As to incrimination as a ground for resisting discovery, see 12 HALSBURY'S LAWS (3rd Edn.) 50; and for cases see 18 DIGEST (Repl.) 134–137. For the Bankers' Books Evidence Act, 1879, see 9 HALSBURY'S STATUTES (2nd Edn.) 598.

Cases referred to:

(1) *Parnell* v. *Wood*, [1892] P. 137; 66 L.T. 670; 40 W.R. 564; 8 T.L.R. 274, C.A.; 3 Digest 309, *1017*.

(2) *South Staffordshire Tramways Co.* v. *Ebbsmith*, [1895] 2 Q.B. 669; 65 L.J.Q.B. 96; 73 L.T. 454; 44 W.R. 97; 12 T.L.R. 32; 40 Sol. Jo. 49, C.A.; 3 Digest 309, *1018*.

(3) *Perry* v. *Phosphor Bronze Co., Ltd.* (1894), 71 L.T. 884; 14 R. 351, C.A.; 3 Digest 309, *1019*.

(4) *Parkhurst* v. *Lowten* (1816), 1 Mer. 391; 35 E.R. 718, L.C.; (1878), 2 Swan. 195; 36 E.R. 598, L.C.; 18 Digest (Repl.) 139, *1252.*

(5) *Arnott* v. *Hayes* (1887), 36 Ch.D. 731; 56 L.J.Ch. 844; 57 L.T. 299; 36 W.R. 246; 3 T.L.R. 807, C.A.; 3 Digest 308, *1016.*

(6) *Tournier* v. *National Provincial and Union Bank of England, Ltd.*, [1924] 1 K.B. 461; 93 L.J.K.B. 449; 130 L.T. 682; 40 T.L.R. 214; 68 Sol. Jo. 441; 29 Com. Cas. 129, C.A.; Digest Supp.

(7) *Emmott* v. *Star Newspaper Co., Ltd.* (1892), 62 L.J.Q.B. 77; 67 L.T. 829; 57 J.P. 201; 9 T.L.R. 111; 5 R. 137; 3 Digest 308, *1013.*

(8) *Re Bankers' Books Evidence Act, 1879, R.* v. *Bono* (1913), 29 T.L.R. 635, D.C.; 3 Digest 309, *1022.*

(9) *Pollock* v. *Garle*, [1898] 1 Ch. 1; 66 L.J.Ch. 788; 77 L.T. 415; 46 W.R. 66; 14 T.L.R. 16; 42 Sol. Jo. 32, C.A.; 3 Digest 308, *1012.*

(10) *Re Marshfield, Marshfield* v. *Hutchings* (1886), 32 Ch.D. 499; 55 L.J.Ch. 552; 54 L.T. 564; 34 W.R. 511; 3 Digest 308, *1010.*

Also referred to in argument:

Harding v. *Williams* (1880), 14 Ch.D. 197; 49 L.J.Ch. 661; 42 L.T. 507; 28 W.R. 615; 3 Digest 307, *1007.*

Howard v. *Beall* (1889), 23 Q.B.D. 1; 58 L.J.Q.B. 384; 60 L.T. 637; 37 W.R. 555; 3 Digest 308, *1011.*

A.-G. v. *Le Merchant* (1772), 2 Term Rep. 201, m.; 1 Leach, 300, n.; 100 E.R. 109; 18 Digest (Repl.) 135, *1197.*

R. v. *Kinghorn*, [1908] 2 K.B. 949; 78 L.J.K.B. 33; 99 L.T. 794; 72 J.P. 478; 25 T.L.R. 219; 21 Cox, C.C. 727, D.C.; 3 Digest 309, *1021.*

Spokes v. *Grosvenor Hotel Co.*, [1897] 2 Q.B. 124; 66 L.J.Q.B. 572, 578; 76 L.T. 677, 679; 45 W.R. 545, 546; 13 T.L.R. 426, 431, C.A.; 18 Digest (Repl.) 11, *60.*

Appeal from an order of GREER, J., at chambers.

The plaintiff, Muriel Gertrude Jane Annie Waterhouse, the widow and executrix of the will of Alfred Francis Waterhouse, deceased, claimed against the female defendant and her husband a sum of £10,000 alleged to have been obtained by the female defendant by fraud between July, 1913, and December, 1920. Alternatively she claimed damages for fraud and conspiracy, and a charge on certain real and personal estate in which the moneys alleged to have been obtained by fraud had been invested by the female defendant, with all necessary accounts and inquiries. The defendants by their defence denied the allegations and the right of the plaintiff to the relief claimed.

An order for discovery of documents having been obtained by the plaintiff, the female defendant filed an affidavit of documents in which she scheduled her pass books during the period in question. She also scheduled copies of entries of her current and deposit accounts with the bank during the period but she objected to produce those copies of entries upon the ground that they would, to the best of her knowledge, information, and belief, tend to incriminate her and to subject her to a criminal prosecution, and she alleged that the said pass books had been lost or destroyed. The plaintiff had previously applied to the Master in Chambers under s. 7 of the Bankers' Books Evidence Act, 1879, for an order that she should be at liberty to inspect and take copies of all entries in the books of the bank relating to the female defendant's account between Jan. 1, 1913, and the present time, but the Master refused to make an order upon the ground that the privilege claimed by the defendant was absolute and precluded him from making the order asked for, but he made an order giving the plaintiff liberty to inspect and to take copies (a) of all entries in the banker's books relating to the said defendant's account with the said bank from Feb. 13, 1922, onwards, and (b) of all entries relating to her account other than entries of current and deposit accounts in such books between Dec. 31, 1912, and Feb. 13, 1922.

The Bankers' Books Evidence Act, 1879, provides, by s. 7:

"On the application of any party to a legal proceeding a court or judge may order that such party be at liberty to inspect and take copies of any entries in a banker's book for any of the purposes of such proceedings. An order under this section may be made either with or without summoning the bank or any other party, and shall be served on the bank three clear days before the same is to be obeyed, unless the court or judge otherwise directs."

GREER, J., having affirmed the order of the Master, the plaintiff appealed.

Haydon, K.C., and *S. E. Pocock* for the plaintiff.
Hawke, K.C., and *Lord Erleigh* for the defendant.

Cur. adv. vult.

June 23. The following judgments were read.

BANKES, L.J.—This appeal raises an important point of practice in reference to the right to inspection before trial by a party to a litigation of entries in the books of the banker of another party to the litigation.

The power of inspection is given by s. 7 of the Bankers' Books Evidence Act, 1879, which provides that

"on the application of any party to a legal proceeding a court or judge may order that such party be at liberty to inspect and take copies of any entries in a banker's book for any of the purposes of such proceedings."

This Act and its predecessor, the Act of 1876, were passed in the interest of bankers in order to prevent interference with their business and needless expense and trouble, and to facilitate the giving in evidence of relevant material contained in their books. Incidentally, also, the section, a portion of which I have quoted, has afforded an opportunity to a litigant of becoming possessed in advance of the trial of what may be very valuable information. *Perry* v. *Phosphor Bronze Co., Ltd.* (3) is an instance where the court gave the litigant the opportunity sought for.

In that case the plaintiff had disclosed his pass book. The defendants desired to inspect the entries in the bank books upon the ground that they would show them, more definitely than the pass book could do, the nature of the plaintiff's accounts at his bank. The judge at chambers made the order asked for, and the Court of Appeal affirmed it. It is noticeable, however, that in giving judgment COTTON, L.J., says that he considered that a special case must be made out for what he described as getting behind the pass book; and A. L. SMITH, L.J., said that the application to the court to put in force s. 7 of the Bankers Act was a strong thing to do. It is common knowledge that the jurisdiction to give inspection of bankers' books under s. 7 of the statute is always exercised with caution, but that orders are constantly made for the inspection, not only of the books of the bankers of a litigant, but also of the books of bankers of persons who are not parties to the litigation, and that by means of such orders valuable information is rendered available before trial.

The question which arises on this appeal only arises when the application is to inspect the books of the banker of a party to the litigation where the party has in an affidavit of documents claimed in proper form and on sufficient grounds that the entries sought to be inspected, if contained in books or documents in his own possession, would be protected from production. On the one hand it is said that the Court of Appeal has laid down the rule that in such a case an order for inspection will not be made. On the other hand, it is said that the rule was not laid down in reference to the exceptional case where a litigant claimed protection from inspection upon the ground that it might incriminate him, and that there was no reason why the rule should be applied to that case. To determine this contention it is necessary to look closely into the facts and the judgments in the only two material cases, *Parnell* v. *Wood* (1) and *South Staffordshire Tramways Co.* v. *Ebbsmith* (2). It is quite true that in neither of these cases did the particular point in issue here arise. In both cases an affidavit had been made denying the

relevancy of the entries of which inspection was sought. In the one case the party disclosed the pass book, but claimed to seal up parts which were sworn to be irrelevant. In the other case the party obtained copies from his bank of certain entries in the bank books and included them in his affidavit of documents, and then swore that, with those exceptions, there were no entries in his account of which inspection was sought relating to the matters in question in the action. It is in reference to these facts that the judgments must be read, but making full allowance for the difference in the facts of those cases and the present one, I think that the judgments do lay down a general rule of practice which is just as applicable to the one set of facts as to the other and which consequently we must follow. Had the question come before the courts in its present form in the first instance, I am not at all sure that the judgments would have been expressed as they are.

That, however, is not a material consideration; we must deal with the judgments as they are and not as what, under other circumstances, they might have been. I think that perhaps the strongest passage in support of the view I am expressing is to be found in the judgment of LINDLEY, L.J., in *Parnell* v. *Wood* (1), where he says:

> "The plaintiff was ordered to make an affidavit as to documents and produce them. She complied. She set out her pass books and produced them, sealing up parts of them which she swore to be irrelevant to the matters in issue. Her opponents, therefore, have got production of the pass books to the extent to which, as between them and her, they are entitled to see them before the trial."

And later on in his judgment he says:

> "The sole object of this application is to get behind the privilege, and such an object is not within the scope of the Act."

This was the ground upon which the lord justice based his judgment. It is a ground which places discovery of a litigant's banker's books in exactly the same category as the documents in the litigant's own possession, and it covers a claim for protection from production upon the ground of a tendency to incriminate just as completely as a claim for protection from production upon the ground of irrelevancy. In the *South Staffordshire Case* (2) LORD ESHER, M.R., says in terms that the exercise of the jurisdiction of the court to make an order under s. 7 of the Bankers' Books Evidence Act ought to be regulated by the general rules laid down by the decisions in relation to inspection of documents before the trial. I do not refer to the other judgments in these two cases, as I find nothing in them indicating that the lords justices did not entirely approve of the passages in the judgments which I have quoted. Under these circumstances I think that this appeal fails and must be dismissed, with costs, in any event. I need hardly add that this decision has no bearing at all upon the admissibility of the evidence at the trial, and any delay or expense which may be incurred owing to the defendant having taken the objection to inspection at this stage can be adequately dealt with by the trial judge.

SCRUTTON, L.J.—This appeal raises an important question under the Bankers' Books Evidence Act, 1879, under curious circumstances. The plaintiff, the executrix of one Waterhouse (deceased), alleges that the defendant, Lady Wilson Barker, in collusion with a named solicitor, has fraudulently obtained money from the deceased man by untruly representing that the solicitor would disclose to her husband her adultery with the man now dead. The claim gives particulars of some twenty payments between 1913 and 1920 alleged to have been made by the dead man in banknotes in consequence of these fraudulent misrepresentations. The interlocutory proceedings took an unusual course. At first it was contended that the female defendant was unfit to plead, so that no discovery at all could be required from her. On inquiry before a Master the lady was found fit to plead. She then took the bold course of declining to produce sixty-five letters in the handwriting of

the dead man, two draft letters in her own writing, and "copies of bankers' entries of current and deposit accounts of Lady Wilson Barker with National Provincial Bank, Ltd., between 1912 and Feb. 13, 1922," the latter being the date of the death of the plaintiff's testator. Her refusal to produce the documents was sworn to be upon the ground "that they may to the best of my knowledge, information, and belief tend to incriminate me and subject me to a criminal prosecution." It can hardly be contended, therefore, that parts of the documents are not relevant. Before this affidavit had been sworn the plaintiff had taken out a summons under the Bankers' Books Evidence Act for liberty to inspect and take copies of the accounts in question. The Master and judge refused it at the present stage upon the ground, as I gather, that two decisions of the Court of Appeal, *Parnell* v. *Wood* (1) and *South Staffordshire Tramways Co.* v. *Ebbsmith* (2), laid down a general rule that the Act did not extend the limits of discovery so as to do away with a litigant's privilege. It is to be observed that in each of these cases the defendant had sworn that certain entries in accounts in his custody were irrelevant, and the court was asked to order inspection in the bankers' books of entries which the defendant had sworn were irrelevant. There is no trace in either of the cases of any consideration by the court of the question of what was to happen with relevant entries in bankers' books which yet were privileged if in possession of the client, because they might tend to criminate that client. It seems clear, and was indeed admitted by defendant's counsel, that the banker could not at the trial refuse to give evidence of transactions recorded in his books, because they would tend to criminate his customer. This question was discussed by LORD ELDON in *Parkhurst* v. *Lowten* (4), when discovery by interrogatories was being sought to support a claim against a trustee. The trustee and his executor had successfully objected to discovery upon the ground that it might tend to show simony (see 1 Mer. 391), but discovery was then sought against Lowten's solicitor to ascertain the dates and amounts of certain payments and the facts about a certain deed. LORD ELDON, with his usual caution, declined to decide any particular question till he saw it and the witness's objection to answer, but he did decide that the general objection that the witness was Lowten's attorney and that some answers might tend to criminate his client was a bad one. He said (2 Swan. at p. 211):

> "The court would oblige the attorney of Lowten to show that Lowten had been engaged in a simoniacal contract, from discovering which Lowten might protect himself. If the interrogatories are such as not to invade the privilege of the client, which is to be attended to by the attorney, though they bring out proof of simony, yet bringing out proof of payment of the money, they must be answered,"

and again (ibid. at p. 215):

> "There is no doubt, that the privilege which protects a man from criminating himself, does not belong to a witness whose disclosures may criminate not himself, but others; if the matter which the witness has to state is relative to the time of payment, he cannot object to make the statement, because it may prove that some other person has been guilty of an offence."

If this is so, the plea in this case is merely a dilatory plea. One may not look now at a relevant matter, but may look at the trial, a course which seems to me merely a piling up of expense. LINDLEY, L.J., indeed, says in *Parnell* v. *Wood* (1):

> "I do not say that the Bankers' Books Evidence Act might not be resorted to before the trial in some cases—as, for instance, if the pass books had been lost."

Curiously enough, LORD ELDON, in *Parkhurst* v. *Lowten* (4), likens the case of refusal to produce upon the ground of tendency to criminate to the case of a lost document, suggesting by that that secondary evidence might be given in either case.

Before the Bankers' Books Evidence Act, 1876, if it was desired to prove a banking transaction someone from the bank must be called who conducted the

transaction, and it would usually be necessary for him to refresh his memory by producing the original books of the bank. It would undoubtedly interfere with banking business to have clerks and original books, both required at the bank for other purposes, required to attend the Law Courts. So in 1876 an Act was passed "to amend the law with reference to bankers' books evidence," reciting that "it is expedient to facilitate the proof of the transactions recorded in such ledgers and account books." Section 3 made the entries admissible as primâ facie evidence of the matters and transactions recorded therein upon certain affidavit evidence of source and accuracy being given, but s. 5 provided that the books or copies thereof should not be admissible unless five days' notice containing a copy of the entries proposed to be adduced should have been given by the party proposing to give the evidence to the other party. By s. 6 such latter party could, on receiving the notice, get an order to inspect and take copies of any relevant entry. This Act apparently contemplated that only the customer would wish to prove entries in his own account, and provided that to do so he must give copies to his opponent, which, of course, the customer could furnish, and that his opponent should have a right to inspect all relevant entries. But this did not provide at all for the case of the opponent wishing to prove the account of the customer; for the opponent could not serve copies of it and had no right to get an order for inspection, so the Act of 1876 was repealed by the Act of 1879. The power to inspect was given to any party, and there was no need for him to give notice to the other party, unless the judge ordered him to give such notice. It appears to me that the primary object of the Act was to amend the law of evidence as to proof of matters recorded in bankers' books, and incidentally to facilitate proof by giving the person desiring to prove such transactions a right to see the books in order to extract the requisite evidence. This was the way in which the Court of Appeal used the Act in *Perry* v. *Phosphor Bronze Co., Ltd.* (3). There the plaintiff had disclosed his pass book, but the defendants wanted to discover and prove matters recorded in the bank books, but not in his pass book. It was argued that *Parnell* v. *Wood* (1) prevented this, but both LINDLEY, L.J., and A. L. SMITH, L.J., repudiated this, saying the applicant was entitled to "get behind" the pass books. So also the Court of Appeal, in *Arnott* v. *Hayes* (5), pointed out that the Act gave a privilege to a litigant to prove transactions by copy entries and gave him, that he might know what copies to get, a privilege to look at the books. I cannot think it was intended that the trial must commence before he could inspect and get copies, and that an adjournment must take place to enable him to get his evidence. As COTTON, L.J., says in *Arnott* v. *Hayes* (5):

> "This is not giving the plaintiff discovery from the defendant to assist the plaintiff's case, but giving him a power of examination for the purpose of ascertaining what copies he will require for the purpose of being put in evidence."

The evidence, if material, is admissible, but the plaintiff cannot tell which entries are material till he inspects. Therefore the Act gives him the power to inspect and take copies. I am bound by *Parnell* v. *Woods* (1) and *Ebbsmith's Case* (2) to hold that where the defendant swears that entries are irrelevant the plaintiff cannot before the trial get an order to inspect entries primâ facie irrelevant. But I cannot see how, when it is admitted that some entries may be relevant, the defendant can prevent the preliminary steps to giving them in evidence by swearing they are so relevant that they may criminate him. He could do so if the documents were in his possession, but they are not, and those in whose possession they are will be bound to give the evidence contained in them. As ATKIN, L.J., says in *Tournier* v. *National Provincial and Union Bank of England, Ltd.* (6): "It is plain that there is no privilege" in bankers "from disclosure enforced in the course of legal proceedings." Here the disclosure seems to me enforced by s. 7 of the Act of 1879, for the purpose of facilitating the giving in evidence at the trial of relevant matters. In the present case the plaintiff desires to prove that her testator paid

repeatedly to the defendant large sums in bank notes. She relies, I suppose, on the letters to show why or under what circumstances the sums were paid, and the defendant swears that the evidence of payments may tend to criminate her. This seems to me pre-eminently a case where the procedure for facilitating the giving of relevant evidence by bankers should apply. In my view, therefore, the appeal should be allowed, with costs, here and below, and the order asked for made.

ATKIN, L.J., stated the facts and continued: The plaintiff makes the present application, which is to inspect and take copies of the original entries, copies of which, in the defendant's possession, are admittedly protected from inspection before trial. Such an application appears to me to be in direct conflict with decisions of the Court of Appeal and the practice of the courts for the last thirty years. The words of the Act give an unlimited power to the court to order inspection before trial, whether of the account of a party or of a third person not a party. But the court early perceived that to exercise the power without limitation would extend the inquisitorial powers of the court beyond reason, and that it was necessary to lay down rules for the exercise of their discretion. Rightly or wrongly—as I think rightly, though my opinion is irrelevant, for the decisions bind me—the Court of Appeal has laid down the rule that where the account is the account of a party the court is to apply the rules relating to discovery of documents in the possession of the party or his agent, so that, if the party might protect the account from inspection before trial if in his own possession, he shall have equal protection on an application for inspection under the Act. Any other rule would result in an absurdity. A pass book is but a copy of the bankers' ledger, and if justice requires that the party should be protected in particular circumstances from disclosing entries in the pass book, it seems preposterous that justice should permit him not to be protected in the same circumstances from an inspection of the original. The two relevant cases are *Parnell* v. *Wood* (1) and *South Staffordshire Tramways Co.* v. *Ebbsmith* (2). In the former case the plaintiff on discovery had in an affidavit disclosed her pass books, and had sealed up certain portions which were sworn to be irrelevant. The interveners in the suit, a probate suit, took out a summons for leave to inspect and take copies of the bankers' books containing the account. This application was refused by COLLINS, J., in chambers and by the Court of Appeal. LINDLEY, L.J., said:

> "This application in effect seeks to deprive the plaintiff of the right to seal up until the trial such part of the books as she swears to be irrelevant. I do not say that the Bankers' Books Evidence Act, 1879, might not be resorted to before the trial in some cases—as, for instance, if the pass books had been lost. But the sole object of this application is to get behind the privilege, and such an object is not within the scope of the Act. The Act was passed mainly for the relief of bankers, to avoid the serious inconvenience occasioned to them by their having to produce books which were in constant use in their business, and by having to send, for the purpose of verifying them, a clerk who would otherwise be employed at the time in making entries in those very books."

LOPES, L.J., said:

> "The object of this application is to obtain inspection of the parts of the pass books which the plaintiff has sealed up. The Bankers' Books Evidence Act has no relation to this case, which must be decided according to the rules as to discovery. The plaintiff has made an affidavit as to documents, in which she has scheduled her pass books, and has produced them, sealing up parts of them, and pledging her oath that the parts sealed up are not relevant to the matters in issue. She is entitled to do so. The appellants seek inspection of the materials from which the pass books are made up, in order, in fact, to obtain inspection of the parts which are sealed up and sworn to be immaterial. If we granted this application we should destroy all the rules as to privilege."

KAY, L.J., said:

> "According to the appellants, if a person engaged in litigation has a banking account, his adversary is entitled to inspect that account to see whether he can find anything that will help him. The Bankers' Books Evidence Act has nothing to do with any question of the kind,"

and later on he says:

> "I never saw a more extraordinary application than the present. Pass books are produced which are no doubt copied from the bankers' books, but the party producing them seals up parts which she swears not to be relevant. According to the law of discovery, the opposite party has no right to look at the parts so sealed up. The present application is an attempt to get behind the affidavit of the party producing the documents. There is nothing to show that the affidavit is untrue, but the applicants wish to evade it by obtaining inspection of the books from which the pass books were made out."

It was argued before us that this decision is confined to a claim for protection upon the ground of irrelevancy. Such a contention appears to ignore the reasoning of the lords justices. The principle in terms laid down is that the application must be decided according to the rules of discovery, and that the applicant has no right to get behind the affidavit of documents. It is true that the binding effect of the oath of the party to relevancy is one of the rules of discovery and was the particular rule applicable in that case, but the major proposition which is necessary to support the reasoning is that all the rules of discovery relative to protection are applicable, and the major is expressed in terms by both LOPES and KAY, L.JJ., and is implied in the judgment of LINDLEY, L.J. There can be no conceivable ground for importing the rule of discovery as to relevancy which does not import the other rules. For it is to be noted that the case does not turn on the determination by the court that the documents sought to be inspected are not shown to be relevant, but on the acceptance by the court of the rule of discovery that the litigant's oath on this matter is conclusive. It is also to be noted that the oath was taken, not on an affidavit for the purposes of the application, but in the affidavit of documents claiming protection for the pass books. In this respect the facts are precisely those of the present case, for it can hardly be contended that there is any difference between a copy of an account in the bankers' ledger in the form of a book and a copy of the same account in the same ledger in the form of a sheet.

This case seems sufficient to decide the present issue, but the matter seems to me to be placed beyond controversy by the decision in *South Staffordshire Tramways Co.* v. *Ebbsmith* (2). In that case the action was by a limited company against the promoter for an account of secret profits. It does not appear that discovery of documents had been ordered; but the plaintiffs applied for an order under the Act for leave to inspect and take copies of the accounts of the defendant and of another company not a party to the action. The defendant made an affidavit in which he swore that with the exception of three items, of which he produced duly certified copies, the account contained no relevant entries. The Master made the order, which was reversed by HAWKINS, J. The appeal to the Court of Appeal was dismissed. LORD ESHER, M.R., said:

> "I have no doubt that the court has jurisdiction under the section to make the order asked for; but we have to consider and endeavour to lay down the rule of conduct by which the court ought to be governed in exercising that jurisdiction. This is an application for inspection before the trial; and it appears to me that, where such an inspection is asked for, the conduct of the court in the exercise of this jurisdiction ought to be regulated by the general rules laid down by the decisions in relaton to inspection of documents before the trial. It was the rule of the Court of Chancery, where such an inspection of documents was asked for, that the court granted it subject to this, namely, that, if in answer to the application the defendant pledged his oath to the fact that

A certain entries were irrelevant to the matters in dispute, the court accepted that answer, leaving the defendant exposed to the risk of a prosecution for perjury if it was untrue. I think that in exercising its jurisdiction under s. 7 of the Bankers' Books Evidence Act, 1879, the court ought to be governed by the same rule."

B If LORD ESHER is not saying: All the rules of discovery as to inspection apply (the rule as to relevancy is one of the rules of discovery as to inspection, therefore the rule as to relevancy applies), I am incapable of understanding the reasoning, and if he is, then the major proposition is an essential part of his syllogism and must be taken by us to be true. KAY, L.J., says:

"The rule as to inspection of documents has always been that it is granted C subject to the liberty of the person against whom it is asked for to seal up any part of a document which he swears by affidavit made for the purpose not to be relevant to the issues in the action, and that the other party cannot get behind the statement so made by him upon oath."

Then a little lower down on the same page he says:

"The question is whether that rule is altered by the Act. It would be very D strange if it were. I quite agree with what was said in *Parnell* v. *Wood* (1), to the effect that it was not intended by the Act to do away with any privilege which a litigant possessed by virtue of which he was entitled to resist or limit the extent of inspection, but only to give inspection subject to such privilege in a certain case where it could not have been given before."

E When KAY, L.J., says "any privilege," I myself have no doubt that he means any privilege, including the present privilege of protection against inspection of documents sworn to tend to criminate, though the particular example in the case cited was protection on the ground of irrelevancy. Such being the two leading authorities, the practice of the courts has followed them ever since they were given. I am confirmed in this, not only by my own experience, such as it is, but by the F unrivalled authority in such a matter of the learned editor of the YEARLY PRACTICE, who in the notes to Ord. 31, r. 19A (3), says (YEARLY PRACTICE (1924), p. 458):

"The party whose account is sought to be inspected may oppose the application on any ground on which inspection of ordinary documents could be resisted."

Then he proceeds to say:

G "The main object of this Act is to enable evidence to be procured and given (*Arnott* v. *Hayes* (5); *Emmott* v. *Star Newspaper Co., Ltd.* (7); *R.* v. *Bono* (8)) and to relieve bankers from the necessity for attending and producing their books (*Parnell* v. *Wood* (1); *Emmott* v. *Star Newspaper Co., Ltd.* (7); *Pollock* v. *Garle* (9) ([1898] 1 Ch. at p. 4)). It enables a party who formerly had the right to issue a subpœna duces tecum to compel bankers to produce their books H and to attend and be examined on them, to obtain an order for leave to inspect and take copies of them (*Re Marshfield, Marshfield* v. *Hutchings* (10)). It does not give any new power of discovery (*Arnott* v. *Hayes* (5), per COTTON, L.J.; *R.* v. *Bono* (8)); but consider *Perry* v. *Phosphor Bronze Co., Ltd.* (3), or alter the principles of law or the practice with regard to discovery (*Pollock* v. *Garle* (9), per LINDLEY, L.J.), or take away any previously existing ground I of privilege (*South Staffordshire Tramways Co.* v. *Ebbsmith* (2), per KAY, L.J.; *Parnell* v. *Wood* (1), per LINDLEY, L.J.)."

The saving reference to *Perry* v. *Phosphor Bronze Co., Ltd.* (3) is well founded. The Act clearly gives a right to discovery of documents which could not be in the possession of the party, for it enables the court, where no privilege is claimed, to order inspection of entries in bankers' books, such as waste books and the like, which would not be found in the pass books, though relating thereto. The case has no reference to the question of privilege. It is said by the plaintiff that it would be wrong to give effect to the defendant's claim for protection, because at

the trial the defendant's oath as to the tendency to criminate would not protect the document from production, nor at the trial would her oath on relevancy, which, in view of the above authorities, is perhaps a sufficient answer. The rules as to discovery before trial have no reference to protection at the trial. In every case where protection is claimed the claim must be renewed on oath at the trial unless, possibly, on the face of the documents a ground for protection is apparent, as in the case of communications with the parties' legal adviser. If the protection against disclosure before trial can be obtained for entries in the passbook on such grounds as exclusively disclosing the parties' evidence, or of injury to public interests, as it obviously can, I see no reason why similar protection should not be given upon the same grounds against disclosure of the originals of such entries, the bankers' books; and if these grounds of protection exist, there can be no possible reason for excluding the ground of tendency to criminate. If the inspection is at this stage inadmissible it is unnecessary to consider the alleged inconvenience to the plaintiff. I am, however, by no means impressed by it. The documents will apparently be admissible at the trial. The amounts are such that there can be little difficulty in tracing them. I have no doubt that a very short perusal of the document will put the plaintiff's advisers in full possession of all relevant information. It will not be the only case in which a plaintiff's advisers have obtained inspection of relevant documents for the first time at the trial. The nature of the claim for protection in this case, of course, throws doubts upon the merits of the defence. I am not prepared, however, from untested suspicions of the defence to overrule decisions which are both binding on me and based on principles of which I approve, or to depart from a well-established practice based on those decisions. I think, therefore, that the appeal should be dismissed, with defendants' costs, in any event. The Master's order is limited. It does not, I think, extend to any entries in books, &c., which relate to entries in the current or deposit account; so to hold would be to nullify the privilege. The order so construed is not likely to be of much avail to the plaintiff, but it seems unnecessary to amend it.

Appeal dismissed.

Solicitors: *Leonard A. L. North*; *Lewis & Yglesias.*

[*Reported by* Edward J. M. Chaplin, Esq., *Barrister-at-Law.*]

A

Re BATES. SELMES *v.* BATES

[Chancery Division (Russell, J.), October 31, 1924]

[Reported [1925] Ch. 157; 94 L.J.Ch. 190; 132 L.T. 729]

B *Annuity—"Such a sum in every year as after deduction of the income tax for the time being payable in respect thereof will leave a clear sum of £2,000"—Right of annuitant to payment of sum in respect of supertax [now surtax].*

A testator by his will gave to his wife "such a sum in every year as after deduction of the income tax for the time being payable in respect thereof will leave a clear sum of £2,000."

C **Held:** the annuity was payable free of income tax only, and the wife was not entitled to payment of any sum in respect of supertax.

Notes. Distinguished: *Re Veale's Will and Codicils, Malone* v. *James* (1931), 75 Sol. Jo. 780. Considered: *Re Reckitt, Reckitt* v. *Reckitt*, [1932] All E.R.Rep. 961.

As to deduction of tax in the case of an annuity, see 28 Halsbury's Laws (3rd D Edn.) 214–217; and for cases see 39 Digest 164 et seq.

Cases referred to:

(1) *Re Crawshay, Crawshay* v. *Crawshay* (1915), 60 Sol. Jo. 275; 39 Digest 167, *582*.

(2) *Re Crosse, Oldham* v. *Crosse*, [1920] 1 Ch. 240; 89 L.J.Ch. 145; 122 L.T. 462; 64 Sol. Jo. 260; 39 Digest 168, *589*.

E (3) *Re Doxat, Doxat* v. *Doxat* (1920), 125 L.T. 60; 64 Sol. Jo. 651; 39 Digest 168, *590*.

(4) *Re Bowring, Wimble* v. *Bowring* (1918), 34 T.L.R. 575; 62 Sol. Jo. 729; 39 Digest 168, *593*.

Adjourned Summons.

F The trustees of the will of the testator (other than his widow who was thereby appointed a trustee thereof) took out this summons for the determination of the question whether the widow was entitled, under the gift of "such a sum in every year as after deduction of the income tax for the time being payable in respect thereof will leave a clear sum of £2,000," to an annuity free not only of income tax, but also of supertax.

G *J. E. Harman* for the plaintiffs.
Ashworth James for the annuitant.
Rawlence for other persons interested.

RUSSELL, J.—This summons raises quite a short point, but one not free from difficulty in view of the authorities that have been cited to me. The question to be decided is whether the annuitant is entitled to receive her annuity, not only H free of income tax, but also of supertax. The words of the will must be borne in mind. The testator has not said that the annuitant is to be paid her annuity free of income tax. What he has said is that she is to be paid such a sum in every year as after deduction of the income tax for the time being payable in respect thereof will leave a clear sum of £2,000.

In none of the authorities cited to me were the words the same as those which I we have here. In *Re Crawshay, Crawshay* v. *Crawshay* (1) the testator by his will gave his wife an annuity of £1,500 "free of all deductions except income tax." By a first codicil, he gave her such a sum as together with the income for the time being received by her under the will would make up an annual sum of £2,000 "clear of all deductions including income tax." By a second codicil, he declared the amount to be paid to his wife should be increased to the annual sum of £2,500 "clear of all deductions including income tax." It has been pointed out that the will and codicils in that case were made before supertax was ever heard of, but I do not think that that affected the decision of Peterson, J. The summons asked

whether, having regard to the terms of the first and second codicils, the trustees of the testator's will should pay out of the income of his residuary estate any and what part of the supertax payable by the widow in respect of the income received by her from all sources. The judgment of PETERSON, J., was short. He referred to decisions that the gift of an annuity "free from all deductions" would not free the annuitant from liability to pay income tax, and that, unless income tax were expressly included in the term "deductions," the annuitant would have to pay it, and said that trustees who had to pay an annuity were accountable for the income tax, and in the ordinary course would, for the purpose of meeting their accountability, deduct the income tax before payment and only hand over the balance to the annuitant; that he thought the testator treated income tax as a deduction and, by the directions in the codicil, meant "I direct that nothing shall be deducted from the sum given, not even income tax"; that, in his opinion, what the testator was considering when he gave the sums in question was the income tax, for which the respective trustees would be accountable in respect of the particular annuity or sum; that supertax was not a charge in respect of any particular annuity or sum, but was a charge in respect of the recipient's whole income, and was not a matter with which the trustees would be charged or concerned at all; and that, what the testator had done, in his opinion, was to give the widow the yearly sum of £2,500 clear of all deductions for which the trustees were accountable—but that that did not include supertax, which she must pay herself. I think the ground of that decision was that the £2,500 was to be paid clear of all deductions for which the trustees were accountable, and that, supertax being a deduction for which they were not liable, was therefore payable by the widow. I see nothing to quarrel with in that decision.

The next decision is *Re Crosse*, *Oldham* v. *Crosse* (2). In that case, ASTBURY, J., came to the conclusion that, on the terms of the will, the testator had directed that the amount to be paid should be free of income tax, and that, as supertax was an additional income tax, the amount was to be paid free of that tax also. That decision does not affect the present case, the words being altogether different. Then came *Re Doxat*, *Doxat* v. *Doxat* (3). There again the words were different from those which we find in the present case. The testator gave his wife an annuity of £2,500 "free of income tax and of all other deductions." SARGANT, J., said that the testator knew that after his death his widow would be subject to some supertax. Supertax, according to statute, was only additional income tax. The difference between the two was in the mode of collection, and, apart from that, the legal positions of the two taxes were substantially the same. That being so, it would be curious if the words "all other deductions" should be held to diminish the force of the previous words. *Re Crawshay*, *Crawshay* v. *Crawshay* (1) did not establish any general principle, and the language of the will there was different from that of the codicil before him. Supposing that income tax was partly paid and partly deducted, both sums would have to be regarded. The widow was entitled to the naked amount of the annuity free from both income tax and supertax. And, following *Re Bowring*, *Wimble* v. *Bowring* (4), his Lordship held that the income of the residuary estate must bear such proportion of the total supertax payable by the widow as the annuity, with the income tax thereon added thereto, bore to the total amount of her income assessed for the purposes of supertax. That decision is that, where there is a gift of an annuity free of income tax and all other deductions, the annuity is to be paid free of income tax and supertax. But here the words are different. Here the words are "such a sum . . . as after deduction of the income tax for the time being payable in respect thereof will leave a clear sum of £2,000." No supertax is really payable "in respect of" this sum. The question is, did the testator mean that only income tax "in respect thereof" was to be deducted, and that supertax was not to be deducted? I think that the testator did not intend that, in addition to income tax being deducted, a proportion of the supertax payable by his wife in respect of her total income should also be deducted.

A I hold, accordingly, that the annuity is to be paid free of income tax only, and there will be a declaration that the widow is not entitled to payment of any sum in respect of supertax.

Solicitors: *Williams & James*, for *Dawes, Son & Prentice*, Rye.

[*Reported by* J. L. DENISON, ESQ., *Barrister-at-Law.*]

B

C

BACK *v.* DANIELS

[COURT OF APPEAL (Sir Ernest Pollock, M.R., Warrington and Scrutton, L.JJ.), November 14, 17, 18, December 1, 1924]

D [Reported [1925] 1 K.B. 526; 94 L.J.K.B. 304; 132 L.T. 455; 41 T.L.R. 162; 69 Sol. Jo. 160; 9 Tax Cas. 183]

Income Tax—Occupation of land—Landlord and tenant working land—Landlord assessed under Sched. B—Assessment of tenant under Sched. B—Income Tax Act, 1918 (8 *& 9 Geo. 5, c.* 40), *Sched. B.*

The taxpayers carried on the business of buying and selling potatoes and E other vegetables. They also grew potatoes on lands held by them under ordinary tenancies, in respect of which they were taxed as occupiers under Sched. B of the Income Tax Act, 1918. In respect of other land the taxpayers entered into agreements under which they were granted fields to be used by them for the purpose of raising potatoes. Under these agreements, the taxpayers were to supply the seed potatoes and artificial manure, and the labour F necessary to drill the manure and plant the seed potatoes, as well as to take up and pit the potatoes, and afterwards to riddle, sort and clean and otherwise prepare them for market. The landlord was to work and prepare the land and have done all the work on it requiring horse labour, and was to do all the carting. The taxpayers were to pay a rent of £3 per acre, and £15 per acre for men and horse labour, the sums to include all rates and taxes. The G duration of the use of the land varied, and might extend to twelve months or more or less according as the crop sown was early, main crop or late. In each case the landlord had been assessed to income tax under Sched. B in respect of the occupation of the land. The taxpayers contended that they ought to be assessed to income tax under Sched. B in respect of the land held by them under these agreements, and not under Sched. D of the Act of 1918 H in respect of their profits from the sale of potatoes grown on the lands.

Held: the taxpayers ought to be assessed under Sched. B because, on the true construction of the agreements and having regard to the substance of them, they were the occupiers of the land within r. 2 of No. VII of Sched. A, since the agreements conferred the right to the possession and use of the land, with the incidental right to bring an action of trespass in respect of it.

I *Holywell Union and Halkyn Parish* v. *Halkyn Drainage Co.* (1), [1895] A.C. 117, *Roads* v. *Trumpington Overseers* (2) (1870), L.R. 6 Q.B. 56, *Crosby* v. *Wadsworth* (3) (1805), 6 East, 602, and *Burt* v. *Moore* (4) (1793), 5 Term Rep. 329, applied.

Decision of ROWLATT, J., [1924] 2 K.B. 432, affirmed.

Per SIR ERNEST POLLOCK, M.R.: I do not shrink from the result that there may be two persons who may be chargeable as occupiers under Sched. B.

Notes. The Income Tax Act, 1918, Sched. B, was replaced by the Income Tax Act, 1952, s. 83.

Considered: *Fry* v. *Salisbury House Estate, Ltd.*, [1930] All E.R.Rep. 538; *Dennis* v. *Hick* (1935), 19 Tax Cas. 219; *Dawson* v. *Counsell*, [1938] 3 All E.R. 5; *Bomford* v. *Osborne*, [1940] 1 All E.R. 91; *Bomford* v. *Osborne*, [1941] 2 All E.R. 426; *Thornley* v. *Payne*, [1943] 1 All E.R. 354. Applied: *Christie* v. *Davies*, [1945] 1 All E.R. 370. Considered: *Sharkey* v. *Wernher*, [1955] 3 All E.R. 493. Referred to: *Huxham* v. *Johnson* (1926), 136 L.T. 410; *Lord Glanely* v. *Wightman* (1933), 149 L.T. 121; *Bertram* v. *Wightman*, [1936] 2 All E.R. 487; *Long* v. *Belfield Poultry Products, Ltd.* (1937), 21 Tax Cas. 221; *Sywell Aerodrome, Ltd.* v. *Croft*, [1941] 2 All E.R. 325.

As to persons chargeable under Sched. B, see 20 Halsbury's Laws (3rd Edn.) 90 et seq.

Cases referred to:

(1) *Holywell Union and Halkyn Parish* v. *Halkyn Drainage Co.*, [1895] A.C. 117; 64 L.J.M.C. 113; 71 L.T. 818; 59 J.P. 566; 11 T.L.R. 132; 11 R. 98, H.L.; 38 Digest 424, *7*.

(2) *Roads* v. *Trumpington Overseers* (1870), L.R. 6 Q.B. 56; 40 L.J.M.C. 35; 23 L.T. 821; 35 J.P. 72; 38 Digest 442, *130*.

(3) *Crosby* v. *Wadsworth* (1805), 6 East, 602; 2 Smith, K.B. 559; 102 E.R. 1419; 30 Digest (Repl.) 528, *1658*.

(4) *Burt* v. *Moore* (1793), 5 Term Rep. 329; 101 E.R. 184; 18 Digest (Repl.) 437, *1819*.

(5) *McKenna* v. *Herlihy*, *Woodburn* v. *Herlihy* (1920), 7 Tax Cas. 620; 28 Digest (Repl.) 221, **551*.

(6) *Donald* v. *Thomson*, 1922 S.C. 237; 28 Digest (Repl.) 45, **118*.

(7) *Smith* v. *St. Michael Cambridge Overseers* (1860), 3 E. & E. 383; 3 L.T. 687; 25 J.P. 133; 7 Jur.N.S. 24; 121 E.R. 486; sub nom. *R.* v. *Smith*, 30 L.J.M.C. 74; 38 Digest 444, *150*.

(8) *R.* v. *St. Pancras Assessment Committee* (1877), 2 Q.B.D. 581; 46 L.J.M.C. 243; 25 W.R. 827; sub nom. *Willing* v. *St. Pancras Assessment Committee*, 37 L.T. 126; 41 J.P. 662; Ryde, Rat. App. (1871–85) 188; 38 Digest 423, *5*.

(9) *Cox* v. *Glue*, *Cox* v. *Saint*, *Cox* v. *Mousley* (1848), 5 C.B. 533; 17 L.J.C.P. 162; 10 L.T.O.S. 374; 12 Jur. 185; 136 E.R. 987; 43 Digest 389, *134*.

(10) *Jones* v. *Flint* (1839), 10 Ad. & El. 753; 2 Per. & Dav. 594; 9 L.J.Q.B. 252; 113 E.R. 285; 2 Digest (Repl.) 338, *268*.

(11) *Liverpool Corpn.* v. *Chorley Union Assessment Committee*, [1912] 1 K.B. 270; 81 L.J.K.B. 426; 106 L.T. 205; 76 J.P. 161; 10 L.G.R. 165; Konst. & W. Rat. App. 252, C.A.; affirmed, [1913] A.C. 197; 82 L.J.K.B. 555; 108 L.T. 82; 77 J.P. 185; 29 T.L.R. 246; 57 Sol. Jo. 263; 11 L.G.R. 182; 1 B.R.A. 72, H.L.; 38 Digest 428, *36*.

(12) *R.* v. *London Corpn.* (1790), 4 Term Rep. 21; 100 E.R. 872; 38 Digest 426, *10*.

(13) *Hilton and Walkerfield Overseers* v. *Bowes Overseers* (1866), L.R. 1 Q.B. 359; 7 B. & S. 223; 35 L.J.M.C. 137; 14 L.T. 512; 30 J.P. 325; 14 W.R. 368; 38 Digest 571, *1090*.

Appeal by the Crown from a judgment of Rowlatt, J., given on July 14, 1924, and reported [1924] 2 K.B. 432, whereby he confirmed the decision of the Special Commissioners of Income Tax, who had reduced the assessment on the respondents on the ground that they ought to have been assessed as the occupiers of lands under Sched. B of the Income Tax Act, 1918, and not on the profits of growing potatoes on the land as a profit of a trade or business carried on by them under Sched. D. The Crown expressed dissatisfaction with the decision of the Special Commissioners as being erroneous in law and required them to state a Case for the opinion of the High Court pursuant to s. 149 of the Income Tax Act, 1918. The Case was as follows.

"1. At a meeting of the Special Commissioners of the Income Tax, held on Nov. 3, 1922, Leslie Vaughan Daniels and Percy Leigh Daniels, trading as

Joseph S. Daniels, appealed against an assessment to income tax (Sched. D) in the sum of £9,632 for the year ending April 5, 1922, made upon them by the Additional Commissioners for the Tower Division of the County of Middlesex under the provisions of the Income Tax Acts in respect of the profits of the business of wholesale potato merchants, fruit and vegetable salesmen and potato growers carried on by the respondents at 107, Commercial Street, London.

2. The respondents grow potatoes upon lands which they both own and occupy and also upon lands which they occupy under ordinary tenancy agreements. The profits of the occupation of these lands are not included in the Sched. D assessment, which is the subject of this case and with regard to those lands no question for the court arises.

3. In addition to growing potatoes on the lands mentioned in the preceding paragraph, the respondents grow potatoes on lands which they hire from neighbouring farmers at Holbeach, in Lincolnshire, and elsewhere, under special agreements in the form mentioned in para. 5 hereof. This appeal relates only to potatoes grown on lands hired by the respondents under these special agreements. The profits derived by the respondents from potatoes grown on these lands are included in the assessment under Sched. D appealed against, and the only question for the opinion of the court is whether these profits have been rightly included in the Sched. D assessment.

4. The potatoes grown on the lands referred to in the preceding paragraph together with the other produce of the respondents are sent to London and sold off by the respondents at No. 107, Commercial Street, in London.

5. The memorandum of agreement which follows is admitted to be typical of the agreements referred to in para. 3 above:

'Memorandum of agreement made Oct. 11, 1921, between Herbert Parkinson Carter, of Abbotts' Manor, Holbeach, in the county of Lincolnshire, an officer of the Order of the British Empire, hereinafter called the landlord of the one part and Percy Leigh Daniels and Leslie Vaughan Daniels (trading as Joseph S. Daniels) of Spitalfields Market, London, E. and other places, farmers and potato merchants, hereinafter called the tenants of the other part, whereby the landlord has agreed to let and the tenants have agreed to take the one in consideration of the agreement of the other subject to survey eight fields consisting of 157 acres or thereabouts of land exclusive of headlands, known as Twenty-Seven acres Bean Land (Welsh's Farm) Nine acres Newland (Welsh's) Fifteen acres Newland (Wood House Farm), Six acres Oatland (Wood House) and various other parcels of land of another hundred acres situate at Holbeach Hurn, Lincolnshire, now in the occupation of the landlord upon terms and conditions following, that is to say:

(1) The tenants shall have possession of the said land for the purpose of growing potatoes from the date of this agreement until the potatoes are fully ripe and in fit condition to be stored in pits and in addition to possession of so much thereof or of other equally convenient land to be submitted therefore with the consent in writing of the said tenants as shall be required for pitting their seed and storing their crops in pits until such time as the said crop is sold and removed in the ordinary course of trade.

(2) The tenants shall at their own cost and expense provide all necessary seed and shall also at their own cost supply twelve hundredweight of the usual artificial potato manure to each acre.

(3) The tenants shall at their own cost and expense supply all the manual labour (except such as is usually performed by the horsemen and wagoners) necessary to drill the manure and plant the seed mentioned in cl. 2 hereof and take up and pit the potatoes and afterwards riddle sort clean and otherwise prepare the same for market.

(4) The landlord shall at his own cost and expense plough 10 in. deep, and when requested well and sufficiently cultivate and work the said land and

make the rows, cart the manure and seed from the nearest station or landing-place on to the land and provide all horse labour (except such as is to be provided by the said tenants under the provisions of cl. 3) that is necessary and required for drilling manure, properly covering the potatoes in the rows and for the successful production and careful scuffling, moulding, spraying and ploughing up the crop and harrowing and cross-harrowing according to the custom of the country around and carting to the pits, pitting and delivery on rail of the same to the satisfaction of the tenants or their agents.

(5) The landlord shall deliver the potatoes on rail at Holbeach or Fleet Stations at such times and in such quantities as the tenants shall require them and shall for such purpose provide sufficient men horses carts straw and sheets to load and convey the potatoes to the station, properly protected from damage by frost and weather or otherwise and unload the same into trucks and shall also provide sufficient dry wheat straw and cover therewith the ends sides and the top of each truckload of the potatoes so as to effectually protect the same from damage by frost and weather or otherwise in transit.

(6) The landlord shall supply the tenants free of charge with an ample quantity of dry wheat straw to safely and efficiently cover the seed and the whole of the crop in pits and to effectually protect the same from damage by frost and weather or otherwise.

(7) The landlord hereby undertakes and agrees to supply and carefully spread on the said land all the good rotten cowyard dung possible.

(8) The landlord hereby undertakes and agrees to occupy the said land until the said crop of potatoes shall have been cleared off the land and will in the meantime pay all rent, rates, taxes, charges and assessments that may be due from him in respect of his holding and also in no way suffer the said crop of potatoes to be distrained upon or to be taken or levied in execution.

(9) The landlord shall procure the consent of the superior landlord to this agreement if by the terms of his tenancy such consent is necessary.

(10) The tenants will pay as and for rent of the said land the sum of £3 per measured acre, and in consideration of the landlord supplying all horse-labour and men to work the horses and other manual labour as mentioned in the preceding clauses to be executed by the landlord, the sum of £15 per measured acre, top and bottom headlands not to be planted or measured in the acreage, which sum shall include all rates and taxes, parochial and parliamentary, levied or hereafter to be levied. Payments to be made as follows: end of September, 1922, £500; end of October, 1922, £500; end of December, 1922, £500; end of January, 1923, £500; end of February, 1923, £500. Balance end of March, 1923, but it is hereby agreed that should the tenants clear a larger acreage of land than is covered by the several instalments for payment as they become due, then the several instalments are to be accelerated in proportion to the land cleared. In witness, &c.'

6. Land held under the agreements in question is given up to the farmer as soon as the crop is lifted and carted away, the time taken for the complete operation from the commencement of cultivation to the carrying of the crop varying with the kind of potatoes grown. In the case of early potatoes the respondents are usually in possession of the land for less than a year, in other cases for more than a year. To secure proper rotation of crops the same land is never utilised for the purpose of growing potatoes for the respondents for two years in succession. [Here is inserted a table showing in the case of potatoes planted in the spring of 1921 the dates when cultivation started and when the fields were cleared in which, in each case, cultivation of fields started in September, 1920, and potatoes were cleared in July, September and October, 1921.]

7. The farmers and not the respondents are the rated occupiers of the

A lands in question, and the farmers and not the respondents are assessed and charged to income tax under Sched. B in respect of the occupation of the lands.

8. Counsel for the respondents contended: (a) That the lettings under the special agreements in question were not lettings for a period less than a year; (b) That the respondents were in complete occupation of the lands in question; (c) That the farmers were erroneously assessed under Sched. B in respect of B the occupation of these lands, and that the fact that the farmers and not the respondents were actually assessed did not prejudice the respondent's case; (d) That the fact that the farmers were assessed under Sched. B on twice the annual value showed that the lands had been treated as being occupied solely for the purpose of husbandry; (e) That as the agreement provided for a payment to cover all rates and taxes, parochial and parliamentary, it was C immaterial whether the Sched. B assessments were made on the farmer or on the respondents, and that neither of the parties had objected to such assessments on those grounds; (f) That the cases of *McKenna* v. *Herlihy* (5) and *Donald* v. *Thomson* (6) were not in point, as the lands in those cases were let for a period less than a year and the appellants were graziers deriving profits other than profits of husbandry from buying and selling cattle. More- D over, in the latter case, the grazier only occupied the land from May to November; (g) That the profits derived by the respondents from growing potatoes on these lands were not assessable under Sched. D.

9. The inspector of taxes, on behalf of the Crown, contended (inter alia): (a) That the farmers and not the respondents were the occupiers of the lands; (b) That the farmers had been properly assessed under Sched. B in respect of E the occupation of the lands, and that the respondents were not so assessable; (c) That the agreement did not amount to a demise of the land, but was merely a contract for the purchase of potatoes by the respondents to be grown on lands of the farmers; (d) That the profit arising to the respondents from the growing and sale of the said potatoes was a profit arising from their trade of wholesale F merchants and was not a profit arising from the occupation of land; (e) That the said assessment under Sched. D was correct and should be confirmed.

10. Having taken time to consider our decision, we held that the respondents were the occupiers of the lands in question, and we reduced the assessment to £2,577."

G In a supplemental statement of facts it was stated (inter alia) that the respondents' lands referred to in para. 2 of the Case comprised in all 770 acres, and the lands referred to in para. 3 held under the special agreements varied from year to year comprising portions of farms at Holbeach, and particulars were given of the acreage and assessments during the relevant years under Sched. B. All the manual labour was done by the respondents, the cost being for 1919, £3,675 11s. 8d., H and for 1920, £6,276 16s. Separate accounts were kept by the respondents of each of the various farms and lands and of the sales in London. The account of the Holbeach lands, the subject-matter of the special agreements, was debited with commission on the sale of the potatoes grown on the Holbeach lands at the same rate as was charged by the respondents on produce sold for other growers or consignors, and that commission was credited to the general account. In com- I puting the profits of the respondents for assessment for Sched. D for 1921–22 there was included the full amount of the profits shown in the Holbeach account. On appeal, the Special Commissioners reduced that assessment by excluding therefrom the full amount of the Holbeach profits and including the commission on the sales of potatoes grown at Holbeach.

The Attorney-General (*Sir Patrick Hastings, K.C.*), *The Solicitor-General* (*Sir Henry Slesser, K.C.*) and *R. P. Hills* for the Crown.

A. M. Latter, K.C., and *Sir E. Stanford London* for the taxpayers.

Cur. adv. vult.

Dec. 1. The following judgments were read.

SIR ERNEST POLLOCK, M.R.—The respondents, as merchants, buy and sell potatoes as well as other vegetables, and have been assessed on the profits of this business. In addition to buying potatoes that they sell, they produce some on lands which they own in respect of which they are taxed under Sched. A, and on lands which they occupy as tenants in respect of which they pay income tax under Sched. B. They also sell the potatoes grown on lands which are the subject of a special and somewhat unusual agreement. Transactions in these potatoes, they claim, should not be included in the assessment made on them under Sched. B because they form the produce of the lands of which, under the special agreement, they claim to be occupiers, and to be taxable only under Sched. B.

The terms of the special agreement are set out in para. 5 of the Case, and the question for decision herein is whether the respondents are "occupiers" under it so as to be taxable in respect of it under Sched. B unless they had exercised the option which occupiers of land for the purposes of husbandry only are granted under r. 5 of Sched. B, to be taxed under Sched. D.

Put shortly, the effect of the agreement is that certain fields which are not the same in each year, because of the necessity of maintaining the rotation of crops, are granted to the respondents to be used by them for raising potatoes on them. They supply the seed potatoes and the artificial manure used, and the labour necessary to drill the manure and plant the seed potatoes, as well as to take up and pit the potatoes and afterwards riddle, sort, and clean and otherwise prepare them for market. The "landlord" is to work and prepare the land and do all the work on it necessary to be done by horse labour, the carting involved to and from the nearest station, whether incidental to fetching the seed and artificial manure therefrom, or conveying the crop when raised and ready for market thereto. The tenants are to pay a rent of £3 per acre, measured as used, for this use of the fields as well as a sum of £15 per acre, similarly determined, for the horse labour and men to work the horses and other manual labour provided, and this sum includes all rates and taxes. The duration of the use of the land thus conferred on the taxpayers may extend to a full twelve months, or even more, or less, according as the crop sown is of early, main crop, or late potatoes.

The taxpayers contend that they are, for the purpose of the Income Tax Acts, to be deemed occupiers of the lands thus used by them. They have not exercised their option to be taxed under Sched. D. They claim that the potatoes are grown and produced as the result of their occupation of the lands, and that while they are liable to be assessed under Sched. B in respect of this occupation, the potatoes so grown cannot be distinguished from any other produce of husbandry marketed in ordinary course, and that the profits from the sale of them are not to be included in any assessment under Sched. D. ROWLATT, J., acceded to these contentions, and held the taxpayers to be occupiers of the lands and taxable only as such under Sched. B. I agree with him, and for the reasons which he gives in his judgment.

The agreement of Oct. 11, 1921, in form confers a tenancy on the taxpayers, but I do not overlook the agreement of the "landlord," under cl. 8, to occupy the land until the crop has been cleared off the land.

The terms of the agreement itself do not conclude the matter; it is necessary to have regard to the substance of it: *Smith* v. *St. Michael Cambridge Overseers* (7) (3 E. & E. at p. 390). In *Holywell Union and Halkyn Parish* v. *Halkyn Drainage Co.* (1) LORD HERSCHELL said ([1895] A.C. at p. 125):

> "The question whether a person is an occupier or not within rating law is a question of fact, and does not depend upon legal title,"

and LORD MACNAGHTEN said (ibid. at p. 127):

> "Liability to rates is not a matter of title. The question in each case must be whether there is in fact such occupation as, according to the Statute of

A Elizabeth and a course of decisions which have been recognised and established at law, carries with it liability for rating purposes."

On the above principle, and *Roads* v. *Trumpington Overseers* (2), the taxpayers appear to be in occupation of the land so as to make them liable for rates. The parties to the agreement specially guarded against this result by the insertion in cl. 10 of an express provision that the payment of the £15 shall include all rates B levied or hereafter to be levied.

The taxpayers were, under cl. 1 of the agreement, to have possession of the land, but although possession is an element of, it is not equivalent to, occupation: see *R.* v. *St. Pancras Assessment Committee* (8) (2 Q.B.D. at p. 588). In *Roads* v. *Trumpington Overseers* (2)—the *Coprolite Case* (2)—the contractors were to enter on the land and dig for coprolites and reinstate the land and, as LORD BLACKBURN C summarises their position, were to do everything that was to be done on the land. In the present case the taxpayers are to plant and harvest the only crop that is to be grown on the land, and the payments to be made by them are for rent to their "landlords" and a sum for services to be rendered incidental to, and required for, the taxpayers' crop of potatoes. It seems that the taxpayers could bring trespass quare clausum fregit against any person who entered on the land ceded to D them and interfered with their sown crop. In *Crosby* v. *Wadsworth* (3) it was held that the man who had contracted with the owner of a close for the purchase of a growing crop of grass—to be made into hay—has such an exclusive possession of the close, though for a limited purpose only, that he may maintain trespass quare clausum fregit against any person entering the close and taking the grass even with the assent of the owner. LORD ELLENBOROUGH says (6 East at p. 610): E

"He might, in respect of such exclusive right, maintain trespass against any persons doing the acts complained of in violation thereof."

In *Burt* v. *Moore* (4), where the use of dairy cows was granted to B. to be fed on the land of A., LORD KENYON said (5 T.R. at p. 333) that though B. was

F "restrained by the agreement to the particular mode of occupation, he is to be considered as the occupier of the land, and being entitled to the sole use of the land is also entitled to maintain trespass and to justify distraining the plaintiff's cattle damage feasant there":

see also *Cox* v. *Glue* (9) as to the right to bring trespass in enforcement of their respective rights by those in possession of the surface or the subsoil of the land.

G The agreement of Oct. 11, 1921, cannot be regarded as a mere sale of the crop as in *Jones* v. *Flint* (10), but as conferring the right to the possession and use of the land with the incidental right to bring trespass in respect of it. By r. 2 of No. VII of Sched. A, "Every person having the use of any lands or tenements shall be deemed to be the occupier thereof." On consideration of the cases that I have referred to, it seems clear that the taxpayers have the use of the lands, in H a full sense of that term, with power to maintain their rights. In my judgment, therefore, they must be deemed to be occupiers within the above rule, which is the interpretation clause for Sched. B.

The Case states that the "landlord" has been assessed and charged to income tax under Sched. B, in respect of the occupation of the lands. That may be so, but it does not conclude the matter as against the taxpayers. I do not shrink from I the result that there may be two persons who may be chargeable as occupiers under Sched. B, especially in view of the reasoning of the court in *Cox* v. *Glue* (9). In my judgment the taxpayers are right in their contention that their liability to assessment and tax falls under Sched. B and not under Sched. D; and that the commissioners were right in their decision.

The appeal will be dismissed with costs.

WARRINGTON, L.J.—The question in this case is whether the taxpayers are entitled to be assessed to income tax under Sched. B in respect of the occupation

of the lands in question, and the real issue between them and the Crown is whether they are in fact the occupiers of the lands within the meaning of Sched. B.

The Crown have sought to charge them under Sched. D in respect of the profits and gains accruing to them from the trade or business of potato merchants and salesmen so far as they are produced by the growing of potatoes on these lands and the sale thereof in the market. If the taxpayers are entitled to be assessed under Sched. B as the occupiers of the land, they cannot, in my opinion, without their own consent, be charged also under Sched. D in respect of the profits in question, such profits being profits arising from the occupation of lands for the purposes of husbandry. The taxpayers might elect to be charged in respect of their profits under Sched. D (Sched. B, r. 5), but unless they so elect they can only properly be charged under Sched. B. Was the learned judge right, then, in upholding the view of the commissioners that the taxpayers were the occupiers of the land for the purposes of husbandry? I felt, and expressed during the argument, some doubt whether this was so, but on reflection and on further consideration of the terms of the agreement, I am satisfied that the view of the commissioners and the learned judge is correct.

It is clear that the growing during the reason 1921–22 of a crop of potatoes meant devoting the land to that purpose exclusively for that season. The tenants are to have possession during the period of preparation and the period during which the crops are attaining maturity. That possession seems to me to be exclusive for the purpose for which the land is to be used. On the authorities the tenants would be able to bring trespass quare clausum fregit against any person, including the landlord, who might go on the land and interfere in any way with the crop, once it had been sown. Even during the period of preparation they are in possession, and I think they would by virtue of such possession be entitled to maintain such an action. It is true that during this period the landlord is entitled to enter, but this is only for the purpose of performing his obligations under the agreement between himself and the tenant, and the same is true of the subsequent period during which he has to perform on the land acts of cultivation and other acts mentioned in the agreement as to be done by him. Clause 8 of the agreement providing for the "continued occupation" of the land by the landlord does not, in my opinion, interfere with the view that, looking at the substance and effect of the agreement as a whole the tenant is the occupier of the land in question. It was obviously inserted with a view, first, to preserve the tenant from ejectment under a superior title; and secondly, to cast on the landlord rates, taxes, and so on, to the liability for which the tenant's possession of the land might otherwise expose him. Neither do I think there is anything in the fact that the landlord was rated to the poor and assessed to income tax in respect of the lands in question and the occupation thereof. To have charged the tenant would have involved a valuation separately from the rest of the farm of the lands covered by the agreement, and having regard to cl. 8, there was no object in doing so, as the ultimate liability would in any case fall on the landlord.

I agree that the appeal ought to be dismissed with costs.

SCRUTTON, L.J. (read by WARRINGTON, L.J.).—This appeal raises a troublesome question as to the assessment to income tax of the persons interested in potato growing on some land in Lincolnshire under a system common in that county. One Carter originally occupied some land in that county and was assessed under Sched. B as occupier. On Oct. 11, 1921, he entered into an agreement with two gentlemen named Daniels, who, among other things, are potato merchants at Spitalfields Market. The agreement, which is difficult to classify from a legal point of view, describes Carter as the landlord and the Daniels as tenants, and recites that the landlord has agreed to let and the tenants to take certain specified fields. [His Lordship referred to cl. 1, cl. 8, and cl. 10 of the agreement.] There are also included an elaborate set of provisions for cultivation. [His Lordship having referred to these, continued:] In fact Carter has been assessed to Sched. B

A and rated as the occupier of the lands, and the Daniels have been assessed under Sched. D as carrying on the trade of potato growers and salesmen. The Special Commissioners struck out of Daniels' assessment the profits of growing and selling these potatoes, except a conventional commission assigned to them as salesmen for selling their own potatoes; ROWLATT, J., affirmed this decision, and the Crown appeal.

B Schedule B is levied on occupiers, and "occupiers," who are charged with the tax under Sched. A, with a power of deduction from the rent due to the owner, are defined in No. VII, r. 2, as persons having the use of the land. The term is probably used in the same sense as in the law of rating. That sense may be collected from the judgments of LUSH, J., in *R.* v. *St. Pancras Assessment Committee* (8) (2 Q.B.D. at p. 588), and of BUCKLEY, L.J., in *Liverpool Corpn.* v. C *Chorley Union Assessment Committee* (11) ([1912] 1 K.B. at p. 287), and appears to involve possession of a permanent character such that trespass could be brought by the occupier with the enjoyment of a benefit from the land.

It is clear that at common law, for the same land, though hardly for the same portion of it, two persons may be in possession at the same time, and each can bring trespass. In the case of a grant by the owner of the soil of the right to D herbage, vestura terræ, or growing crops, the owner can bring trespass for damage to his right to the soil; the person having a right to the herbage for damage to the herbage or crops; but neither could bring trespass for the damage to the other's right. Thus in *R.* v. *London Corpn.* (12) the owners of the towpath could bring trespass for injury to the soil though they had granted the herbage and pasture of E the towpath to another. In *Crosby* v. *Wadsworth* (3) the purchaser of a growing crop of grass brought trespass quare clausum fregit against persons who cut the grass, "he having the exclusive enjoyment of the crop growing on the land during the full period of its proper growth." In *Cox* v. *Glue* (9) the owner of the soil brought trespass for damage to the soil, though another had then exclusive possession of the close for the purpose of pasture; but the owner of the soil was F held not to be able to bring trespass for damage to the pasture. The latter, according to LORD COKE (COKE ON LITTLETON, 4 b.), could bring trespass quare clausum fregit for damage to the pasture. The growing crops, before severance, were not the subject of larceny at common law, for they were not separate chattels. The remedy was trespass clausum fregit, because they were still part of the land: see POLLOCK AND WRIGHT ON POSSESSION, p. 230.

G In *Roads* v. *Trumpington Overseers* (2) the court had to deal with a similar case under rating law. The owner of land had let it to a farmer, reserving the minerals—i.e., coprolites, and a right of entry to get them. Coprolites were worked by removing the surface soil, digging up the coprolites and replacing the soil, only a small piece of land being worked at a time. The Court of King's Bench held that the grantee of the right to take coprolites was in exclusive occupation H and could be rated; but it might be different if the landlord "had to do anything with the land, as drain it."

I agree with MR. RYDE'S view (4th Edn. RATING, p. 56, note to p. 65) that exclusive occupation does not mean the power of excluding everyone else from the land, but does mean the exclusive power of using the rights given him in the soil. From this point of view no one but Daniels could use the land for growing potatoes; I no one else could use the land for any purpose inconsistent with Daniels' right to grow potatoes; the potatoes growing in the land were Daniels' potatoes in the sense that if Carter or anyone else dug them up or interfered with them Daniels could bring trespass clausum fregit. This does not appear to me a mere incorporeal right in grass, which was not occupation, and so could not be rated, as was held of sporting rights before the Rating Act, 1874: see *Hilton and Walkerfield Overseers* v. *Bowes Overseers* (13). It was a right in a portion of soil, enough to found an action of trespass against those who interfered with it. In *Cox* v. *Glue* (9) (see WILDE, C.J., 5 C.B. at p. 549) the jury seem to have found that the injury to the

soil extended beyond the soil necessary for the right of pasture, to the soil still occupied by the owner, who could therefore bring trespass. It appears to me, therefore, that both Daniels and Carter were in occupation of various portions of this field, which could be valued, the two together making up the annual value of the land.

The next question is whether a person who can be assessed as an occupier of land can without his consent be rated for a trade carried on, if that trade is only the use of the land for the purposes of husbandry. I say "without his consent," for such a person can, under r. 5, elect to be assessed under Sched. D instead of under Sched. B. But no express power is given to the Crown to make such an election.

Cultivating land to grow produce for the purpose of sale is, in my opinion, a trade. But Parliament has dealt with that trade, where it is exercised by the occupation of land, by assessing the occupier on the annual value of the land and not on the profits made out of its produce, unless the occupier himself elects to be so taxed. When there is a separate and distinct operation unconnected with the occupation of the land, such as a cheese factory dealing with the milk of a dairy farm, or a butcher's shop dealing with the beasts of a cattle farm, I can understand a separate assessment of that operation, but I do not think that the fact that the farmer sells his produce either on the farm or at the local market, or at Mark Lane, or even if he sells it in a shop, justifies an assessment under Sched. D as well as or in substitution for Sched. B.

I therefore agree with the commissioners that Daniels were occupiers of, at any rate, some part of the land in question, which prevented them being assessed under Sched. D, and with ROWLATT, J.'s affirmance of their decision.

The appeal should be dismissed with costs.

Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue*; *Edward Betteley.*

[*Reported by* GEOFFREY P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

Re CLOUT AND FREWER'S CONTRACT

[CHANCERY DIVISION (Lord Buckmaster sitting as a judge of the Division to take ASTBURY, J.'s List), May 28, 1924]

[Reported [1924] 2 Ch. 230; 93 L.J.Ch. 624; 132 L.T. 483; 68 Sol. Jo. 738]

Trustee—Disclaimer by conduct—No action in the trust for thirty years—No application for official legacy.

A trustee, who had not formally renounced probate or disclaimed the trust, survived the testator for nearly thirty years without proving the will, acting in the trust, or applying for a legacy left to him by the testator as recompense for the trouble he might have in proving and acting in the trusts of the will.

Held: from the length of time during which he did nothing, there was sufficient evidence that he never intended to act and that he had disclaimed the trusts.

Re Gordon (1) (1877), 6 Ch.D. 531, and *Re Birchall* (2) (1889), 40 Ch.D. 436, applied.

Re Uniacke (3) (1844), 1 Jo. & Lat. 1, and *Re Needham* (4) (1844), 1 Jo. & Lat. 34, doubted.

Notes. As to disclaimer of the office of trustee, see 33 HALSBURY'S LAWS (2nd Edn.) 184 et seq.; and for cases see 43 DIGEST 698 et seq.

Cases referred to:

(1) *Re Gordon, Roberts* v. *Gordon* (1877), 6 Ch.D. 531; 46 L.J.Ch. 794; 37 L.T. 627; 43 Digest 700, *1380.*

A (2) *Re Birchall, Birchall* v. *Ashton* (1889), 40 Ch.D. 436; 60 L.T. 369; 37 W.R. 387, C.A.; 43 Digest 700, *1381.*
(3) *Re Uniacke* (1844), 1 Jo. & Lat. 1; 43 Digest 696, *l.*
(4) *Re Needham* (1844), 1 Jo. & Lat. 34; 43 Digest 696, *m.*

Also referred to in argument:

B *Re Lord and Fullerton's Contract,* [1896] 1 Ch. 228; 65 L.J.Ch. 184; 73 L.T. 689; 44 W.R. 195; 40 Sol. Jo. 113, C.A.; 43 Digest 699, *1365.*
Stacey v. *Elph* (1833), 1 My. & K. 195; 2 L.J.Ch. 50; 39 E.R. 655; 43 Digest 699, *1375.*

Vendor and Purchaser Summons.

By his will dated July 7, 1870, William Clout devised and bequeathed his residuary real and personal estate to his wife Emma Clout, Robert Hinton and
C William Crick, on trust to convert his personal estate and invest the proceeds in the investments therein mentioned and to pay the income to his wife during her life for her separate use, and to stand possessed of his real estate on trust to pay to his wife or permit her to receive the whole net income thereof for her separate use and after her death to stand possessed thereof on trust for sale. He appointed the same three persons his executors and gave to Hinton and Crick nineteen guineas
D apiece as a small recompense for the trouble they might have in proving and acting in the trusts of his will. The testator died on Aug. 18, 1872, and his will was proved on Sept. 14, 1872, by the widow Emma Clout alone, power being reserved of making the grant to Hinton and Crick, the other executors. The testator died possessed of personal estate and freehold and leasehold property including the freehold property hereinafter mentioned. Neither Hinton nor Crick
E formally renounced probate or disclaimed the trusts of the will, but neither of them ever proved the will or acted in the trusts, the estate being administered by the widow alone. Neither Hinton nor Crick ever applied for or received his legacy. In October, 1872, the widow married John Snell. On Sept. 7, 1890, Hinton died. On Dec. 25, 1897, the widow died intestate, and on Jan. 30, 1898, letters of administration to her estate were granted to John Snell. By a deed of Feb. 11,
F 1898, which recited the death of Hinton without ever having proved or acted in the trusts of the will, and that Crick had never proved the will or acted in the trusts thereof, John Snell, as legal personal representative of Emma Snell, the last surviving or acting trustee of the will, purported to appoint William Clout the younger and Richard Clout trustees of the will in the place of Emma Snell, Hinton and Crick and made a vesting order accordingly. Richard Clout, one of the new
G trustees, died on Nov. 13, 1899, and Crick died on Jan. 18, 1901. On Nov. 10, 1911, William Clout the younger, the surviving new trustee, died, having by his will dated Jan. 18, 1907, appointed his wife Amelia Clout sole executrix, and she duly proved his will. On Nov. 26, 1923, Amelia Clout agreed to sell to John Frewen certain freehold property held under the trusts of the will, and Frewen paid a deposit. An abstract was delivered making the will of William Clout the
H testator the root of title. The purchaser required evidence to show that Crick had disclaimed the trusts of the will, and contended that otherwise, as Crick was alive on Feb. 11, 1898, when the appointment of new trustees purported to be made, that appointment was inoperative, and that the vendor could not make a title without the concurrence of the legal personal representative of Crick. The vendor
I was only able to show that Crick had never proved the will nor acted in the trusts nor applied for or received his legacy. The purchaser issued this summons for a declaration that a good title had not been shown, and for an order for the return of the deposit.

Mulligan for the purchaser.
Henry Johnston for the vendor.

LORD BUCKMASTER stated the facts, and continued: This is a point of some difficulty, as the case lies between two classes of authorities not easy to understand or reconcile, though equally binding on me.

In *Re Uniacke* (3) a settlement of Feb. 24, 1821, was made, whereby a sum of £2,000 secured by bond was assigned to Rochfort and Townsend as trustees. Townsend did not execute the settlement. The £2,000 was afterwards invested in government stock in the names of the two trustees. Rochfort died, and Townsend, who had never acted, declined to interfere. On a petition for the appointment of new trustees, SUGDEN, L.C., said:

> "It is said that the trustee never executed the deed; never acted, and now refuses to act; but after the lapse of time which has occurred since the settlement was executed, this person must be considered to have accepted the trust. The petitioner must, therefore, procure a transfer of the trust funds from him by the ordinary means."

It is difficult to understand why the lapse of time—about twenty-three years—influenced SUGDEN, L.C., so convincingly, but that he was so influenced is manifest from the next case, where the period was thirty-four years. In *Re Needham* (4) a testator died in 1810, having bequeathed a long term to Hall and other executor-trustees. Some executors proved, saving the rights of the others, but Hall declined to act. He survived the other executor-trustees. On a petition for appointment of new trustees, SUGDEN, L.C., made the appointment, but said:

> "Mr. Hall must assign the term of years to the new trustees; for after the lapse of such a number of years since the death of the testator, without a disclaimer by him, I must presume that he accepted the trust."

In other words, SUGDEN, L.C., apparently considered that Hall's long period of inaction raised a presumption that he had accepted the office, the duties of which he had neglected to perform, and according to a well-known textbook, LEWIN ON TRUSTS (10th Edn.), p. 214, the longer the period of inaction the stronger the presumption is. I find this extremely difficult to accept or understand.

There are other authorities which afford some assistance. In *Re Gordon* (1) an executor-trustee renounced probate and did not in any way act as trustee, but he did not execute a disclaimer. He died three years after the testator without acting. JESSEL, M.R., dealt with the disclaimer point separately as follows (6 Ch.D. at p. 534):

> "I think that there was sufficient evidence of disclaimer. My reasons for saying so are these. In the first place we have this, that he never acted; that is a very strong circumstance, a man lives three years and does not act at all. It is a strong proof that he does not intend to act."

That is directly contrary to SUGDEN, L.C.'s view:

> "Of course it is not in itself conclusive, but it is evidence that he does not intend to act. But, when we have the trusts of the will and the personal estate combined, the real estate to be sold and made a mixed fund, and to be applied with the personal estate in paying debts, legacies, and funeral expenses, and we find the same people appointed executors, and the gift of the personal estate is not to him except the direction to get it in and divide it, and then we find the trustee renouncing, it is conclusive evidence; he renounces execution of the will as to the personal estate, he cannot carry out the trusts as to the payment of the debts and funeral and testamentary expenses, as that is the executor's business, and the person who takes out the administration must perform it. He cannot, as I understand it, get rid of a part of his trust in this way. In other words, it is evident that he intends to have nothing to do with the will, and that he intends, in fact, to disclaim all the trusts; that is material evidence."

This shows that the mere fact that a trustee does nothing for three years is strong, though not conclusive, evidence that he does not intend to act. Surely a longer period of inaction would be still stronger evidence.

In *Re Birchall* (2) an executor-trustee, Ashton, never proved or acted in the trusts of the will, and there was evidence that he had told the beneficiaries that

A he would do neither. But he never formally renounced or disclaimed. Nine years after the testator's death, the sole acting trustee died, and the beneficiaries brought an action against Ashton in the Palatine Court for the appointment of new trustees. A few days later, Ashton purported to appoint Healey a new trustee with himself, and Healey was then added as a defendant. Ashton was not called by either side, but Bristowe, V.-C., held that the evidence of his non-acting and his statement B was enough to prove disclaimer, and that his appointment of Healey was void. On an appeal brought by Ashton and Healey, Cotton, L.J., said (40 Ch.D. at p. 438):

> "It is not necessary to say what my conclusion might have been if the evidence had come before us in the first instance. There was some evidence in favour C of the conclusion at which the Vice-Chancellor arrived, that Ashton had never acted in the trusts or accepted the office of trustee, and he was not put into the witness-box and asked whether he had ever acted. It is impossible for us in this state of circumstance to reverse the decision of the Vice-Chancellor on this point."

Lindley, L.J., said (ibid. at p. 439):

D "I am of the same opinion. There was evidence that Ashton had not acted, though he was not asked in the witness-box whether he had done so. But the Vice-Chancellor had all the evidence before him, both words and conduct, and he came to the conclusion that Ashton had disclaimed the trusts, and I think I should have arrived at the same conclusion. . . . All we know is that he said in the conversations, which were proved, that he had not accepted the trusts, E and he was not asked in the witness-box whether he had acted."

Lopes, L.J., was of the same opinion, and said (ibid.):

> "It was argued that there was no evidence of anything but conversation. But the subsequent conduct of Ashton in not acting for nine years must be taken into account. On the whole evidence I am of opinion that the Vice-Chancellor F was justified in coming to the conclusion at which he arrived."

In the present case, Crick survived the testator for nearly thirty years without proving, acting of applying for, or receiving his official legacy. In the circumstances, I think that is sufficient evidence that he never intended to act, and disclaimed the trusts. There will consequently be a declaration that a good title was shown, and the purchaser must pay the costs.

G Solicitors: *Ernest F. G. Oxley*; *Scott & Son.*

[*Reported by* E. K. Corrie, Esq., *Barrister-at-Law.*]

SCRIMAGLIO *v.* THORNETT AND FEHR

[COURT OF APPEAL (Bankes, Scrutton and Sargant, L.JJ.), February 7, 1924]

[Reported 131 L.T. 174; 40 T.L.R. 320; 68 Sol. Jo. 630; 29 Com. Cas. 175]

Arbitration—Submission—Dispute "to be settled by arbitration in London in the usual way"—"Usual way"—Way in which disputes arising as to particular commodity or class of commodity were usually settled by arbitration held in London.

Arbitration—Setting aside award—Misconduct of arbitrator—Need of motion to set aside—Failure of one side to appoint arbitrator—Other arbitrator acting as sole arbitrator—Failure to give proper notice of hearing—Not defence to action on award—Arbitration Act, 1889 (52 & 53 *Vict.*, *c.* 49), *s.* 11.

By a contract for the purchase and sale of carbonate of soda and soda ash made between an Italian buyer and English sellers, it was provided: "Any dispute arising out of this contract to be settled by arbitration in London in the usual way." A dispute having arisen between the parties, the sellers appointed M. as their arbitrator. The buyer having failed to appoint an arbitrator after due notice given, M. made an award in favour of the sellers, who, in an action by the buyer for the repayment of a sum which, he alleged, he had overpaid under the contract, counter-claimed to enforce it. The buyer denied liability on the grounds: (i) that the dispute had not been referred to arbitration in London in the usual way, that is to say, in accordance with the conditions of the British Chemical Trade Association; (ii) that under the Arbitration Act, 1889, a single arbitrator could not act without the concurrence of both parties, and that he had not concurred in the appointment of M.; and (iii) that the arbitrator had not given proper notice of his intention to proceed with the arbitration. Evidence was given that the appointment of M. as sole arbitrator was the habitual form of arbitration adopted in the particular trade.

Held: (i) the words "to be settled by arbitration in London in the usual way" meant the way in which disputes arising as to the particular commodity or class of commodity were settled in London, and there was ample evidence that the dispute had been settled "in the usual way"; (ii) any objection to the award on the ground of irregularity or misconduct on the part of the arbitrator could only be taken by motion to set aside or remit the award, and the buyer having failed to move within the limited time, his remedy in that respect had lapsed.

Notes. The Arbitration Act, 1889, s. 11, has been repealed by the Arbitration Act, 1950, s. 44 (3). See now s. 23 of the 1950 Act.

Applied: *Birtley District Co-operative Society, Ltd.* v. *Windy Nook and District Industrial Co-operative Society, Ltd.*, [1959] 1 All E.R. 43.

As to the construction and scope of an arbitration agreement, see 2 HALSBURY'S LAWS (3rd Edn.) 11 et seq.; and as to actions on an arbitrator's award, see ibid. 51; and for cases see 2 DIGEST (Repl.) 440 et seq., 686 et seq. For the Arbitration Act, 1950, s. 23, see 29 HALSBURY'S STATUTES (2nd Edn.) 108.

Cases referred to:

(1) *Oppenheim & Co.* v. *Mahomed Haneef*, [1922] 1 A.C. 482; 91 L.J.P.C. 205; 127 L.T. 196, P.C.; 2 Digest (Repl.) 686, *1991*.

(2) *Bache* v. *Billingham*, [1894] 1 Q.B. 107; 63 L.J.M.C. 1; 69 L.T. 648; 58 J.P. 181; 42 W.R. 217; 9 R. 79, C.A.; 25 Digest 325, *265*.

(3) *Thorburn* v. *Barnes* (1867), L.R. 2 C.P. 384; 36 L.J.C.P. 184; 16 L.T. 10; 15 W.R. 623; 2 Mar.L.C. 459; 2 Digest (Repl.) 563, *980*.

Also referred to in argument:

Bright & Bros. v. *Gibson & Co.* (1916), 32 T.L.R. 533; 2 Digest (Repl.) 441, *148*.

Appeal from a decision of GREER, J., on the trial of a preliminary point of law.

The buyer claimed to be repaid £392, being an amount alleged to have been overpaid in respect of two contracts for the purchase and sale of carbonate of soda and soda ash respectively. This claim was admitted subject to the sellers' counter-claim, whereby the sellers alleged that the buyer had committed a breach of the contract by refusing to take up the shipping documents. Each contract contained an arbitration clause in the following terms: "Any dispute arising out of this contract to be settled by arbitration in London in the usual way." In accordance with that clause, the dispute was referred to arbitration, and the sellers appointed a Mr. Charles Mangold as their arbitrator. No appointment of an arbitrator having been made by the buyer after due notice given, Mr. Mangold acted as sole arbitrator and he awarded that the buyer should pay to the sellers £4,800 together with a sum for the costs of the arbitration, which amount the sellers claimed. The buyer refused to pay on the grounds that (i) the dispute had not been referred to arbitration in London in the usual way; (ii) by the Arbitration Act, 1889, a single arbitrator could not act without the concurrence of both parties, and he had not concurred in the appointment of Mr. Mangold; Mr. Mangold had no power to act as arbitrator or make an award; (iii) Mr. Mangold had not given proper notices of his intention to proceed with the arbitration, and the award was bad on the face of it and unenforceable in law. In the alternative, he said that "arbitration in London in the usual way" meant arbitration according to the rules of the British Chemical Trade Association; and that Mr. Mangold had not been appointed arbitrator in accordance with those rules. MCCARDIE, J., ordered the issue whether the award was a valid one to be tried before any other issue. The sellers said that the usual method of arbitration in the chemical trade was by two arbitrators with an umpire. GREER, J., after hearing evidence, decided the preliminary point in favour of the sellers, namely, that the award was a valid one. The buyer appealed.

Neilson, K.C., and *C. M. Pitman* for the appellant, the buyer.
Jowitt, K.C., and *James Dickinson* for the respondents, the sellers.

BANKES, L.J.—This appeal raises the question whether GREER, J., put a right construction on a clause in a contract entered into between the parties for the purchase and sale of a quantity of soda ash. The clause in question was one which provided that any dispute arising out of this contract should be settled by arbitration in London in the usual way, the contract being one between merchants in this country and a merchant at Genoa. A dispute did arise, and thereupon the merchants in this country, the sellers, appointed an arbitrator and gave notice to the Genoa merchant to appoint his arbitrator, and that they had appointed their arbitrator. The Genoa merchant did not appoint an arbitrator, and thereupon the arbitrator appointed by the sellers proceeded to act as sole arbitrator, and he gave notices to the buyer that he was intending to proceed. I think a good deal might be said in reference to the regularity or irregularity of those notices if the question were open to the buyer in these proceedings. The form of action here was an action by the buyer for a balance of account which he said was owing to him. That was not disputed, but the sellers counter-claimed by claiming the amount which had been awarded to them by the sole arbitrator, amounting to over £4,000. In answer to that counter-claim, the buyer set up, in substance, two separate defences—namely (i) that the arbitrator had no jurisdiction, and (ii) that, even if he had jurisdiction and was properly acting as arbitrator, he had acted irregularly in certain matters which he specified, including the failure to give proper notices of the hearing. I think it is quite clear, on the authorities, that that class of defence is not open to the buyer. SCRUTTON, L.J., has referred to *Oppenheim & Co. v. Mahomed Haneef* (1), where VISCOUNT CAVE expressly deals with and decides that question. He there says that, if the complaint is of irregularity, it cannot be pleaded in answer to an action on the award, but that, if the party desires to raise the question, it must be on motion to set aside, and if the time has elapsed to do that, then the party has lost that form of remedy.

The question, therefore, resolves itself into this, whether the learned judge was right in saying that this sole arbitrator had jurisdiction to act, and that depends on the construction which has been placed on this clause. He read it in this way: "Any dispute arising out of this contract to be settled in London," that is to say, the place where the arbitration was to take place, and it also indicates the law by which the arbitration is to be governed as far as ordinary law applies having regard also to the further terms of the contract which provided that it was to be "arbitration in London in the usual way." And the learned judge has held, and I think rightly held, that that meant in the usual way in which disputes in reference to the particular commodity or class of commodity are dealt with. The learned judge says that it does not provide that it must necessarily be the universal way, but only a usual way. These are his words: "In the usual manner as in the chemical trade in London." It appears to me that that means not the invariable way—the learned judge does not say "the invariable way"—but the usual way. I think "the usual way" is the way usually, though not always, adopted. If the learned judge is right in his construction that "in the usual way" means in the usual way of dealing with disputes in reference to commodities such as this particular one (that is to say, in the chemical trade generally), the evidence was really all one way on the question whether or not this particular way of proceeding by appointing arbitrators, and if the one party did not appoint his arbitrator then the sole arbitrator would act under s. 6 (b) of the Arbitration Act, 1889, was the usual way, and if the learned judge was right in saying that the contract referred to the usual way in this particular trade, then I think it follows that the judgment was correct and cannot be interfered with.

SCRUTTON, L.J.—An Italian gentleman resident in Genoa makes a contract with an English firm, but in the form of contract is the clause: "Any dispute arising out of this contract to be settled by arbitration in London in the usual way." That particular clause, in my experience, is a time-honoured clause in London and in many cases it is impossible to find out what it means because, on the evidence, there does not appear to be any usual way relating to that particular commodity. It must be settled by evidence whether there is a usual way, and one question is within what sphere is that usual way to be found. Counsel for the buyer suggests that there might be three methods. It might be the usual way of arbitrations in London without reference to any particular trade; it might be the usual way in the particular trade in which the commodity which was the subject-matter of the contract was dealt in; or it might be where a course of business is proved between the parties, the usual way between those parties, according to that course of business.

In this case, there have been no previous dealings between the parties which had involved arbitration, and I agree with the view of the learned judge that, in such a case, it means the usual way in the trade which embraces the particular article which is to be bought or sold. In some cases it is difficult to ascertain even this usual way because the ways of arbitration in the trade vary so much. Commercial men know their own business best, but I think it is a pity they keep to this form instead of stating in two or three lines, as they might do, what form of arbitration they mean. But they keep on using this form and when they do use this form the court has to find evidence whether there is or is not a usual way in that trade. I agree with GREER, J., that that does not mean the invariable way. It means the way so frequently used in relation to the number of arbitrations that it may properly be described as the usual way—not a usual way, because there may be two or three—but the usual way in the trade. If that is the proper meaning of the clause, then the evidence in this case was practically all one way, namely, that the usual way was to have an arbitration conducted by two arbitrators who may appoint an umpire. As to the procedure in the arbitration, when once one has the arbitration, I do not think this means that one has to find out what is the usual way in the trade in which arbitrations are conducted. I think that would

generally be a hopeless attempt. What it means is this: once one has the arbitrators appointed, they have to deal with the matter according to the law of England and the conditions laid down in the Arbitration Act, 1889.

Counsel for the buyer then desired to take the further point that, once one has the arbitrator properly appointed sole arbitrator, he conducted himself improperly. In my view, the decisions have settled that, when once one has the arbitrator properly appointed and the objection to the award is that, being properly appointed, he has conducted himself improperly in the arbitration so that the award can be set aside on the ground of misconduct, that cannot be set up as a defence to an action on the award; the objection must be taken by motion under the Arbitration Act, 1889, to set aside or remit the award. VISCOUNT CAVE has stated the principle in the Privy Council in *Oppenheim & Co.* v. *Mahomed Haneef* (1). Of course that case is not technically binding on us; he was only stating what was laid down by this court in *Bache* v. *Billingham* (2) and in previous cases, of which *Thorburn* v. *Barnes* (3) is one. Consequently, even if on the first point as to the construction of the clause the buyer is right, on the second point he cannot set up any defence to an action on the award for the reasons I have stated. I think it is very important that, when a commercial arbitrator acts as sole arbitrator, he should be very careful in the case of foreigners to see that they have abundant notice of his proceedings. Nothing is more likely to bring English justice into contempt abroad than that proceedings should be carried on by an English arbitrator acting alone without fullest notice of what was going on being given to the foreigner. I do not say that that was not done in this case, but with reference to this and other cases I have thought it desirable to say that an English arbitrator should be very careful to observe that practice when dealing with foreigners.

SARGANT, L.J.—I am of the same opinion. I would only add what I think is the construction of this short phrase "by arbitration in London in the usual way." In the first place, I think "in London" denotes primarily the locality where the arbitration is to be held. That may not exhaust its meaning, because the locality may have some influence on the character of the arbitration, and that is made plain by the subsequent words "in the usual way." I think those words must show that some comparatively definite subject-matter is being considered, because it is hardly possible to use that phrase "in the usual way" if anything in the world, in any place, is to be considered. In my judgment, the words "in the usual way" mean this: in the way usual in arbitrations there, that is in London, with reference to the subject-matter of the contract.

Appeal dismissed.

Solicitors: *Cosmo, Cran & Co.*; *Barnes & Butler.*

[*Reported by* EDWARD J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

NICHOLL *v.* LLANTWIT MAJOR PARISH COUNCIL

[CHANCERY DIVISION (Tomlin, J.), May 13, 1924]

[Reported [1924] 2 Ch. 214; 93 L.J.Ch. 602; 131 L.T. 634; 68 Sol. Jo. 718]

Burial—Burial ground—"Disused burial ground"—Land conveyed to burial authority—Not consecrated or used for burial—Power to exchange for another piece of land free from restrictions on building—Burial Act, 1852 (15 *&* 16 *Vict., c.* 85), *s.* 28—*Burial Act*, 1853 (16 *&* 17 *Vict., c.* 134), *s.* 7—*Metropolitan Open Spaces Act*, 1881 (44 *&* 45 *Vict., c.* 34), *s.* 1—*Disused Burial Grounds Act*, 1884 (47 *&* 48 *Vict., c.* 72), *s.* 2, *s.* 3, *s.* 5—*Open Spaces Act*, 1887 (50 *&* 51 *Vict., c.* 32), *s.* 2, *s.* 4, *Schedule—Local Government Act*, 1894 (56 *&* 57 *Vict., c.* 73), *s.* 8 (2).

The words "set apart for the purposes of interment" in the Metropolitan Open Spaces Act, 1881, s. 1, as amended by the Open Spaces Act, 1882, s. 2 and Schedule, mean an actual physical setting apart, and, therefore, the conveyance of a piece of ground for burial purposes without any further act of consecration or any actual burials therein does not make the land into a "disused burial ground" so as to bring it within the restrictions on building imposed by the Disused Burial Grounds Acts, 1884, s. 3. A council has power to exchange such land by virtue of the power to sell land not wanted for interments contained in the Burial Act, 1852, s. 28, as extended by the Burial Act, 1853, s. 7, or (if the council has adopted the Burial Acts) under the Local Government Act, 1894, s. 8 (2).

Dicta of KAY, J., in *Re Ponsford and Newport District School Board* (1), [1894] 1 Ch. at p. 467, and of BRAY, J., in *Re Bosworth and Gravesend Corpn.* (2), [1905] 1 K.B. at p. 409, to the effect that land set apart for the purposes of interment is a "disused burial ground" although never used for interments, doubted.

Notes. The Burial Act, 1852, s. 28, was repealed, except so far as relates to burial boards appointed under the Burial Acts, 1852 to 1906, by the Local Government Act, 1933, s. 307 and Sched. XI. It was repealed as to London by the London Government Act, 1939, s. 207 and Sched. VIII. The Metropolitan Open Spaces Act, 1881, s. 1, as amended, was repealed by the Open Spaces Act, 1906, s. 23 and Schedule. For the definition of "disused burial ground," see, now, s. 20 of the Act of 1906. The Disused Burial Grounds Act, 1887, s. 2 and Schedule, were likewise repealed by the Act of 1906. The Local Government Act, 1894, s. 8 (2), was repealed by the Local Government Act, 1933, s. 307 and Sched. XI, Pt. IV. The powers of local authorities and parish council to sell or exchange land are now contained in the Local Government Act, 1933, s. 165 and s. 170.

Explained: *L.C.C.* v. *Greenwich Corpn.*, [1928] All E.R.Rep. 724.

As to provision of burial grounds, and as to building on disused burial grounds, see 4 HALSBURY'S LAWS (3rd Edn.) 53 et seq., 88–90; and for cases see 7 DIGEST 540 et seq., 551, 552. For the Burial Act, 1852, s. 28, the Burial Act, 1853, s. 7, the Disused Burial Grounds Act, 1884, s. 2, s. 3 and s. 5, and the Open Spaces Act, 1887, s. 4, see 2 HALSBURY'S STATUTES (2nd Edn.) 708, 723, 792, 793; and for the Local Government Act, 1933, s. 165 and s. 170, see 14 HALSBURY'S STATUTES (2nd Edn.) 442, 445.

Cases referred to:

(1) *Re Ponsford and Newport District School Board*, [1894] 1 Ch. 454; 63 L.J.Ch. 278; 42 W.R. 358; 10 T.L.R. 207; 38 Sol. Jo. 199; 7 R. 622; sub nom. *Ponsford* v. *Newport District School Board*, 70 L.T. 502, C.A.; 7 Digest 551, *291.*

(2) *Re Bosworth and Gravesend Corpn.*, [1905] 1 K.B. 403; affirmed, [1905] 2 K.B. 426; 74 L.J.K.B. 810; 93 L.T. 226; 69 J.P. 337; 54 W.R. 39; 21 T.L.R. 608; 3 L.G.R. 849, C.A.; 7 Digest 552, *292.*

A Also referred to in argument:

Re Ecclesiastical Comrs. and New City of London Brewery Co.'s Contract, [1895] 1 Ch. 702; 64 L.J.Ch. 646; 72 L.T. 481; 43 W.R. 457; 11 T.L.R. 296; 13 R. 409; 7 Digest 552, *293*.

Re Howard Street Congregational Chapel, Sheffield, [1913] 2 Ch. 690; 83 L.J.Ch. 99; 109 L.T. 706; 30 T.L.R. 16; 58 Sol. Jo. 68; 7 Digest 552, *296*.

B

Special Case.

The Llantwit Major Parish Council (hereinafter called "the council") were the duly constituted burial authority for the parish of Llantwit Major in the county of Glamorgan, having, pursuant to s. 7 of the Local Government Act, 1894, adopted the Burial Acts, 1852 to 1900. By a deed dated Dec. 3, 1921, and made C between the plaintiff of the one part and the council of the other part, it was recited that the plaintiff was desirous of making a gift of the hereditaments hereafter described to the council for such purposes and subject to such provisions as were thereafter expressed, and that the council, having been duly constituted a burial authority for the parish of Llantwit Major, were desirous of accepting such gift of the said hereditaments and of holding the same pursuant to the provisions D of the Burial Acts, and had agreed to execute such work on the premises and perform such acts in relation thereto as were thereafter mentioned. The plaintiff then, for the purpose of effecting the aforesaid desire and in consideration of the covenants by the council thereafter contained, conveyed to the council a piece of ground situate in the parish of Llantwit Major containing two acres and twenty-six perches, being part of fields Nos. 634 and 637 on the ordnance survey map of the E parish, "To hold the same with and to the use of the council their successors and assigns for ever according to the true intent and meaning of the said Acts." The council then covenanted (a) within six months from the date of the deed to erect, and forever thereafter maintain, a fence along the east side of the land conveyed; and (b) within twelve months from the date of the deed to redeem the tithe rent-charges charged on and paid in respect of the land conveyed and of the remainder F of the said two fields retained by the plaintiff. This piece of land had never been fenced or consecrated, and no interments had taken place there, it having been found impracticable to use the piece of land for the purposes of interments, owing to the fact that the rock strata extended up to a short distance below the surface. Further, the piece of ground did not adjoin any other land used as a burial ground. By an agreement, dated Dec. 31, 1923, the council agreed to re-convey the piece G of land to the plaintiff free from all restrictions attaching thereto by reason of the same having been conveyed to the council as a burial authority, and to make such application to the court as might be necessary to enable this to be done; and the plaintiff thereby agreed in exchange therefor to convey to the council another piece of land for use as a burial ground. This agreement was made with the consent of the parish meeting. The parties were in doubt whether the relevant statutory H provisions operated to prevent the re-conveyance to the plaintiff of the piece of land free of all restrictions as to the user, and the question was submitted to the court on a Special Case stated by consent pursuant to R.S.C., Ord. 34.

Clause 7 of the Special Case set out the relevant statutory provisions as follows:

"The Metropolitan Open Spaces Act, 1881, s. 1, provides as follows: 'The term "Burial Ground" shall include any ground, whether consecrated or not I which has been at any time set apart for the purposes of interment and in which interments have taken place since the year 1800.'

The Disused Burial Grounds Act, 1884, s. 3, provides that 'After the passing of this Act it shall not be lawful to erect any buildings upon any disused burial ground, except for the purpose of enlarging the church, chapel, meeting house or other places of worship.'

By s. 2 that 'In this Act a "disused burial ground" shall mean a burial ground in respect of which an Order in Council has been made for the discontinuance of burials therein.'

By s. 5 that 'Nothing in this Act shall apply to any burial ground which has been sold or disposed of under the authority of any Act of Parliament.'

The Open Spaces Act, 1887, provides, by s. 4, as follows: 'In the Disused Burial Grounds Act, 1884, and this Act, the expression "burial ground" shall have the same meaning as in the Metropolitan Open Spaces Act, 1881, as amended by this Act, and the expression "disused burial ground" shall mean any burial ground which is no longer used for interments whether or not such ground shall have been partially or wholly closed for burials under the provisions of any statute or Order in Council.'

And by the effect of s. 2 (1), and the Schedule, the following words in s. 1 of the said Metropolitan Open Spaces Act, 1881, occurring in the definition of a burial ground are repealed—namely, the words 'and in which interments have taken place since the year 1800.'

By the Local Government Act, 1894, s. 8 (2), the defendant council is authorised with the consent of the parish meeting to sell or exchange any land vested in the council."

The question submitted to the court was whether, on a conveyance by the plaintiff to the council of certain freehold hereditaments situate in the parish of Llantwit Major in exchange for the freehold hereditaments conveyed to them by the conveyance of Dec. 3, 1921, the council would be empowered under the statutes in that behalf to re-convey to the plaintiff the last-mentioned hereditaments free from all restrictions.

Church for the plaintiff.
Watmough for the parish council.

TOMLIN, J.—This is a Special Case stated for the opinion of the court under R.S.C., Ord. 34, and it raises an unusual point of some little difficulty. It has been suggested that there has fallen on the piece of land conveyed to the council, which they are seeking to exchange for other land, something of the nature of a permanent blight, so that it can never more be used for any purpose which involves building, by reason of the restriction against building imposed by the Disused Burial Grounds Act, 1884, on a disused burial ground. It would be a very remarkable conclusion to come to, for this land has, in fact, never been allocated to or used for burials, and it would be an abuse of language to describe it as a disused burial ground unless the expression has an artificial meaning at law. I have very little doubt that, when the definition of "burial ground" in the Metropolitan Open Spaces Act, 1881, was amended by the Open Spaces Act, 1887, it was meant by this modification to provide that any ground which had been set apart for interment, in which interments had at any time taken place, whether before or since the year 1800, should be burial grounds within the definition; and, if that were so, it might well be that the definition of "burial ground" would not include a ground set apart for burials in which, in fact, no burials had ever taken place. But whether that be so or not, I am quite satisfied that, in this case, the land with which I am dealing has never at any time been set apart for the purposes of interments within the meaning of s. 1 of the Act of 1881. It was, in my opinion, never set apart, nor was any beginning ever made in setting it apart for the purposes of interments. I think that the expression "set apart" refers to an actual physical setting apart. I, therefore, come to the conclusion that this was not a burial ground within the definition, and if not, still less is it a disused burial ground, and, therefore, the prohibition against building on a disused burial ground does not apply to it.

I may add that, with reference to the definition of "disused burial ground" in s. 4 of the Act of 1887, my attention has been called to observations on it in *Re Ponsford and Newport District School Board* (1) ([1894] 1 Ch. at p. 467) and *Re Bosworth and Gravesend Corpn.* (2) ([1905] 1 K.B. at p. 409). The facts in both these cases were entirely different, and it does not seem to me that the particular observations to which I was referred were directed to anything material to the determination of those cases; and for my part I should not be prepared to

accept without much more argument the view that the definition of a "disused burial ground" as a "burial ground which is no longer used for interments" can include a burial ground which has never been used for interments. It is not, however, necessary for me to determine this in view of the conclusion I have arrived at on the facts.

The only question that remains is what are the powers of disposition of the council in reference to this land, they not having set it apart for interments. Plainly there is power to sell it under s. 28 of the Burial Act, 1852, the operation of which is extended by the Burial Act, 1853, to the whole of England. It was, in my opinion, clearly purchased by them, and, if so, they have power to sell it under that section. It may be that they also have power to sell it under s. 8 (2) of the Local Government Act, 1894, in view of their having adopted the Burial Acts under s. 7 of that Act; but, assuming that their powers are confined to those conferred by s. 28 of the Act of 1852, they stand in the position that they have, on the one hand, power to acquire land for the purpose of a burial ground, and, on the other, power to sell land acquired for but not required for that purpose. I have no doubt that a person having these two powers and giving effect to them by way of an exchange would be found to be acting intra vires and would be held to confer a good title in respect of the land so disposed of. It is inconceivable that the exchange could be held to be bad, when the person possessed all the powers necessary to effect a sale of the existing land for £x and a purchase of other land for £x. There was, therefore, power for the council to enter into a transaction with the plaintiff whereby the plaintiff disposed of part of his land and acquired the land previously conveyed to the council. It will be for the conveying counsel who advise the parties to put the transaction in the form they consider most suitable; but that there is power to carry out the transaction I have no doubt.

It may also well be—and my present view is—that, as the council have adopted the Burial Acts, the powers of sale and exchange conferred by s. 8 (2) of the Local Government Act, 1894, extend to land vested in them under the Burial Acts. In one way or another, therefore, I am of opinion that the transaction can be properly carried out and that a good title will be conferred on the plaintiff in the land re-conveyed to him free from any restriction imposed by s. 3 of the Disused Burial Grounds Act, 1884.

Solicitors: *Taylor, Rowley & Lewis*, for *J. C. Llewellin & Co.*, Newport. Mon.

[*Reported by* L. MORGAN MAY, ESQ., *Barrister-at-Law.*]

Re ALLOTT. HANMER *v.* ALLOTT

[Court of Appeal (Sir Ernest Pollock, M.R., Warrington and Sargant, L.JJ.), July 1, 1924]

[Reported [1924] Ch. 495; 94 L.J.Ch. 91; 132 L.T. 141]

Powers—Leasing—Perpetuity—No limit of time expressed in deed creating power—Trusts of annuity for life of daughter and husband her surviving—Power of leasing to provide money for annuity—Possibility of power being exercised outside period prescribed by rule against perpetuities.

A power to lease in a deed which might be exerciseable beyond the perpetuity period is invalid.

By his will a testator directed his trustees to stand possessed of the mines and minerals beneath his residuary real estate and of the rents, royalties, and profits therefrom, upon trust to pay thereout perpetual annuities to his two daughters, and after the death of each daughter on trust to pay the annuity to the husband (if any) of such daughter for his life. By a deed of family arrangement, to which the daughters were parties and in which the trusts of the will were incorporated, power was given to the trustees to lease the mines and minerals to raise the moneys to pay the annuities under the will. No limit of time was expressed in the deed within which the power was to be exercised.

Held: that as the deed contemplated the continuance of the power of leasing throughout the life of a surviving husband, and such surviving husband was not necessarily a person who was alive at the date of the execution of the deed of arrangement, it was possible for the power of leasing to be exercised at a point of time outside the period of time prescribed by the rule against perpetuities, and, consequently, such a power of leasing was void.

Notes. As to the application to powers of the rule against perpetuities, see 25 Halsbury's Laws (2nd Edn.) 149 et seq.; and for cases see 37 Digest 107 et seq.

Cases referred to:

(1) *Ware* v. *Polhill* (1805), 11 Ves. 257; 32 E.R. 1087, L.C.; 37 Digest 115, *466*.

(2) *Lantsbery* v. *Collier* (1856), 2 K. & J. 709; 25 L.J.Ch. 672; 28 L.T.O.S. 35; 4 W.R. 826; 69 E.R. 967; 37 Digest 87, *250*.

Appeal from an order of Russell, J.

By his will, dated July 6, 1882, the testator, John Allott, dealt with mines and minerals in Yorkshire, part of his residuary estate, and provided for an accumulation which came to an end in March, 1893. The testator further declared that his trustees for the time being should

> "from and after the expiration of the said accumulation period stand possessed of all the mines and minerals situate beneath the surface of the lands forming part of my residuary real estate . . . and of the rents royalties and profits to accrue in respect of the said mines and minerals until the sale thereof and also of the proceeds of sale of the said mines and minerals upon trust to set apart and pay thereout rateably the following annual sums as perpetual annuities in the nature of personal estate."

Then he set out a number of annuities which were to be payable to his daughters, and directed that the surviving husband of any daughter should be entitled during his life to the annuity given to his wife. In 1894 a deed of arrangement, in which the trusts of the will were incorporated, was executed under which power was given to trustees to lease the mines in order to provide the money needed to pay the annuities. Russell, J., on an originating summons taken out by the trustees of the deed, held that the power of leasing contained in the deed was invalid as infringing the rule against perpetuities. Beneficiaries under the deed who were interested in contending that the power was valid appealed.

A. Grant, K.C., and *Russell Gilbert* for the appellants.

C. A. Bennett, K.C. (*Bryan Farrer* with him), and *W. A. Jolly* for the trustees and other respondents.

SIR ERNEST POLLOCK, M.R.—This is an appeal from a decision of Russell, J., on a point which he was invited to consider by an originating summons setting out a number of points arising on a family deed of arrangement entered into on Dec. 9, 1894.

The testator, John Allott, who had made his will on July 6, 1882, made certain provisions for his family, which consisted of three sons and four daughters. Among the provisions that were made by the will was a provision that in certain events and at certain times after there had been made an accumulation which was for the purpose of providing a sum of £3,000 in respect of each of the daughters, the income from which was to be paid to the daughters, the testator provided that that sum should be paid to the daughters, and that the trustees, from and after the death of each daughter, should stand possessed of each daughter's share in the accumulated fund in trust to pay the income thereof to the husband, if any, of each daughter for his life. Later, it was provided that certain sums were to be paid, not by way of income from the accumulated fund, but by way of annuities that were to be paid to the daughters—upon trust

> "to pay and apply the same sums to the same persons upon and subject to the same trusts and provisions as are hereinbefore declared in respect of the shares of such daughters in the said accumulated fund and the income thereof."

The testator died on Aug. 7, 1888. Part of his estate consisted of mines and minerals in Yorkshire, and it was determined that there should be a deed of family arrangement. That deed was entered into on Dec. 9, 1894. Meantime the grandson of John Allott, Hugh Allott, who was the eldest son of John George, the eldest son of John Allott, had come of age on May 29, 1894, and he (Hugh) executed on Dec. 5 a disentailing deed, which was enrolled on Dec. 8, and became tenant in fee. The deed of Dec. 9, 1894, was entered into for the purpose of clearing up a number of matters which were left in an unsatisfactory position under the will of John Allott. In particular, I may mention two. One was that the unmarried daughters had by the terms of the will received two annuities severally; another that the income from certain mines which had not been disposed of went to the grandson and was not, as it was understood by the family to be, to belong to the three sons of the testator. However, I need not deal with those matters because they were dealt with under the deed. That deed contained a power of leasing which had not appeared in the original will. It provided that the trustees

> "may from time to time or at any time grant any leases not exceeding ninety-nine years of all or any of such mines beds veins and seams of coal and fireclay and whether opened or unopened and in each case upon such terms and conditions as to rents royalties and reservations (and as to rent whether by way of sliding scale or otherwise) and as to searching for opening up and developing and winning and working the same mines beds veins and seams of coal fireclay and otherwise with reference thereto and the carrying away thereof as to the trustees or trustee may seem proper."

The originating summons was taken out to determine (inter alia) whether this power: "thereby purported to be given to the trustees or trustee for the time being thereof of granting leases not exceeding ninety-nine years of the mines beds veins and seams of coal and fireclay thereby settled is valid and subsisting and capable of being exercised by the plaintiff and the defendant Percy Brian Allott as the present trustee of the said indenture or is void as infringing the rule against perpetuities or otherwise not subsisting and capable of being exercised as aforesaid." Russell, J., determined that this power of leasing is void, and it is on that point alone that the appeal is brought before us.

In giving judgment, RUSSELL, J., said:

"There is no limit of time expressed upon the face of the deed during which the power may be exercised."

Then he records that, although unlimited in point of time, and, primâ facie, a perpetual power, in a number of cases the courts have construed such a power:

"as limited in regard to the period of time within which it must be exercised to the duration of the trusts for the execution of which the power is given."

It has been argued before us that the learned judge's decision is wrong, and that, if one looks at the power so granted as ancillary only to the purpose of the deed which was entered into, there is no difficulty in giving validity to the power of leasing. Counsel has called our attention to a number of cases, but I do not see that RUSSELL, J., has in any way deviated from the authorities as they stand. I will not attempt to go through them; but it appears that owing to a decision of LORD ELDON in *Ware* v. *Polhill* (1) (11 Ves. at p. 283) it was a matter of doubt whether or not these powers, if unrestricted in point of time, were valid or not, and the habit of conveyancers thereupon arose of putting a time limit for a power of sale and the like, although the power of leasing was usually treated as one still subject to and curtailed by the limits of the deed within which it was to be exercised and for the purpose of which it was to be exercised. Later, the true result of LORD ELDON'S decision was explained in the passages which we have had quoted from SUGDEN ON POWERS (5th Edn.), pp. 847, 848, and in DAVIDSON'S PRECEDENTS IN CONVEYANCING (3rd Edn.), vol. 3, part 1, pp. 570, 571, and it is to be found in *Lantsbery* v. *Collier* (2), where PAGE WOOD, V.-C., gave a decision in which he said:

"The court looks to the whole intent and purpose of the settlement, and, whether the reversion or remainder in fee simple be limited after estates tail or after estates for life, will hold the power to be a valid and subsisting power until the estates tail (if any) are barred, or the fee simple vested in possession; in either of which events the purpose of the settlement is spent and the power ceases."

So, it is argued, in this present case that this power of leasing is entirely ancillary to the purposes of the deed, the power is not void ab initio, and, if the limitations are valid and the power is for the purpose of carrying into effect the limitations, then the power itself is valid.

I think, however, reading them more accurately, the result of the cases appears to be that the power ancillary is to be deemed to be valid if it is for the purpose of carrying out the limitations which are valid, provided that those limitations will in their ordinary course, or may if certain events happen, be put an end to or come to an end within the limitations of the rule against perpetuities. If that be the right view to apply, and I have endeavoured to express it in accordance with the terms which are laid down in the case to which I have referred, in order to see whether this power of leasing is good or not, one has to see, as RUSSELL, J., held, whether or not, assuming the power to be ancillary, in the events or event or particular circumstances of this deed, the actual limitations come, or would come, to an end within the rule against perpetuities. This will provides that the interests of the daughters should enure as life interests to their husbands, and their husbands might or might not be in being at the time when the testator died, that is 1888. The daughters might marry persons who were not in being at the time. Therefore, for the purpose of the life interest to the husband, it might be necessary to keep alive that power beyond the rule against perpetuities of lives in being and twenty-one years thereafter. Therefore, there being events in which it would be impossible to bring to an end that power within the limitations laid down by the rule against perpetuities, the power itself, ancillary though it is, is invalid. That is the decision which RUSSELL, J., has come to, I think it is a right decision, and, therefore, the appeal must be dismissed.

WARRINGTON, L.J.—I am of the same opinion. The question is whether a certain power of leasing contained in the deed of December, 1894, is or is not valid. It is said not to be valid because it might be exercised at a period exceeding the limit laid down by the rule against perpetuities. The deed of 1894 is a deed dealing with the rights of the beneficiaries in certain mines and minerals comprised in and devised by the will of John Allott, who died in 1888. Under the will of John Allott there were in 1894 payable under the trusts of his will two perpetual annuities. One of them by his will was settled upon trust for one of his unmarried daughters during her life and after her death made payable to any husband whom she might marry, and after the death of such husband payable to or held in trust for her children as she should appoint, and in default of appointment upon trust for children attaining twenty-one. I need not give the details of those trusts, they are quite immaterial. The point is that each of those annuities might become payable during the whole of the life of a person who was not in existence at the death of the testator, and, looking at it from the point of view of the deed of 1894, who was not in existence at the date of the execution of that deed.

The deed, as I say, dealt with the beneficial interests of the parties to it and left unaffected the legal estate which was vested in the trustees of John Allott's will. The duties of the trustees of the deed were to manage these mines and minerals, to seek for and get, if they could, the minerals, but with power to lease the mines and minerals for any term not exceeding ninety-nine years. It is that power and authority which is in question. The trusts imposed upon the trustees of the deed were, first, to pay the annuities payable under the will of John Allott to his daughters, including the annuities payable, as I have mentioned, to each unmarried daughter, and after her death to any husband whom she might marry. That was a direction to pay the annuities in those ways and to those persons. It is obvious that if the trustees carried out those trusts they might have extended beyond the period allowed by the rule against perpetuities because they might have required the trustees to pay each of these annuities for a period exceeding lives in being at the date of the execution of the deed and twenty-one years afterwards. The power of leasing is co-extensive with and given to the trustees for the purpose of enabling them to execute the trusts of that deed, and, as that is so, then that power is one which might be exercised at some time exceeding the period allowed by the rule against perpetuities—i.e., at a time beyond the lives of persons in existence at the date of the deed and twenty-one years afterwards. The learned judge has held that in these circumstances the power was void in its inception, and I agree with him, I think it was. It is perfectly true that if a power of this sort which is inserted in a settlement is capable of being put an end to or of itself comes to an end with the determination of the trusts within a period not affected by the rule against perpetuities, then the power is good although there are no express words limiting its execution to such period. But that doctrine, in my opinion, is inapplicable to the present case because in the present case the trusts themselves continue or may continue, which, of course, is sufficient for the purpose, beyond the period allowed by the rule against perpetuities. The continuance of the power is, I agree, co-extensive with the trusts of the deed; but then, unfortunately, those trusts exceed the legal limit. Therefore, as the power could be exercised within a period exceeding the legal limit, in my opinion, it is invalid. I agree with the judgment of RUSSELL, J.

SARGANT, L.J.—I am of the same opinion. I wish the court could have taken a different view, because the decision will obviously add to the expense of granting the necessary leases, but one must not fall into the error of deciding cases by making bad law. Here I desire to deal with the matter on the lines on which it is dealt with by the learned judge. The learned judge proposes a test for himself, and then considers how that test is satisfied in the particular circumstances of this case. He says this:

"Is it upon the true construction of the instrument which creates the power

capable of being exercised at a point of time when the perpetuity period has run out?"

In my judgment, that is the true test to apply. The learned judge fortifies his view by citing a passage from a judgment of PARKER, J. It is true that in many cases a power of this kind, which is not limited in point of time by any express words, is held to be good because in the settlement or other document there are indications which show that it was not intended to be exercised except with the limits which are good in law. I except, of course, the special case of the power which can be defeated by a deed under the Fines and Recoveries Act. Here, if the general terms in which the power is expressed could be limited in any such way within the necessary confines, then this power would be good. The learned judge, having stated the test, proceeds to see whether the document in question does so confine the power by virtue of its general provisions, and he says this in his judgment:

"To put the case at its lowest, the following seems to be the position, that the express term of the deed of 1894 contemplates the continuance of the power of leasing throughout the life of such surviving husband."

That is, a husband who might marry one of the daughters of the testator and who was not in existence, at the date of the deed of 1894. If that is so, not only is there not any implied limitation of the period of the exercise of the power within the proper limits, but there is a definite expression of the fact that the power may be exercised at a period outside those limits. Therefore, in my opinion, the power was bad from the beginning.

Counsel has pressed this point upon us. He says, here the trusts for the surviving husband, although he was not born at the date of the deed, are good; his life interest is a perfectly good one, and, therefore, it is absurd to say that a power of leasing which can be exercised during the continuance of a trust which is a good trust would be bad. I think the answer to that is this. The quantum of the life estate of the husband had been determined once and for all within the period allowed, namely, immediately on the death of the wife. On the other hand, the estate which would be created under the exercise of a power of leasing would be something which would be determined in quantity and quality, not within the limits, or it might not necessarily be within the limits but during the additional period covered by the remainder of the life of the surviving husband. It seems to me that the power is bad because it would create an estate the quantum of which can be determined outside the limits of perpetuity, while the estate itself of the husband is good because its quantum is determined within those limits. I agree with the very careful reasoning of the learned judge, and I accept every word that the learned judge has used.

Appeal dismissed.

Solicitors: *Collyer-Bristow & Co.*, for *Wilson, Bell, Ingoldby & Son*, Louth; *Frere, Cholmeley & Co.*; *Pilley & Mitchell*, for *Staniland & Grocock*, Boston, Lincolnshire.

[*Reported by* J. L. DENISON, ESQ., *Barrister-at-Law.*]

CHRISTOFORIDES *v.* TERRY

[House of Lords (Viscount Cave, Viscount Finlay, Lord Dunedin, Lord Sumner and Lord Carson), February 22, 25, March 18, 1924]

[Reported [1924] A.C. 566; 93 L.J.K.B. 481; 131 L.T. 84; 40 T.L.R. 485]

Agent—Account—Duty to account—Failure by principal to pay money due to agent—Right of agent to sell principal's property—Sale to third party and simultaneous re-sale back to agent—Bona fide transaction—Agent's duty to account for any profit made by him on further sale—Principal's right to damages if sale to third party at less than market price.

A broker who had bought cotton on behalf of a client became entitled, on the client's failure to pay moneys due to the broker, to close the client's account by selling the cotton, and then to claim indemnity from the client in respect of a loss on the transaction. The broker sold the cotton to a jobber who simultaneously re-sold the cotton at the same price to the broker in a fictitious name. It was found as a fact that the sale by the broker to the jobber, and the re-sale by the jobber to the broker, were not sham contracts, but were a genuine sale and re-sale. In an action by the broker to enforce the indemnity against the client,

Held: (i) as the sale by the broker to the jobber was genuine and valid it was effective to close the account and so made the indemnity enforceable against the client, even though the broker would be liable to account to the client for any profit he might make on a further sale by him of the cotton; (ii) the broker would have been liable to the client in damages also if his sale to the jobber had been for less than the full market price.

Macoun v. *Erskine, Oxenford & Co.* (1), [1901] 2 K.B. 493, and *Erskine, Oxenford & Co.* v. *Sachs* (2), [1901] 2 K.B. 504, approved.

Notes. As to the rule that an agent may not buy his principal's property without the principal's knowledge, see 1 Halsbury's Laws (3rd Edn.) 191, para. 442; and for cases see 1 Digest 470–474. As to breach of contract between broker and client, see 31 Halsbury's Laws (2nd Edn.) 621–625; and for cases see 42 Digest 793 et seq.

Cases referred to:

(1) *Macoun* v. *Erskine, Oxenford & Co.*, [1901] 2 K.B. 493; 70 L.J.K.B. 973; 85 L.T. 372, C.A.; 42 Digest 806, *145.*

(2) *Erskine, Oxenford & Co.* v. *Sachs*, [1901] 2 K.B. 504; 70 L.J.K.B. 978; 85 L.T. 385; 17 T.L.R. 636, C.A.; 42 Digest 807, *154.*

(3) *Duncan* v. *Hill*, *Duncan* v. *Beeson* (1873), L.R. 8 Exch. 242; 42 L.J.Ex. 179; 29 L.T. 268; 21 W.R. 797, Ex. Ch.; 42 Digest 805, *130.*

(4) *Ellis* v. *Pond*, [1898] 1 Q.B. 426; 67 L.J.Q.B. 345; 78 L.T. 125; 14 T.L.R. 152, C.A.; 42 Digest 804, *126.*

(5) *Walter and Gould* v. *King* (1897), 13 T.L.R. 270, C.A.; 42 Digest 800, *88.*

(6) *Ex parte Lacey* (1802), 6 Ves. 625; 31 E.R. 1228, L.C.; 43 Digest 864, *3100.*

(7) *Ex parte James* (1803), 8 Ves. 337; 32 E.R. 385, L.C.; 43 Digest 779, *2193.*

(8) *Rothschild* v. *Brookman* (1831), 2 Dow. & Cl. 188; 5 Bli.N.S. 165; 6 E.R. 699, H.L.; 42 Digest 810, *189.*

Appeal from an order of the Court of Appeal affirming a judgment of Sankey, J., in an action tried by him without a jury.

The facts are stated in the opinion of Viscount Cave.

Doughty and *De Reya* for the appellant.

Greaves-Lord, K.C., and *Goldie* for the respondent.

The House took time for consideration.

Mar. 18. The following opinions were read.

VISCOUNT CAVE (read by LORD DUNEDIN).—In the months of October and November, 1920, the appellant Mr. John Christoforides engaged in a series of speculative purchases of cotton, employing as his broker Mr. F. N. Thomson (trading under the style of J. and B. Thomson & Co.) on the terms that there should be a "mutual call" of £1,000, that is to say, that if at any time the indebtedness of either party to the other should exceed £1,000, the party in credit should be at liberty to call upon the party indebted for payment of that sum. In the month of November, 1920, the market having gone against the appellant and his account being in debit to a large amount, the broker required him to make good the deficiency, and on his failure to do so became entitled (as is now admitted) to close the account and sell the cotton bought on his behalf. The broker accordingly closed the account on Dec. 2, 1920, and called upon the appellant to indemnify him against the loss. This the appellant failed to do. The broker having afterwards got into difficulties and assigned his property for the benefit of his creditors, this action to enforce the claim for indemnity was brought by the respondent as the trustee of the deed of assignment. At the trial of the action by SANKEY, J., several defences were raised; but the controversy between the parties is now confined to two items in the broker's account, namely (i) a claim in respect of 100 bales of Egyptian cotton, and (ii) a claim in respect of 1,200 bales of American cotton, both lots having been bought on behalf of the appellant for delivery at Liverpool in January, 1921. In the account delivered by Thomson to the appellant of the sales effected on Dec. 2, the 100 bales of Egyptian cotton were entered as sold at 19·75d. per lb., and the 1,200 bales of American cotton as sold at 11·39d. per lb.; but in the course of the proceedings it was ascertained that, while the contract notes and contract book showed sales to jobbers at those prices, the contract book also showed simultaneous purchases by the broker of the same quantities of cotton from the same jobbers at the same prices, these purchases being entered as made on behalf of "John Shaw," a fictitious name which the broker was in the habit of using to cover his own speculative dealings in cotton. Upon this it was contended on behalf of the appellant that the sales alleged to have been made on his behalf of the 100 bales and the 1,200 bales were fictitious and non-existent and accordingly that as regards these items the broker had never properly closed the account against him, and had not become entitled to his indemnity. SANKEY, J., after hearing the evidence of the broker and others, found this issue in favour of the respondent. He said:

> "I accept the broker's evidence with regard to the Liverpool contracts. I think they were honest contracts, and I think he did not make any secret profit. I think that he was entitled to close as I have already found, and having closed properly, legally, and honestly, I think he was entitled to buy under the circumstances. One has to look very carefully at it. I agree with counsel (for the appellant) that it is a thing of great suspicion, but I am not prepared to say that these were dummy or sham contracts or that the Liverpool sales were not sales which the broker was entitled to effect as and when he did."

He accordingly gave judgment against the appellant for £6,385 13s. 1d. Upon an appeal to the Court of Appeal the point was again raised, but that court, after a careful consideration of the documentary and other evidence, came to the same conclusion as SANKEY, J., namely, that there had been a bona fide sale of the 100 bales and the 1,200 bales of cotton and a bona fide purchase of equivalent amounts on the broker's behalf. But in the course of the argument before the Court of Appeal it was pointed out that it appeared by the contract book that on Dec. 2, 1920, the day of the closing of the appellant's account, the broker had sold on his own behalf, 100 bales of Egyptian cotton at prices which realised £50 more

A than the amount which he paid for the same amount of cotton later in the day; and thereupon the respondent's counsel in order to avoid controversy consented to credit the appellant with this profit of £50. The amount of the judgment was accordingly reduced by £50, but subject to this reduction the appeal was dismissed. Thereupon the present appeal was brought.

It appears to me that the first question to be considered is one of fact, namely, B whether there was on Dec. 2 a real sale by the broker of the two lots of cotton at the proper market prices and a real purchase by the broker of equivalent amounts on his own behalf, or whether the whole transaction was a sham and a pretence. Upon this question, it appears to me that the finding of the learned trial judge, affirmed as it was by the Court of Appeal, is conclusive. He found that the contracts of sale and purchase were honest and bona fide transactions and not a C sham. However suspicious the circumstances appear at first sight to be—and as against the broker there was grave reason for suspicion—it is impossible to say that there was no evidence upon which the learned judge could come to his conclusion, and I do not see how that conclusion can now be disturbed. But it is argued that, however that may be, the result of the transactions of sale and purchase taken together was that the broker became the purchaser of the appel- D lant's cotton, and that under the well-known equitable rule which forbids an agent for sale to become himself a purchaser, the transactions were invalid and may be treated by the appellant as a nullity. This argument appears to me to be founded on a misconception. The appellant had no cotton, but only contracts which entitled him on payment of certain sums on the due days to have certain quantities of cotton delivered to him in the future. He failed to perform his contract, and the E broker (who, of course, was personally liable to the jobbers under the contracts) paid the amounts due and became entitled, in order to protect himself against further loss, to close the account by sales of equivalent amounts of cotton. This he did, and so ascertained and crystallised his right to indemnity; and he did not lose that right by reason of the fact that he at the same time entered into bona fide contracts for the purchase of like quantities of cotton on his own account. No F doubt, if he had sold the cotton at an undervalue, he would have been liable in damages; and if he had abused his position as the appellant's broker in order to get a profitable bargain for himself, he could have been called upon by virtue of his fiduciary position to account to the appellant for any profits that he might have made. But no undervalue was alleged or proved; and he made no profit other than the £50, which has already been credited in his account. Indeed, the G purchase by the broker of 1,200 bales of American cotton resulted in no profit, but a heavy loss which, if there had been no sale on Dec. 2, would have fallen upon the appellant. In the circumstances it appears to me that the appellant is not entitled to repudiate the sales or to escape altogether from his liability under his contracts for purchase. As to the cases cited, *Duncan* v. *Hill* (3) and *Ellis* v. H *Pond* (4) have no application, as there was no illegal sale. But *Macoun* v. *Erskine*, *Oxenford & Co.* (1) and *Erskine*, *Oxenford & Co.* v. *Sachs* (2) are directly in point, and I see no reason for questioning those decisions. For the above reasons I am of opinion that this appeal fails and should be dismissed with costs.

VISCOUNT FINLAY stated the facts and continued: I regret that I am not I able to concur with SANKEY, J., in thinking that this was a proper transaction on the part of the broker. He was broker for the appellant, and in closing his account he should have sold on the market in the ordinary way, without any arrangement for re-purchase by himself. What he was not at liberty to do directly he was not at liberty to do indirectly by means of a sale with an arrangement for immediate re-purchase by him. But the question, and the only question, with which we are concerned on this appeal is whether this impropriety in the re-purchase (the second stage of the transaction) prevents the sales to Eccles and to Laredo from effectually closing the accounts between the broker and the appellant. BANKES, L.J., points

out that the appellant had two possible remedies, and refers to *Macoun* v. *Erskine, Oxenford & Co.* (1) and *Erskine, Oxenford & Co.* v. *Sachs* (2), in both of which cases *Walter and Gould* v. *King* (5) is cited. The lord justice goes on to say:

"Now the next point was this: Assuming that the broker had the right to close the contract, the appellant by his counsel makes great complaint of the way in which he did it. His contention, as I understand it, is that not having sold to some independent purchaser—some purchaser who was quite independent of the broker and from whom the broker did not re-purchase—the appellant was entitled to disregard the sale altogether and to set up that the broker had exceeded his authority and was therefore no longer entitled to claim the indemnity to which an agent who acts within his authority is entitled. There has been a good deal of authority on that point and I am not going through all the cases, but the last cases, I think, establish the principle quite clearly—*Macoun* v. *Erskine, Oxenford & Co.* (1) and *Erskine, Oxenford & Co.* v. *Sachs* (2). In both, the facts, I think, are very similar, at any rate to this extent, that those were the cases where the broker had been employed to purchase shares for a client, and the circumstances having arisen which entitled the broker to close the account, what he did was: he went to the jobber in the market to make a price for the shares, and the jobber making a fair market price a bargain was made by the defendant with the jobber for the sale of the shares to him at the price fixed and for the re-purchase of the shares by them from him for the next account. Now that transaction was complained of as being a breach of the broker's duty because in substance he was buying his own client's shares. In both cases it was held that the broker had a right to close the transactions, and although of course he had no right to buy himself, the client could not complain except in one or two forms, either that the broker had made a profit for himself out of the transaction, in which case he would have to account for it, and the other might be if the shares had not been sold at the market price, in which case he might be liable for damages. That is how I understand the law stands with regard to a case where an agent has made an actual sale of the commodity, and has then re-bought it from the seller, and therefore if the facts in this case were that with regard to these two particular lots of cotton the broker had really sold to a real purchaser, but with an arrangement either made at the same time or shortly afterwards that he would re-purchase them from him, yet as it was a genuine transaction in the sense that it was not merely a book entry or a sham the appellant would not be entitled to refuse to indemnify the broker merely on that ground."

SCRUTTON and ATKIN, L.JJ., rested their decisions simply on the ground that these two cases in 1901 and the earlier case, *Macoun* v. *Erskine, Oxenford & Co.* (1), were binding upon them. SCRUTTON, L.J., however, appears to intimate that he would have had some doubt upon the point if it had been open to him upon the authorities. This House is, of course, not bound by these decisions of the Court of Appeal, and it becomes necessary to consider the matter afresh and on principle.

In my opinion, the passage which I have above quoted from the judgment of BANKES, L.J., correctly states the conclusion of law in the present case; I agree with that conclusion and with the reasons which BANKES, L.J., gave for it. In order to close an account of this kind effectually it is necessary for the cotton broker to sell and the sale must be a valid one. He could not himself take over the open contracts at the price of the day; a sale to himself would be a mere nullity. There can be no doubt that if any profit is realised in a case of this kind by the broker who has re-purchased from the person to whom he sold under a simultaneous arrangement, such as existed in this case, he would have to account for that profit to his client. Indeed it is on this very ground in the present case that the broker has been held liable to account to the appellant for a small profit of £50 made on

A a re-sale of the Egyptian cotton. An agent cannot retain for himself such a profit arising out of a transaction in which he was acting in a fiduciary capacity (see *Ex parte Lacey* (6) and *Ex parte James* (7)). As BANKES, L.J., further points out in the passage which I have quoted, if the sale which he effected to close the account was under the market price he would be liable in damages. It is now urged that we ought to go further and should refuse to treat the account as effectually closed B by such a transaction, which in its second stage vests the property of the client in the broker. In my opinion, any such decision would not be warranted by the law and would occasion great inconvenience in practice. The sales to Eccles and Laredo were real sales, and indeed it was for that very reason that Eccles and Laredo were able to effect the re-sales to the broker. It is true that the scheme involved that the purchaser should immediately part with his rights by an imme- C diate re-sale to the broker. But the vesting of these rights in the purchaser, even for an infinitesimal space of time, is quite enough to close the account as between the broker and his customer. I cannot see that this result is nullified by the improper re-sale to the broker which accompanies it. If the first sale by the broker was at too low a price the broker is liable in damages, and if the broker makes a profit out of the re-sale to him by again selling at an enhanced price, he D must account to his client for such profit, as the re-sale by him would be voidable at the option of the client. There is no authority for the proposition that in such a case the account as between broker and client still remains open, and it seems to me that such a proposition is, on principle, unsound. The simultaneous re-sale to the broker does not vitiate the first sale by a broker, which closed the account, and we have had no authority cited to us which would lead to any such conclusion. E For these reasons I think that this appeal should be dismissed.

LORD DUNEDIN.—I agree. From the first I thought that the case for the appellant was based on a confusion of thought, and the progress of the argument did not dispel that impression. It was admitted that unless the transactions in American and Egyptian cotton could be put aside altogether, the appellant could F not succeed. What were those transactions? They were transactions by which Thomson & Co., as brokers, bought cotton for the appellant. The broker was an agent to buy, not sell. It was true that on the client failing to produce the money the broker then had a right, by the rules of the exchange, to sell what he had not yet delivered to indemnify himself against the loss for which he had become liable to the person from whom he bought. It is true that he then becomes an agent to G sell, but that is a different transaction. I assume that if he sells to himself he could be called to account as a trustee. So here, assuming contrary to the finding of the Court of Appeal, the sales to Eccles and Laredo to be mere blinds and not real sales, and that the real sales were to J. Shaw, alias Thomson, if the appellant could have shown that the market had gone up, he would have been entitled to hold the original transaction as not effectually closed by these sales, but as closed H by the subsequent superior prices. But to say that because the broker sold to himself, that vitiated the original transaction under which the broker bought from the appellant is to take a step for which there is no authority. Various cases were cited, but none of them in point. *Rothschild* v. *Brookman* (8), which was strongly founded on, may be taken as an example. There it was an initial transaction which was no transaction at all. If here the original purchase had been of the I broker's own stock, then the case would have been in point. The prices have never recovered, the cotton was eventually sold by the broker at a further loss, so that to that extent the appellant has actually benefited by its being held that the original transaction was closed on the terms of the sale of Eccles and Laredo.

LORD SUMNER (read by LORD CARSON).—The finding that the sale contracts, by which the broker closed the appellant's open purchase contracts, were genuine and binding contracts, appears to me to dispose of this appeal. Although the rules and regulations of the Liverpool Cotton Association, Ltd., pursuant to which

they were effected, are not in the record before your Lordships, it has been taken throughout that they were of a type corresponding in this respect to those of the London Stock Exchange. If so, it becomes immaterial that the broker immediately afterwards entered into contracts of purchase with the same parties for identical qualities and quantities of cotton deliverable at the same dates and that these contracts were expected to be disposed of by setting them off and by payment of differences without actual tender or delivery of cotton. The evidence fully justified the learned judge's finding. The allegation made in the Court of Appeal that a secret profit could be detected in connection with these fresh purchases, and the concession of a credit of £50 by the respondent thereupon to avoid further expense and discussion ought not to be treated as extending the appellant's rights on this appeal. He must take the credit as it was offered, namely, as a concession without admission. The facts have not been investigated so as to establish any secret profit, and the respondent was bound in the interest of the creditors, for whom he was acting, to keep down the costs.

Nothing remains except the contention that the transaction now in question can be affected by the broker's conduct in other similar but distinct transactions, opened at about the same dates and closed at the same time. In these, admittedly, secret profits were made which have been accounted for to the appellant, and things were done by the broker which were inconsistent with his obligations as agent, and accordingly his claims connected with such irregular transactions have been abandoned. There, I think, these matters end, and the irregularities there committed leave unaffected the right to close the contracts now in question, and to claim an indemnity for the unsatisfied balance. Principals have three rights as against agents who fail in their duty—they can recover damages for want of skill and care, and for disregard of the terms of the mandate; they can obtain an account and payment of secret and illicit profits, which have come to the hands of their agents as agents; and they can resist an agent's claims for commission and for indemnity against liability incurred as a mandatory by showing that the agent has acted as a principal himself and not merely as an agent. Each remedy is distinct and is directed to a specific irregularity.

There is, accordingly, no reason why the consequences of those irregular or unauthorised acts, for which these remedies are provided, should be pushed beyond the specific mischief, for which they were devised, It seems to be true that the broker was in the habit of making secret profits and of acting as principal though employed as agent, for he found it necessary to invent a certain "John Shaw," who figured as a customer in his books to preserve the decencies of business in his office, though it does not seem to have escaped the acumen of the employees that John Shaw, whom they never saw, was really the broker, whom they saw daily. The appellant had not escaped the depredations, often quite paltry, for which this machinery was devised, but the transactions so affected have really no connection with those under appeal, and no authority has been produced to support the contention that they have. Why the broker, who, thanks to the appellant's mandate, had made himself liable on the appellant's purchase contracts, and thanks to his default was left personally in the lurch, should not be allowed the benefit of the right to close, which he clearly possessed and correctly exercised, I cannot conceive. If any rational ground could have been produced for the argument I should have been tempted to adopt it, for these practices are commercially mischievous and morally wrong, and as fulminations against them seem to produce no effect, all that judges can do is to try to show those guilty of them, in every way they can, that, after all, honesty is the best policy. Still, even a Thomson has legal rights, and cannot be treated as a kind of legal leper. I think the appeal fails.

LORD CARSON.—I concur. I only desire to add that my judgment is based on the conclusion of fact that the sales carried out by the broker to Messrs. Eccles

& Co. and Laredo & Co. respectively, were genuine and bona fide sales. If that had not been the fact, I should not have held that the account had been properly closed.

Appeal dismissed.

Solicitors: *Robert Greening & Co.*; *Halse, Trustram & Co.*, for *J. F. Reed & Brown*, Liverpool.

[*Reported by* Edward J. M. Chaplin, Esq., *Barrister-at-Law.*]

ROSLER AND OTHERS *v.* HILBERY AND ANOTHER

[Court of Appeal (Sir Ernest Pollock, M.R., Warrington and Sargant, L.JJ.), December 5, 1924]

[Reported [1925] 1 Ch. 250, 259; 94 L.J.Ch. 257; 132 L.T. 463; 69 Sol. Jo. 293]

Practice—Service out of jurisdiction—Asset of company established abroad and being wound-up in hands of agent in England—Undertaking by agent not to part with asset—Action by members of company against agent and sequestrator of company claiming injunction against agent—Plaintiffs foreigners and resident abroad—Forum conveniens—Service of notice of writ on sequestrator—R.S.C., Ord. 11, *r.* 1 (*f*), (*g*).

A Belgian company, of which the plaintiffs, who were all foreigners and resident abroad, were members, was, owing to the preponderance of enemy interests therein, placed in liquidation by the Belgian court during the war of 1914–18, and the defendant C. was appointed sequestrator. A company in England, which was being wound-up under the Trading with the Enemy Acts, was found to be owing £22,500 to the Belgian company, and, under an order of the court in the winding-up, this sum was, at C.'s request, paid to the defendant H., who undertook not to part with it if the plaintiffs started proceedings within a certain time, until further order. The plaintiffs commenced an action against H. and C., claiming an injunction to restrain H. from parting with the £22,500, an inquiry as to how much of that sum was due to the plaintiffs, and an order on H. to pay the plaintiffs the amounts found due to them. The writ was served on H., and, on an ex parte application, leave was granted in the High Court to serve notice of the writ out of the jurisdiction on C. who lived at Antwerp. On an application by C. to discharge the order, Russell, J., held that the forum conveniens was the Belgian and not the English court, as the £22,500 formed part of the assets of the Belgian company which was being liquidated by the Belgian court and by a sequestrator properly appointed by the Belgian court, and the rest of the assets of the Belgian company were in that country. He discharged the order for substituted service, and ordered that the service of the notice of the writ on C. be set aside. On appeal by the plaintiffs,

Held: (i) the discretion of the court had been rightly exercised that the forum conveniens was the Belgian court; (ii) the injunction sought in the action was not really part of the relief claimed having regard to the undertaking given by H., and, therefore, was not the sort of injunction contemplated by R.S.C., Ord. 11, r. 1 (f); and, further, the case did not come within Ord. 11, r. 1 (g), as the primary defendant was C., H. being only a subordinate or secondary defendant; and the appeal must be dismissed.

Notes. By R.S.C., Ord. 54, r. 12, as amended, application in the Queen's Bench Division to serve a writ of summons or notice of writ of summons may be made to a master; and by R.S.C., Ord. 55, r. 15, application in the Chancery Division may also be made to a master, but except in clear cases he should refer the matter to the judge: see *Practice Note*, [1955] 1 All E.R. 913.

Distinguished: *Ellinger* v. *Guiness, Mahon & Co.*, *Frankfurter Bank A.-G., and Metall Gesellschaft A.-G.*, [1939] 4 All E.R. 16. Referred to: *Kroch* v. *Rossell et Compagnie Société des Personnes à Responsibilité Limitée*, *Kroch* v. *Société en Commandité par actions le Petit Parisien*, [1937] 1 All E.R. 725.

As to service out of the jurisdiction, see 26 Halsbury's Laws (2nd Edn.) 31 et seq; and for cases see Digest, Practice, 338 et seq.

Case referred to:

(1) *Johnson* v. *Taylor Bros. & Co., Ltd.*, [1920] A.C. 144, 153; 89 L.J.K.B. 227; 122 L.T. 130; 36 T.L.R. 62; 25 Com. Cas. 69, H.L.; Digest Practice 340, *581*.

Appeal by the plaintiffs from an order of Russell, J., discharging an order of Tomlin, J., granting leave to serve notice of a writ out of the jurisdiction on the second defendant, Georges Caroly. The facts appear in the judgment of Sir Ernest Pollock, M.R.

G. B. Hurst, *K.C.*, and *W. P. Spens* for the plaintiffs.

Edward Clayton, *K.C.*, and *W. M. Hunt* for the defendant Georges Caroly.

SIR ERNEST POLLOCK, M.R.—This is an appeal from an order made by Russell, J., acceding to a motion made to him to set aside the service of notice of the writ for which ex parte leave had been granted by Tomlin, J. I am of opinion that the decision of Russell, J., is right, and I agree with him in his conclusion and in the reasons on which he founds that conclusion. I will only add a word or two on the two points that are raised. We have a case in which a claim is made by three plaintiffs, all of them aliens. One is a Czech, one is a Belgian and one is a Swiss, all resident abroad. They bring an action against two defendants, Mr. Hilbery, a solicitor in the city of London, and M. Georges Caroly, a Belgian resident in Belgium. The claim is for a certain portion of a fund which is to be distributed in the course of the liquidation of a firm called Zeller Villinger & Co. That was a Belgian Société en Commandité. The persons who are the members of that firm, as to some were under limited liability, as to others unlimited liability. A sequestrator was appointed at the outbreak of the war of 1914–18 because of the enemy interests in that Société en Commandité, and the defendant, M. Georges Caroly, is the sequestrator, who has been appointed to deal with the assets of the firm to pay its liabilities and to receive the sums due to it. Among the sums due to it is a sum which falls to be payable by Messrs. Winter & Co., Ltd., also a firm in which there were enemy interests. Shortly put, what the plaintiffs claim is that, in respect of their interest in a sum of £22,500 to be paid by Winter & Co., Ltd., to M. Georges Caroly as the sequestrator of Zeller Villinger & Co., they ought to be able to bring an action here, and they asked for and obtained ex parte leave to serve M. Georges Caroly as a party resident abroad, but a necessary party to this action. I quite agree with Russell, J., that, if it had been appreciated when the matter was put before Tomlin, J., and the ex parte leave was asked for to serve notice of the writ on M. Georges Caroly out of the jurisdiction, if it had been understood that the plaintiffs were not in fact entitled to this sum of £22,500, but to some sum, whatever it may be, being a proportion of the ultimate balance after the affairs of Zeller Villinger & Co. had been wound up and the rights of the parties ascertained, no such leave as was granted by Tomlin, J., would have been granted at all. It seems to me almost a confusion of thought to say M. Georges Caroly is a necessary party to the action which is brought against Mr. Hilbery. It seems an inversion of the real facts of the case. Mr. Hilbery is the solicitor of M. Georges Caroly, and originally some undertaking was given by him that he would hold this sum of £22,500, which was

to be paid into his hands as the agent for M. Georges Caroly, the sequestrator of the Société en Commandité, that he would hold it until an action should be brought by four persons within a given time, but it did not at all follow that, in all circumstances, that was to be taken as an admission by Mr. Hilbery, still less by M. Georges Caroly, that a proper action could be founded over here in respect of this sum of £22,500. As a matter of fact, the action that was contemplated was not brought. The action was to have been brought by four plaintiffs, and there are but three, one person is missing, but, to use counsel for the plaintiffs' expression, as an act of grace Mr. Hilbery continued an undertaking—at least, I will not call it an undertaking, for I do not think it was an undertaking to the court—he continued an assurance that he would hold the money for the time being in order to see whether or not some powers could be exercised which should restrain him or prevent him from handing over the money, as he was in duty bound to do, to M. Georges Caroly, on whose account he had received it and to whom he was bound to pay it. Now this action which has been brought by these foreigners resident abroad is, in the first instance, started against Mr. Hilbery. It appears to me that Mr. Hilbery's interest in this fund is really of the slenderest kind. In truth and in fact it might be said that he has no interest at all. His position is merely that of the agent of M. Georges Caroly, and the substantive matter that would have to be tried is this: What rights have the three plaintiffs against M. Georges Caroly, the sequestrator of the Société en Commandité? If and when it was ascertained that the plaintiffs had subsequent rights against M. Georges Caroly, then a subsidiary order might be made as to the funds which are now in the hands of Mr. Hilbery. But any order which Mr. Hilbery would be bound to obey would be subsidiary to and really dependent on the establishment by the plaintiffs of some rights against M. Georges Caroly, who is entitled to the fund as sequestrator.

It is said that the case falls within sub-r. (f) or sub-r. (g), either or both of them, of r. 1 of Ord. 11 of the Rules of the Supreme Court. Rule 1 provides:

> "Service out of the jurisdiction of a writ of summons or notice of a writ of summons may be allowed by the court or a judge whenever . . . (f) Any injunction is sought as to anything to be done within the jurisdiction, or any nuisance within the jurisdiction is sought to be prevented or removed, whether damages are or are not also sought in respect thereof."

I share the view that was expressed by my brother, SARGANT, L.J., that there are grave doubts whether or not the injunction which in fact is claimed here is such an injunction as is referred to in that sub-rule. I think that, if the claim of the plaintiffs was put in its proper order, instead of finding item (i) an injunction, one ought to see some different claim to which this claim for an injunction would be incidental because it is really only an injunction, until the rights of the parties have been ascertained, to restrain Mr. Hilbery from transferring the money to the defendant, M. Georges Caroly, otherwise than with the consent of the plaintiffs or the order of the court. I do not think for myself that such an injunction of such a fleeting nature is the sort of injunction which is referred to, or, indeed, to be included in sub-r. (f). But whether that be so or not, let me give the plaintiffs the benefit of the doubt and say that, ex facie, the claim is one which falls within sub-r. (f). With regard to sub-r. (g), I will recall, for the purposes of expressing my view, that I do not think that M. Georges Caroly is a necessary or proper party to this action, because it seems to me the position is really inverted. The claim ought to be brought against M. Georges Caroly, and it may be that Mr. Hilbery would be a person necessary to be brought into the action in order that he might have the authority of the court in any judgment given which would be binding on him to obey. But let me assume, without saying more, that the case is primâ facie within sub-r. (f) and within sub-r. (g). I agree with RUSSELL, J., in thinking that this is clearly a case in which leave to serve notice of the writ ought not to be granted, even assuming that the actual terms of Ord. 11, r. 1 (f) and (g), or both of them, have been technically complied with. It must be remembered

that the terms of Ord. 11, r. 1, are not that in cases which come within and fit into the sub-rules leave to serve notice of the writ out of the jurisdiction shall be granted, but that service of a notice of writ of summons may be allowed by the court in the circumstances recapitulated in the sub-rules. It is discretionary, and there is no question that, in deciding whether or not it will exercise its discretion, the court pays attention to a great number of matters, in particular it would pay attention to what is the forum conveniens. It would have regard to what is the substance of the question that has to be decided. If regard is to be had to the forum conveniens, I can imagine no forum less convenient than the court of this country, because what will have to be decided is what is the sum to which three foreigners, none of them resident here, are entitled in the ultimate winding-up and distribution to be made of a Belgian Société en Commandité, which has been in the hands of Belgians resident in Antwerp for a considerable number of years. That will have to be decided according to Belgian law, and it seems to me quite impossible to suggest that the courts of this country would be a suitable forum in which to determine the rights of the plaintiffs.

But I go further. What is the substance of this case? It is all very well to comply with the letter of the sub-rules of r. 1, but one ought to have regard to the true spirit of the rule. I will not refer to the very great number of cases which have been decided on this question save one, and that is a recent case of *Johnson* v. *Taylor Bros. & Co., Ltd.* (1). It is quite true that the facts in that case are very different to the present case, but there are some observations made by the learned lords which, I think, in principle are applicable to considerations which I must bring to the decision of this case. In that case, there was a definite and primary breach of contract which was committed outside the jurisdiction. There was a subsidiary and secondary suggested breach of contract which, for the purpose of trying to bring the action over here, it was alleged, and rightly alleged, was committed within the jurisdiction. But the learned lords, in giving their decision, founded it not merely on the question of whether or not the sub-rules had technically been complied with, but on the substance of the matter to be tried, and whether or not one could in truth decide that the notice of the writ, if allowed to be issued, would be ancillary to and necessary to the substantial matter which would have to be, and ought to be, decided over here. Lord Birkenhead, in his speech, points out what is the original nature of this jurisdiction, and Lord Haldane says, speaking of Ord. 11, r. 1 ([1920] A.C. at p. 153):

> "What it does is, while leaving intact the old principle that by the law of England jurisdiction depends, broadly speaking, on presence within the jurisdiction to enable the court to give special leave for service out of the jurisdiction in certain circumstances. The court may do so, that is to say that the court has a new power which it is enabled to exercise in particular cases which seem to it to fall within the spirit as well as the letter of the various classes of case provided for."

Applying that reasoning to the present case, it seems to me that there is no substance in the claim against Mr. Hilbery. There is only a right which would be determined by the particular order made on him as a mere and bare custodian of funds after the determination of the rights between the plaintiffs and M. Georges Caroly. Lord Buckmaster says (ibid. at p. 160):

> "It must, however, be remembered that the issue of the writ, even in a case within the words of the rule, can only be made by leave of the court, and in granting such leave regard ought to be had to the real breach [of course he is speaking of breach of contract there] in respect of which the action is brought, and not merely to a breach on which it is necessary to rely not to obtain relief, but only to found jurisdiction under the rule."

In other words, regard ought to be had in this case to what is the real substance of the matter which has to be tried, and not regard to a matter on which it is necessary to rely not to obtain the integral relief necessary, but merely for the

purpose of founding jurisdiction under the rule. It appears to me that this is why Mr. Hilbery has been joined in the action; that is why the application is made to us. If the true substance of the matter is looked at, this is really an action by these plaintiffs against M. Georges Caroly, resident at Antwerp, and that is where the substance of the matters which will determine the question in issue between the parties in the case took place and ought to be determined, and it is Belgian law which will decide the rights of the parties. I have only added these observations in deference to the argument presented to us by counsel for the plaintiffs, but I agree with the conclusion of RUSSELL, J., and I think the appeal must be dismissed with costs.

WARRINGTON, L.J.—I am of the same opinion. I really have nothing to add to the judgment of RUSSELL, J., on the point on which he really decided the case before him. It seems to me it would be perfectly absurd to have a man proceeding in this country with reference to the rights of some of the shareholders in a company which is being wound up in Belgium. How could one ascertain the interests of those shareholders without first ascertaining what are the debts of the company, what are the other liabilities properly payable out of its assets, and how they have to be distributed? It seems to me one cannot possibly ascertain their interests without going into the winding-up proceedings, and it is quite plain that orders made here may, possibly through ignorance of the law and practice in Belgium, conflict with directions given to M. Caroly out there, and we should be reduced to a perfectly absurd position.

But I want to say one or two words about the jurisdiction. With regard to sub-r. (f), it seems to me that the plaintiffs have not brought their case within it. The injunction is not part of the relief claimed. It is incidental only to the relief claimed in order to keep things in statu quo till the nature of that relief can be determined and given effect to by an order of the court. It seems to me that it does not come within sub-r. (f). This is just one of those cases where a claim for an injunction was made, I should conclude, for the express purpose of bringing the case, if possible, within that sub-rule. Then with regard to sub-r. (g), I am also of opinion that it does not come within that sub-rule, and for this reason, that it is not shown by the plaintiffs that the action is properly brought against Mr. Hilbery, who is the defendant in this country. The affidavit does not say so, and it shows no facts from which we can adduce that there is any right of action by these plaintiffs at all against Mr. Hilbery. It is proved in their own affidavit that the Belgian Société en Commandité is a legal entity in itself. It is also proved on the present application that the £22,500 is money of that legal entity because it has been certified to be money due to that company, and the order has been made to pay it to the sequestrator of that company. It seems to me that, when one finds an action brought, not by the legal entity to whom the money belongs, but by some persons who say they are members, shareholders, or whatever one calls them, of that legal entity, it is incumbent on them to show that, as such shareholders, they have an independent right of action against money which is the money of the legal entity. That they do not show, nor have they attempted to show it. It seems to me, therefore, that the action is not brought within sub-r. (g) any more than it is within sub-r. (f). On all the grounds, I think the order of RUSSELL, J., is entirely right, and that the appeal must be dismissed.

SARGANT, L.J.—I am of the same opinion. I entertain very grave doubt whether this action is within either the letter or the spirit of sub-r. (f) or sub-r. (g) of Ord. 11, r. 1. As regards sub-r. (f), it seems to me that what is contemplated is an action where an injunction is part of the substantive relief claimed. Of course the rights of the parties, speaking generally, are crystallised at the date of the writ, and the reason why they are not then ascertained is because it is impossible to give judgment immediately, various other steps necessarily have to be taken, other cases have priority. But, assuming that a judgment could have been given in this case at the date of the writ, it is quite clear that an injunction would

not have been any part of the relief asked, and would have been wholly and totally unnecessary. It seems to me that the claim on the writ for an injunction suggests that a fictitious importance was desired to be attributed to that part of the relief which was purely only of a temporary character. With regard to sub-r. (g), here again there is a curious inversion. Undoubtedly, even if there was any right against Mr. Hilbery, the principal and primary defendant was M. Georges Caroly, and Mr. Hilbery was not more than a subordinate and secondary defendant. So that the terms of sub-r. (g) are precisely inverted here. You merely have Mr. Hilbery as a necessary or proper party to a claim properly brought against M. Georges Caroly, and, therefore, in my judgment, the terms of sub-r. (g) of the rule are not satisfied.

Then, passing from that and looking at the merits of the case to decide which is the forum conveniens, it seems to me here that, while a general administration is proceeding in Belgium of the whole of the assets of this Société en Commandité and distribution after payment of debts and liabilities among all the shareholders of the company, here you have an attempt to obtain a separate administration of one particular asset of the company amongst certain other of the shareholders of the company. It appears to me that nothing can be more inconvenient and more illusory than a claim of that kind. It is not a case where, as sometimes may happen, you have a subordinate liquidation in one country with a view of handing over the results to the principal liquidator in another country. It is really an attempt to have a partial administration both as regards assets administered and the persons between whom the results of the administration would be handed over. The appeal, therefore, on every ground ought to be dismissed.

Appeal dismissed.

Solicitors: *William A. Crump & Son*; *Henry Hilbery & Son.*

[*Reported by* G. P. Langworthy, Esq., *Barrister-at-Law.*]

HANSEN *v.* GABRIEL WADE AND ENGLISH, LTD.

[House of Lords (Lord Buckmaster, Lord Atkinson, Lord Sumner, Lord Wrenbury and Lord Phillimore), July 1, 31, 1924]

[Reported 93 L.J.K.B. 1089; 132 L.T. 129; 40 T.L.R. 881; 16 Asp.M.L.C. 398; 30 Com. Cas. 46]

Shipping—Charterparty—Freight—Computation—Reduction in freight "if and when the price of good class bunker coals . . . is reduced"—"Price"—Inclusion in price actually paid of "leadage," and commission—Variation after date of charter.

A Norwegian steamer was chartered to carry a cargo of timber from Sweden to Wisbech, the freight to be paid at specified rates depending on the nature of the timber carried. The charterparty further provided that "if and when the price of good class bunker coals ordinarily used in this trade is reduced to 80s. per ton the freight is to be 10s. per standard less."

Held: the price referred to was the price actually paid by the shipowner for the coals and included "leadage" (the extra cost of carriage of the coal to the port where the ship bunkered) and also the amount properly payable as commission to the coal broker or merchant by the owner of a foreign ship; and the words "if and when" made this provision apply only to a variation of price after the date of the charter between the date of the charterparty and the time when the freight became payable.

A **Notes.** As to rate of payment of freight, see 30 HALSBURY'S LAWS (2nd Edn.) 583, para. 742; and for cases see 41 DIGEST 654–661.

Cases referred to:

(1) *Maatschappij Kralingen* v. *Newsum & Co.* (1921), 7 Lloyd L.R. 137.

(2) *Boyazides Bros.* v. *Gabriel Wade and English* (1922), 10 Lloyd L.R. 248.

B **Appeal** by the shipowner from an order of the Court of Appeal (BANKES and ATKIN, L.JJ.; SCRUTTON, L.J., dissenting) whereby it was ordered that the judgment of BAILHACHE, J., given in favour of the charterers be affirmed.

The short point in the case was whether the respondents, the charterers of the Norwegian steamship *Agga*, were or were not entitled to a reduction in the freight of 10s. per standard. The action was brought by the shipowner claiming a sum C for balance of freight payable under the charterparty which provided that "if and when the price of good class bunker coals ordinarily used in this trade is reduced to 80s. per ton the freight to be 10s. per standard less."

The facts appear sufficiently from the judgments.

Jowitt, *K.C.*, and *Sir Robert Aske* for the shipowner.

Claughton Scott, *K.C.*, and *Stranger* for the charterers.

D

The House took time for consideration.

July 31. The following opinions were read.

LORD BUCKMASTER.—The appellant in this case is the owner of a Norwegian steamship known as the *Agga*, chartered by the respondents under charterparty E dated June 12, 1920. By the terms of this document it was provided that the vessel should be chartered from Middlesbrough to Denmark, from whence she was to proceed in ballast to Uleaborg and there load from the agents of the charterers a cargo of sawn deals and boards, and, being so loaded, proceed to Wisbech Town. The freight was fixed for the different classes of timber at so much per St. Petersburg standard as set out in the charterparty. The voyage, according to the charter, F was duly completed and the action out of which this appeal has arisen was an action for the balance of the freight due on the agreed figures. The defence was that, according to one of certain conditions which had been attached to the charterparty, the freight ought to be reduced by 10s. per standard, and the whole question on this appeal is whether that contention is well founded or not. The clause in question is in these terms:

G "If and when the price of good class bunker coals ordinarily used in this trade is reduced to 80s. per ton the freight is to be 10s. per standard less."

It was one of eight clauses fastened on to the charterparty and headed as follows:

"Additional clauses agreed to under the Anglo-Scandinavian Agreement dated Feb. 17, 1920, otherwise the conditions of 'Scanfin' or 'Backrut' charters to H apply."

This addition appears to have been a common form taken from the agreement referred to and added at will to charterparties covering the Anglo-Scandinavian trade. The seventh clause, which was expressly struck out in the present case, being in these terms:

I "All other terms and conditions of the Anglo-Scandinavian Agreement dated Feb. 17, 1920, not mentioned herein and those of the 'Scanfin' or 'Backrut' charter to be incorporated herein."

The first question that was argued was whether, in these circumstances, it was possible to construe the critical clause by considering the whole terms of the Anglo-Scandinavian Agreement dated Feb. 17, 1920, and thus attributing to the clause a meaning which it was contended it would properly bear if so regarded. I am of opinion that this cannot be done. The heading of the added clauses is nothing but a statement of the source from which they were derived, and the express

exclusion of the general provisions of the agreement of Feb. 17, 1920, shows that the parties did not intend that the general effect of that agreement was to be introduced into the charterparty they made. The clause in question has to be construed just as though it had formed a part of the actual body of the charterparty. Even if it be so regarded, it is urged on behalf of the charterers that the price of coal had, in fact, been reduced to 80s. per ton, and consequently the freight had to suffer a corresponding reduction.

The facts with regard to the coal supply are these. The coal industry was at the date of the charterparty under the control of the Controller of Coal Mines, and directions had been issued regulating the supply of coal. The directions applicable at the material date were those issued on May 8, 1919. These provided that coal should not be delivered for bunkering ships at ports in the United Kingdom at prices less than those which were specified in the schedule; that where coal was sold to a broker or merchant his commission on a re-sale was to be charged by way of addition to the colliery price; that the prices were net f.o.b. at the nearest shipping place to the collieries, and if the coal were shipped at a more distant place the extra railway rate and shipping dues might be charged. On Mar. 22, 1920, a circular was issued by the United Coal Trade Association of the North of England which contained a statement as to the arrangements made by the coal owners themselves with the Coal Controller, by which they voluntarily fixed the rates of charge for coal at ports in the United Kingdom. These figures were as follows:

South Wales	80s. f.o.b. large.
Do.	60s. f.o.b. small.
Do.	75s., mixture containing 25 per cent. small.
Tyne and other English districts and North Wales	75s. unscreened.
Scottish ports	72s. 6d. unscreened.

The shipowner bunkered at Middlesbrough—the place which, according to the charterparty, was the port whence the vessel was to proceed to Denmark—coal known as Browney coal, which came under the head of coal from "Tyne and other English districts," the price of which, unscreened, was fixed at 75s. This coal was sold to him by the firm of W. A. Souter & Co. Souter & Co. had bought it from Joseph Walton and had paid the rate of 75s. plus 1s. 6d., the added cost for what is described as "leadage." This was the addition contemplated by the directions of Oct. 26, 1918, and to this sum 5 per cent. was added as the broker's or merchant's commission being the sum properly payable by the owner of a foreign ship to whom the colliery owners and factors sold through agents and not direct, bringing the total price up to 80s. 4d. The actual price, therefore, paid by the shipowner was not below 80s., but it is contended that the price mentioned in cl. 8 is the price contained in the collieries' circular, or, at any rate, the price at the colliery and not the price at the ship. I am unable to accept this view. It appears to me that the essence of the bargain was that if at the time of bunkering the cost of the coal should have been reduced so that the shipowner paid less than 80s., as his expenses would have fallen, so, also, there should be a reduction in freight. There was, in fact, no change whatever in the price of coal as between the date of the charterparty and the date when the ship's bunkers were filled. According to the strict language of the clause, there had been no reduction at all; it had remained constant; but even if the clause meant reduction from a price antecedent to the agreement down to less than 80s. so that if the price were proved to be less than that at the date of the charterparty the reduction in freight would operate, I am still unable to see that in fact the price ever sank below that level.

In my opinion, cl. 8 relates to a ship of the character of the chartered vessel starting from the port specified in the charterparty, and the price is the price to the owner of such a vessel. This price, in the conditions of the present case, included the extra sum of 1s. 6d. and the broker's commission. It is said that the

1s. 6d. might have been saved by taking the vessel to Newcastle-on-Tyne; but that was not what the charterparty contemplated, and the owner was under no obligation to proceed there. The added sum of 5 per cent. was the normal commission of the coal broker or merchant selling to a foreign owner. They were both charges which, under the then existing regulations affecting the supply of coal, it was right and proper to make and which the shipowner was bound to pay. In my opinion, therefore, the price never was below the standard figure mentioned in cl. 8; there was consequently no justification for the claim that the freight should be reduced, and the appellants are entitled to the full freight they claim.

LORD ATKINSON.—I have had the advantage and pleasure of reading the opinion prepared by Lord Sumner. I fully concur in it, and consequently deliver no judgment of my own.

LORD SUMNER.—If this charter is to be read simply as an instrument inter partes, drafted by the contracting parties themselves for the purposes of a particular adventure and expressing the stipulations of their unaided minds, I think that its construction presents no difficulty. A certain freight was agreed, and, the cargo being duly carried and delivered, was earned and became payable. The charterers, however, set up a clause under which in a defined event the amount so agreed is to be reduced, and a less sum is to be paid. The whole question then is whether, on the true construction of this clause by itself, the event on which the agreed freight was to be reduced ever occurred.

Clearly it did not. The words are

> "if and when the price of good class bunker coals ordinarily used in this trade is reduced to 80s. per ton, the freight to be 10s. per standard less."

This, grammatically, speaks from the date of the charter and refers to an event to happen thereafter, at any time between that date and the time when the freight becomes payable according to the agreed terms. In the present case, this event happened, if at all, before the date of the charter, and certainly not afterwards. Again, on the scheme of this charter taken as a whole but apart from other documents, the only principle on which an agreement to reduce the agreed freight while the agreed service remains the same can be justified, is that the charterers, anticipating a fall in the working costs of the voyage by a reduction in the price of coal to the shipowner, stipulate that, if this reduction occurs, it shall enure to their benefit; and that the shipowner, content with a freight which, rebus sic stantibus, gives him a recompense for his outlay with a sufficient profit, agrees to a reduction in the freight to the extent of the anticipated reduction in his coal bill. In this view the price referred to is the price which he may reasonably pay in the ordinary course of business in prosecuting the chartered voyage, and is not a price payable by others, in circumstances and under contracts to which he is a stranger, and from which he cannot benefit upon the voyage in question. If the price referred to is taken in any other sense the shipowner would be liable to have his agreed freight cut down after all his work had been done and all his outlay made, if there should occur, just before the freight becomes formally payable, a change in a market price, from which he neither does nor can derive any benefit at all. The price payable by the shipowner in fact remained over 80s. throughout. The charterers, however, are entitled to prove the circumstances in which the charter was entered into, for these constitute an instrument for testing the meaning of the language which the parties used. The charter itself introduces the reduction of freight clause, among others, by the following heading or preface:

> "Additional clauses agreed to under the Anglo-Scandinavian Agreement, dated Feb. 17, 1920. Otherwise the conditions of 'Scanfin' or 'Backrut' charters to apply."

It appears that there was, among the general trade agreements which came into existence under the peculiar conditions of the shipping trade in 1920, an agreement so dated and described, and, as its actual terms were made use of in the Court of

Appeal, they may be referred to again, without deciding whether they were either formally admissible or strictly proved. The words of the clause in the charter which provides for the reduction of freight are taken textually from the Anglo-Scandinavian Agreement, and, as documents of this kind do not verify their quotations for the mere purpose of acknowledging their indebtedness to other authors, I assume that the reference to that agreement is of some significance in the construction of it. The question now is, how far, if at all, the construction of the charterparty sued on is to be modified in view of the reference to this agreement which it contains.

The import of it, according to the charterers, may be shortly put as follows. At the beginning of 1920 the supply of ships for the carriage of Baltic timber to this country was much less than the demand. Accordingly, the timber import trade, which is highly and intelligently organised, came to terms with representatives of steamship owners in Norway, Sweden and Denmark, with the object of securing "that the latter would allocate tonnage to lift during the Baltic season 1920" specified quantities of timber—the quantity to be dealt with by Norwegian shipowners, of whom the plaintiff shipowner is one, being 100,000 standards, and the total quantity being 260,000. Clause 3 of this agreement provided for an elaborate system of rates of freight varying according to the ports of loading and discharge, the size of the ship, and the particular description of timber carried. Its scheme is that standard rates are fixed, and extra rates, measured by sums to be added to the standard rates, are provided to meet these variations. The clause itself concludes with this provision. "all Scanfin and Backrut charters to have the following alterations," and the fifth and final paragraph of these alterations is in the words which constitute the reduction of freight clause in the present charter. It is on a "Scanfin" form and has apparently adopted the system of rates of freight laid down in the Anglo-Scandinavian Agreement, though, unless Wisbech, the port of discharge, is to be classed with King's Lynn and Boston, and to have the extra freight which the agreement provides for those ports without naming Wisbech, it would seem to have taken as its standard freight a rate of 5s. per St. Petersburg standard above that of the agreement itself.

If, however, the terms of the Anglo-Scandinavian Agreement had been strictly followed, those who made out the present charter would have modified the rates of freight which are set out in it, in view of the reduction in the "price of good class bunker coals ordinarily used in this trade," which was announced and brought into force on Mar. 22, 1920. In the Anglo-Scandinavian Agreement the provision for reducing freights if the price of bunker coal falls is one to be given effect to whenever charters are made after such a fall takes place. There is no scheme for inserting in subsequent charters the rates agreed in February, 1920, and also making them subject to future abatement in a certain event. The plan is to prepare and confirm charters at the rate fixed in the agreement till the price of bunkers falls to the named figure, and thereafter to prepare them at rates reduced in accordance with the agreement. I think this view of the true intent of the Anglo-Scandinavian Agreement is confirmed by the way in which effect has been given to its other requirements in making out this charterparty. It says in cl. 3, "all Scanfin and Backrut charters to have the following alterations," and then follow one paragraph about payment of the freight in two instalments, three with regard to demurrage, and the clause now under discussion. Clause 9 is altered to read thus: "The freight to be paid as per attached clause," and cl. 3 so as to read also, "demurrage shall be paid as per attached clause per day." It is only the rates of freight in cl. 1 that are not modified or made to take effect "as per attached clause," and the paragraph beginning "if and when the price, &c.," has been treated as if it came under cl. 9 of the agreement, which begins "All charterparties to contain the following clause"—namely, (A) time for discharging, (B) report to Central Chartering Bureau; and these are duly incorporated in the present charter. It is perfectly possible that this variation from the scheme of the Anglo-Scandinavian Agreement was inadvertent or arose from a misunderstand-

A ing of its intent. We have, however, to look at the language of the instrument for its construction, and I think it is important to note that in this regard the parties to this charter took their own line and did not simply implement the prescriptions of the Anglo-Scandinavian Agreement. It is important, first of all, in this respect. If the agreement had been faithfully followed, it might have been possible to argue that the date from which the freight reduction clause speaks is the date of the B Anglo-Scandinavian Agreement of February, 1920, to which it refers, and not the date of the charter itself, of which it is an operative part. I do not, however, see how this can be affirmed, as soon as it is clear that the parties have broken away from the Anglo-Scandinavian Agreement and have taken their own course. Accordingly, although the judgments below do not seem to deal with this point, I think that the clause speaks from the date of the charter only. No material reduction of C price having taken place since that date, the clause has no operation and accordingly the defence fails.

Again it may be argued that under the general agreement or collective bargain of Feb. 17, 1920, the "price" therein referred to was a general price prevailing or automatically fixed in the coal trade for the shipping district in question, and was not the price which under the circumstances of any particular adventure the ship- D owner might have to pay to bunker his ship for the voyage. The basis for this contention I suppose to be that the cost of bunkers is so intimately connected with the freight, and so largely governs it, that any index which fairly denotes the general movement of bunker prices will also fairly serve to measure the proper fluctuations of the bill of lading freight to be paid on right delivery. The agreement does not say to whom the price is charged or by whom it is payable, or whether E it is gross or net or where the bunkers are to be delivered in consideration of that price, or specify what "this trade" is, but speaks in terms so general that in themselves they carry indefiniteness to the verge of ambiguity. It is true that agreements have been made between large combinations of employers and large federations of employees by which standard wages fall in conformity with named reductions in the Board of Trade index figures of the cost of living. It is, however, F pure guesswork whether any such analogy is valid for a mere agreement to provide ships to lift 260,000 standards of timber during a single Baltic shipping season, and I think that the Anglo-Scandinavian Agreement itself must be read in the normal way and with reference to the circumstances of the parties to it.

Two facts must, therefore, be particularly taken into account. (i) The coal control system which was in force at the time recognised the division of Great G Britain into a considerable number of coal districts, in which prices varying from district to district were to be charged. It also recognised a trade practice followed for the time being by which collieries would not sell bunker coal to a foreign shipowner direct, but only through some middleman, whose remuneration would then have to be added to the colliery price. In the present case the documents and the evidence show that the middleman employed bought from the colliery the quantity H required and re-sold to the ship at an enhanced price, and it seems to me that this must be the normal, if not the exclusive, mode of complying with the practice. Now all the shipowners who were parties to the Anglo-Scandinavian Agreement were foreigners and had to conform to this practice, and I, therefore, find it impracticable, as a matter of construction, to suppose that they were asked to agree or were willing to agree to any sliding scale of freights except one that would I slide with reference to the prices they must themselves pay for bunkers. It is not reasonable to construe their submission to a reduction of freight already contracted for in accordance with changes in prices charged by the collieries to customers among whom they themselves could not be numbered. That a man may be willing to agree to take a speculative risk with regard to the movements of coal prices at the time when he is bargaining for his freight I can understand, for then he can estimate the probabilities of a change in the market, and of special circumstances affecting himself, and protect himself accordingly; but that he should first submit to a freight fixed for him by a general agreement and then accept a reduction clause

for the charterer's advantage, which throws all the risk on him and brings him no possibility of any corresponding benefit, is a thing that passes my understanding. No doubt the middleman's addition to the colliery price remains uniform in practice though the colliery price itself may fall, though, as I understand the evidence, that is not necessarily so; but this does not make fluctuation in the colliery sale price the same thing for present purposes as fluctuation in the foreign ship's buying price, for there is a limit fixed at which the freight is to alter, and it is fixed at a named colliery price. The result is that the freight to the foreign ship might be reduced, because the pit price had fallen below 80s. by less than 5 per cent., the price payable by the ship to the middleman remaining something higher than 80s. Accordingly, if I had to construe the Anglo-Scandinavian Agreement by itself, I should read the word "price" as the price payable by the ship to the middleman. (ii) In practice it is agreed, as is fairly obvious, that the ship must bunker in Great Britain for the round Baltic voyage out and home; and that, as far as practicable, she must do so at the British port (if any) at which she discharges her previous inwards cargo, or else at the British port (if any) where she takes her cargo outwards for a Baltic port, whichever is the more suitable for economical coaling. In the present case the *Agga* was to load outwards from Middlesbrough to a Danish port, and proceed thence in ballast to Uleaborg to lift her timber cargo. Of course she had to conform to the circumstances of the moment, and, as there is nothing expressed in her charter to require her to go to an extra port to coal, in order thereby to give the charterers the benefit of the freight reduction clause, I take it that the parties contemplated that what was reasonable should be done. In the events that happened, in order to get delivery at Middlesbrough of bunker coal from the only available colliery, a "leadage" or extra transport charge was duly made and paid, which, being added to the middleman's price for the coal, brought the whole over 80s.

I think it is evident that the Anglo-Scandinavian Agreement did not mean by the "price" mentioned in the last paragraph of its third clause the total sum which in the accidental circumstances of a particular future adventure a single shipowner might have to pay per ton of bunkers shipped, but, when parties make a bargain of their own, into which they transfer the actual words of the Anglo-Scandinavian Agreement for a new purpose and with a different effect, I think we must read these words, albeit identical, in accordance with the altered scheme of the particular bargain so entered into. Accordingly, I construe the charter in question as including in the word "price" between these parties not merely the middleman's commission or profit on re-sale added to the colliery price, but also the "leadage," which in the circumstances of this case formed part of the price to the ship. If so, the event in which the agreed freight was to be reduced did not happen, in fact, apart from any question as to the time at which the change occurred.

Although, in my opinion, the same result is arrived at, after giving effect to the Anglo-Scandinavian Agreement and the other circumstances known to and affecting the parties to this charter, as would have been arrived at on the bare language of this charter standing by itself, I feel that we probably know less about these circumstances than might have been desired. Decisions on somewhat similar facts appear to have been given by ROCHE, J. (*Maatschappij Kralingen* v. *Newsum & Co.* (1)), and MCCARDIE, J. (*Boyazides Bros.* v. *Gabriel Wade and English* (2)), which, not being reported in publications accessible to me, I regret that I have not been able to see. Further, at or about the time when he heard this case, BAILHACHE, J., had had before him other cases dealing with a similar subject-matter, which, also, are not before your Lordships, and his decision was in favour of the charterers in this case and was affirmed by a majority in the Court of Appeal. I have throughout been sensible that both courts in this case, and certainly both counsel, knew a great more about the course of business and the state of trade in the early part of 1920 than the mere documents and evidence disclose, and, with this feeling of being at a disadvantage, I should not be at all surprised if to both sides of the trade a decision in favour of the ship in this case should appear something of an

unmerited windfall. I regret that the summary procedure of the Commercial Court does not always enable us to be as much up-to-date on the ultimate appeal as those more in touch with recent commercial changes were on the trial, but it cannot be helped. When controlled trade and collective bargaining have practically eliminated individual choice from any moulding of the contract, and have only left to the parties the option of contracting in the standard terms or of not contracting at all, a good part of the considerations hitherto prevailing in the interpretation of mercantile contracts will have become obsolete, and we may, for example, have to ask what the negotiators of the standard form may be supposed to have meant or to have taken into consideration, and not what circumstances or interests must have affected the minds of the ship's brokers and the chartering agents in the actual case in suit. The Central Chartering Bureau, London, though it signed in this case as charterers' agents, is obviously much more a trade organisation for working the Anglo-Scandinavian Agreement than a private agency firm, and I should not be surprised if the excerpts from that agreement which were pasted on to this Scanfin charter were mechanically incorporated without the agents on either side being conscious that, in effect, another contract was being made than that which the main agreement had contemplated. Quite probably, also, the shipowner had no real choice and no personal concern in the matter. Still, all we can do is to construe this instrument according to the existing law and under the view of the circumstances which the evidence presents; and so viewed, I think it must be read in the shipowner's favour.

LORD WRENBURY.—We are not here concerned with the construction of the Anglo-Scandinavian Agreement. We are concerned with the construction of this contract. It contains in cl. 8 a provision which is found in the Anglo-Scandinavian Agreement and it identifies the clause as finding its origin in the Anglo-Scandinavian Agreement. On the other hand, it contains and deletes words providing that all other terms and conditions of the Anglo-Scandinavian Agreement are incorporated in the contract. We have not to ascertain the true meaning of cl. 8 when found in the Anglo-Scandinavian Agreement, but its meaning when found in this contract and with the setting in which it is found. The words to be construed are "If and when the price of good class bunker coals . . . is reduced to 80s. per ton." There is no one price of coals which is the same to every buyer and in every place. The price at the pit head will be one figure, the price of the same coal delivered at a port some miles distant will be another. The price to a broker or middleman will be one figure, the price of the same coal to a consumer who buys through a broker or middleman will be another. In this contract I think that, for the reasons assigned by the judgments which have preceded my own, "the price" means the price which this shipowner under the circumstances disclosed by his contract would have to pay, and that his freight is reducible if and when the market is such that his expenses of performing the contract are reduced. The 1s. 6d. "leadage" was the cost of bringing the coal to Middlesbrough. The 5 per cent. was commission payable to a broker whom this ship as a foreign ship was compelled to employ and pay. Both the one and the other form, I think, part of "the price of good class bunker coals" to this contracting party for the purposes of this contract. On these grounds I think this appeal succeeds. Further, I think that the words "if and when" point to a variation of price after the date of the contract, and inasmuch as there was no reduction after that date the appeal again succeeds on this ground.

LORD PHILLIMORE.—I agree. Counsel for the charterers pressed your Lordships to refer to the Anglo-Scandinavian Agreement. I see no objection to its being looked at, and I find that it is one of that class of agreements between merchants and shipowners in the same line of business which have been common in recent years. It is not a form of charterparty, but an agreement that certain clauses should be inserted in the charterparties; and in pursuance of this agreement some of these clauses have been printed on a slip and pasted on to the charterparty which is under discussion in the present suit, some words of cl. 2 and the whole

of cl. 7 having been cancelled in ink. The charterparty itself is a common form of charterparty, also agreed, as its title shows, at a conference of shipowners and merchants. When all this has been said, it remains that the printed clauses or words derived from either source must be construed together and with the special clauses as all parts of one instrument of contract between the parties to it; and it does not seem to me to help the case of the charterers very much to say that any particular clauses have been inserted in deference to the Anglo-Scandinavian Agreement. There is an argument drawn from the fact that the Anglo-Scandinavian Agreement is introduced as bearing a certain date with which I would deal later.

The clause which your Lordships have to construe, being cl. 8 of the clauses pasted on, is as follows:

> "If and when the price of good class bunker coals ordinarily used in this trade is reduced to 80s. per ton, the freight to be ten shilling (10s.) per standard less."

The charterers contend that the prices fixed by the circular issued by the North of England United Coal Trade Association on Mar. 22, 1920, established the price of good class bunker coals ordinarily used in the trade at 75s. or less, and that therefore they are entitled to the 10s. reduction of freight. They contend, and the view has prevailed in the courts below, that there is one general price, and that no regard must be paid to any differentiation by reason of peculiarity of port of loading or nationality of ship. The business idea of the clause must be that if shipowners have to pay less for their coal they should charge less freight. First of all, then, as to the leadage, I assent to the view of BAILHACHE, J., that it must be added to the 75s. price. The phrase used in the Board of Trade directions of May 8, 1919, is "the extra railway and shipping dues as compared with those for shipment at the nearest shipping place to the colliery." That circular said that they must be always charged; and it seems clear that the addition contemplated in those directions is always made. This would raise the price from 75s. to 76s. 6d.

As to the 5 per cent. I agree with SCRUTTON, L.J., though not exactly for his reasons. It may be, as BAILHACHE, J., suggests, that if there is something peculiar to the ship, such, for instance, as inability to approach a tip owing to her great draught, it could not be said that the special price which she had to pay for coals was a price within the meaning of cl. 8. It must be something more general. But the right view is that there are two general prices, one for British ships and one for foreigners. The price for the foreign ships is necessarily higher by 5 per cent.; and this ship is, and is described in the charterparty as being, a Norwegian ship.

There is a further reason for coming to this conclusion. The circular issued by the North of England United Coal Trade Association which fixed the price at 75s. was issued on Mar. 22, 1920. This charterparty is dated June 12, 1920. Now the language of cl. 8 is the language of futurity; the words "if and when" point to something which is to happen, and the word "reduced" is at any rate more applicable to a state of change than to a state of rest. But the reduction on which the charterers rely had taken place already. There has been no reduction since the date of the charterparty. It is attempted to meet this argument by pointing to the heading or title of the pasted-on clauses, by which they are described as "additional clauses agreed to under the Anglo-Scandinavian Agreement dated Feb. 17, 1920," and by suggesting that these clauses are to read as if they had been constructed on Feb. 17. This is not so. They are clauses of an agreement of June 12, entered into in pursuance of an anterior agreement of Feb. 17. They date from June 12. I do not say that the argument from these words of futurity is very strong, but it is helpful, and it is certainly not met by the counter-suggestion. I conclude, therefore, that the shipowner is right.

Appeal allowed.

Solicitors: *Botterell & Roche*; *Trinder, Kekewich & Co.*

[*Reported by* EDWARD J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

A

Re DUTTON, MASSEY & CO. Ex parte MANCHESTER AND LIVERPOOL DISTRICT BANKING CO.

[Court of Appeal (Sir Ernest Pollock, M.R., Atkin and Sargant, L.JJ.), March 21, 1924]

B

[Reported [1924] 2 Ch. 199; 93 L.J.Ch. 547; 131 L.T. 622; 68 Sol. Jo. 536; [1924] B. & C.R. 129]

Bankruptcy—Proof—Partnership—Guarantees given and securities deposited by partners to secure debt of partnership to bank—Deed of assignment for benefit of creditors—Right of bank to prove against partners in respect of guarantees C *without giving credit for the proceeds of sale of deposited securities—"Secured creditor"—Bankruptcy Act*, 1914 (4 *& 5 Geo. 5, c.* 59), *s.* 167—*Deeds of Arrangement Act*, 1914 (4 *& 5 Geo. 5, c.* 47), *s.* 23.

Two of three partners in a firm deposited with a bank securities, held by them individually, under memoranda of deposit, showing that they were deposited as securities for the joint debt of the partnership firm. They later D gave personal guarantees to the bank up to a limited amount in respect of sums then or to become due to the bank from the firm. Subsequently a deed of assignment for the benefit of their creditors was entered into by the firm and duly registered. The deed provided that it was made subject to the rules in bankruptcy. The bank applied, under the Deeds of Arrangement Act, 1914, s. 23, for a declaration that it was entitled to prove against the separate estates E of the partners in respect of their personal guarantees without giving credit for the proceeds of sale of the securities deposited for the purpose of securing the partnership debt to the bank.

Held: the securities were held by the bank with reference to the debts of the firm which fell to be proved against the estate of the firm; the liability under the guarantees fell to be proved against the guarantors individually; the F partnership was to be regarded as a juridical entity separate from each of the parties individually; and, therefore, the bank was entitled to the declaration it sought.

Notes. As to secured and unsecured creditors in a bankruptcy, see 2 Halsbury's Laws (3rd Edn.) 496 et seq.; and for cases see 4 Digest (Repl.) 386 et seq. For the Deeds of Arrangement Act, 1914, s. 23, see 2 Halsbury's Statutes (2nd Edn.) G 318; and for the Bankruptcy Act, 1914, s. 167, see ibid. 442.

Case referred to:

(1) *Re Turner, Ex parte West Riding Union Banking Co.* (1881), 19 Ch. 105; 45 L.T. 546; 30 W.R. 239, C.A.; 4 Digest (Repl.) 490, *4315*.

Appeal by the trustee of a deed of arrangement from a decision of P. O. H Lawrence, J.

The facts are set out in the judgment of the Master of the Rolls.

Clayton, K.C., and *Tindale Davis* for the trustee of the deed.
Hansell and *du Parcq* for the bank.

SIR ERNEST POLLOCK, M.R.—This is an appeal from a decision of P. O. I Lawrence, J., who on Nov. 5, 1923, gave his decision by which he declared that the bank was entitled to prove against each of the separate estates of C. W. M. Massey and R. Kendall for the sum of £15,000 and interest thereon, and ordered the trustee of the deed of assignment to admit the proofs accordingly. The question which arises is whether or not in respect of those proofs the trustee would be entitled to make the bank bring into account a sum which was quantified at some £27,000.

What happened was this. There was a partnership composed of three partners—Mr. C. W. M. Massey, Mr. R. Kendall, and Mr. Walter Massey—and in the course

of their business, and for the purpose of obtaining facilities from the bank, there had been deposited on April 1, 1921, by Mr. C. W. M. Massey and Mr. Kendall respectively, and by Mr. C. W. M. Massey and Mr. Kendall jointly, certain securities. The terms of those deposits—they are all in the same terms—were that they severally deposited the shares and debentures which were attached to the form of deposit and they were to be held by the bank as security for the payment of all sums of money which should thereafter be owing to the bank by the partnership firm. These two partners, therefore, had provided certain facilities which were placed to the advantage of the firm of Dutton, Massey & Co. It will be observed that Mr. Walter Massey did not make any such deposit. Then, on April 18, 1921, two guarantees were given respectively and severally by Mr. C. W. M. Massey and by Mr. Kendall to the bank for the purpose of guaranteeing the total sum to be advanced by the bank, but there was a limit of liability in each case, that Mr. Massey and Mr. Kendall should not be individually liable for more than the sum of £15,000. On Nov. 16, 1921, a deed of assignment for the benefit of creditors was entered into between the partners and their creditors, and Mr. P. J. Stephens was made the trustee. The terms of that assignment were that, after getting in the assets and paying the costs and charges and preferential debts, the moneys should be divisible in payment of the debts under the rules of bankruptcy as if the firm had, at the date of the deed, been adjudicated bankrupt. The deed was registered under the Deeds of Arrangement Act, 1914, and by s. 23 of that Act any question that has to be decided on it has to be decided by the judge in bankruptcy. Hence the matter came before P. O. Lawrence, J., and from him the appeal comes to this court.

The question which arises is this. There is a bankruptcy of the firm—I say a bankruptcy, for the matters are to be administered as if there were a bankruptcy of the firm, and the individual partners composing the firm are also to have their assets administered as if they had each of them been a bankrupt. The bank has proved against the firm for the advances which it made, and, in proving as it would do if it were a bankruptcy, has to estimate the value of the securities which it holds, and, if there be a balance beyond the sum for which it holds security, the proof is to be for that sum. In the case of the separate administration of the estates of the partners, the debts which are individually owing by them have to be ascertained, and if the creditors have a security against each or any of those late partners, those securities also have to be valued and proof made in respect of the balance. The bank has held the securities given by Mr. C. W. M. Massey and Mr. Kendall on April 1, 1921, and it has also the guarantees which were given on April 18 by Mr. Massey and Mr. Kendall individually. What is said here is that, although the bank has a right to prove against the separate estates of these two partners who gave the guarantees, there ought in some way to be taken into account the fact that the sums for which the guarantees were given were in part secured by the deposit of securities which had been made, so that the estates of these two partners ought not to be liable to the full proof of the guarantees given by them without effect being given—I use a loose expression—to the fact that the bank was, as against the firm, placed in an advantageous position by reason of the security which had been given to it. It is perfectly clear, and there is no controversy about it, that the assets of the firm and the assets of the individual partners have to be administered separately, as if the assets of the firm and of each of the partners were separate entities, and the whole question, as it seems to me, is whether or not one can, in considering what is the liability of the estates of these two partners, say they are quite independent of the administration of the estate of the firm. We are told that both the estate of the firm and the estates of the partners are such that there will be no surplus after paying the debts of one of those entities to the other; there is likely to be a deficiency, both in the estate of the firm and the estates of the individual partners.

Can it be said that, in respect of the proof of the bank against the separate estates of these two late partners for £15,000, the bank is a secured creditor?

Counsel for the trustee calls our attention to *Re Turner, Ex parte West Riding Union Banking Co.* (1), which lays down the rules which are to be followed in such a case. Sir George Jessel, M.R., says in the course of his judgment (19 Ch.D. at p. 112):

> "The principles of the bankruptcy law are plain enough. A man is not allowed to prove against a bankrupt's estate and to retain a security which, if given up, would go to augment the estate against which he proves."

As I have said, by the very terms of the deed the estates of the firm and of these partners are to be administered according to the rules of bankruptcy. Therefore, we have to look to see what the rule is in the case of the proof against a bankrupt's estate. It is clear from this rule, laid down and accepted, that the creditor is not entitled to prove and to retain securities which, if given up, would go to augment the estate against which he proves. Sir George Jessel subsequently expands that rule to the case where there has been a partnership, and he says that the question soon arose whether the separate estate of a partner, as apart from the partnership estate, was within the rule which enabled a man to prove for the full amount of his debt without giving up his security when the property pledged was that of a stranger, and he points out that it was once held that it was—that is to say, the same rule applies as if those were entirely different estates, estates of strangers, and one cannot, by reason of the fact that there had been a partnership previously existing, introduce some different method or different system which would not apply to individual and separate bankruptcies.

What is suggested is that the bank ought not to be entitled to prove for the £15,000 against the separate estates of Mr. Massey and Mr. Kendall under the guarantees which those two partners in the late firm gave without bringing into account the securities which it held in reference to the debts which, primâ facie, are to be paid by, and in the first instance fall to be proved against, the estate of the firm; but, applying the rule which was laid down by the Master of the Rolls in *Re Turner, Ex parte West Riding Union Banking Co.* (1), the bank has certain securities which it holds, and which it is bound to take into account in the matter of its proof against the partnership estate, and if it were to release those securities, which it is now suggested it ought to do, they would not go to the advantage of the estates against which the proof falls to be made—that is to say, the individual partners in the proof under the guarantee—but it would fall to go to the estate of the partnership. The two matters are quite independent, and a secured creditor, after all, under the rules of bankruptcy is a person who, by the interpretation section, s. 167, holds

> "a mortgage charge or lien on the property of the debtor, or any part thereof, as a security for a debt due to him from the debtor."

In the present case, therefore, the secured creditor is one against whom must be established two characteristics, firstly, that he holds a security on the property of the debtor and, secondly, that the security is in respect of a debt due to him from the debtor. Having regard to that definition, and to the rule laid down by Sir George Jessel, it appears to me that there is a confusion of thought in suggesting that there is not the absolute right on the part of the bank to prove against the separate estates of the debtors in respect of the liability created under the guarantees which were given by those debtors respectively. That liability is not to be confounded or confused with what has been done with regard to that which belongs to the estate of the partnership; one has to treat them as entirely separate entities, and the suggestion now made is one to which effect cannot be given, by reason of the fact that there is no method by which one can bring in a security which is appropriated to, or belongs to, quite a different bankruptcy so that it may enure to the benefit of a different bankruptcy from that in which the particular proof is made. The learned judge has, in my judgment, come to a perfectly right conclusion, and on proper grounds, and I think that his judgment is right, and that this appeal must be dismissed with costs.

ATKIN, L.J., stated the facts, and continued: The rights of the parties seem to me to be governed by the Bankruptcy Act, 1914, and that depends, to begin with, on the Schedule as to the proof of debts. By Sched. II, r. 12:

> "If a secured creditor does not either realise or surrender his security, he shall, before ranking for dividend, state in his proof the particulars of his security, the date when it was given, and the value at which he assesses it, and shall be entitled to receive a dividend only in respect of the balance due to him after deducting the value so assessed."

The question that arises, therefore, is whether, in respect of this proof against the separate estates, the bank is a secured creditor. The definition of a secured creditor is that given by s. 167:

> " 'Secured creditor' means a person holding a mortgage charge or lien on the property of the debtor, or any part thereof, as a security for a debt due to him from the debtor."

The words "from the debtor" were not in the Bankruptcy Act, 1869, which was the Act in operation at the time of *Re Turner, Ex parte West Riding Union Banking Co.* (1), which was decided in 1881. Had the bank here a mortgage on the property of the debtors? I think it is plain that it had, because it held the securities, and it has a charge on them, and they are the property of the separate debtors. But are they securities for a debt due to it from the debtors? I should have said quite clearly not. They are due to it as securities for a debt due, not from the separate debtors, but from the firm, and unless "due from the debtor" can be read as "taken from the debtor either alone or jointly," the matter seems to me to be disposed of merely by a consideration of that definition. I have no doubt that one of the reasons for the rule as to proof which has found its way into different Bankruptcy Acts—I have not traced the whole history of them—is that stated by the Master of the Rolls, that a creditor would not be allowed to prove against a bankrupt's estate and retain a security which, if given up, would go to augment the estate against which he proves. That may be the historical reason for it, but we have to determine now: Is this the construction of this particular Act? It appears to me, in view of the plain principles of bankruptcy law, in which a very clear distinction is drawn between the joint estate and the separate estate, and in which, for purposes of partnership, the two obligations are treated as separate, and, indeed, in view of the ordinary meaning of language, that "a debt due from the debtor" means a debt due from the debtor separately and severally, and does not mean a debt due from the debtor jointly with other persons. I think any opposite view would certainly lead to very anomalous results when one has to deal with a several debtor who alone became bankrupt, having given his property, or part of his property, to secure a debt to the same creditor or some other creditors, whether himself, or jointly with other people, or otherwise. For these reasons, it appears to me that this case turns quite simply on the plain construction of the Act of Parliament, and I think that the result arrived at by the learned judge is right, and that this appeal should be dismissed.

SARGANT, L.J.—I am of the same opinion. I agree with ATKIN, L.J., that the question really turns on the construction of the phrase "secured creditor," which is defined by s. 167 of the Bankruptcy Act, 1914, as meaning

> "a person holding a mortgage charge or lien on the property of the debtor, or any part thereof, as a security for a debt due to him from the debtor."

The position of the bank was this: It was a secured creditor on the estate of the partnership by virtue of certain securities which had been given to it by the partnership, in respect of which it is giving credit, but with this further position, that it had also securities on the estates belonging to individual partners. There were three securities, one by each of the two individuals and one by two of the partners jointly, and, in addition, the bank had a guarantee of the joint debt by

A each of the two partners. We have only to consider whether the bank was a secured creditor in respect of the guarantee given by each of the partners, because it is only with the proof which it seeks to lodge in respect of the guarantee given by each of the partners against their separate estates that it is contended that credit ought to be given to them for the effect of the realisation of the securities given by them and made subject to their debt by the individual partners. B In my judgment, when the matter is looked at carefully, it seems perfectly plain that the security which was given by the partners was not in any sense at all a security for the guarantee given by each of them, but was a security simply and solely for the joint debt of the partnership. When once that is appreciated, and when it is also appreciated that in these questions as to the administration of joint estates and separate estates of partners, the partnership is to be looked at as a C separate juridical entity from each of the partners individually, it seems to me to follow that there can be no obligation on the bank to give credit against the guarantee by each of the persons for a security which was given for the debt of a separate juridical entity, namely, the partnership. Of course, it may be—I wish to reserve this point—that, should it happen that, by virtue of all its securities, the bank should ultimately be in a position to receive more than 20s. in the pound D on the joint estate, and should there, therefore, be some surplus from the joint estate to come back to help the separate estates of the partners, possibly, in such an event, the surplus of the security given by the partners for the joint debt would be available for the purpose of diminishing the proof of the bank against the separate estates; but that is, as I understand, in this particular case quite impossible.

Appeal dismissed.

E

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[*Reported by* J. L. DENISON, ESQ., *Barrister-at-Law.*]

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